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REPORTS

OF

All the Cases decided by all the Superior Courts

RELATING TO

MAGISTRATES, MUNICIPAL,

AND

PAROCHIAL LAW.

(REPRINTED FROM THE "LAW TIMES" REPORTS.)

EDITED BY

EDWARD WILLIAM COX,

Serjeant-at-Law, Recorder of Portsmouth.

VOL. XI.

LONDON:

"LAW TIMES" OFFICE, 10, WELLINGTON-STREET, STRAND, W.C.

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LONDON:

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REPORTS OF ALL THE CASES

DECIDED BY THE

Supreme Court of Judicature

RELATING TO THE

LAW ADMINISTERED BY MAGISTRATES

AND TO

PAROCHIAL AND MUNICIPAL LAW.

[Ct. of App.]

REG. v. MONCK AND ANOTHER.

[Ct. of App.]

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

April 18 and 19, 1877.

(Before COLERIDGE, C.J., BRAMWELL, and BRETT, J.J.A.)

REG. v. MONCK AND ANOTHER (Justices of Berks.) (a)
County rate—Liability of portion of county added to borough—Boundary Act (2 & 3 Will. 4, c. 64) —Municipal Corporations Act (5 & 6 Will. 4, c. 76) s. 117.

The Municipal Corporations Act provided by sect. 117 that every borough which before the passing of the Boundary Act 1832 was liable to contribute in whole or in part to the county rate should pay such a proportion of the county rate as would have been chargeable upon the borough if this Act had not passed.

W. was a borough which did not, before the passing of the Boundary Act, contribute to the county rate. A part of a parish which did contribute to that rate was by that Act, and the Municipal Corporation Act, added to the borough for all purposes.

Held (affirming the judgment of the Queen's Bench Division), that the borough of W. was liable to contribute to the county rate in respect of that portion of the borough which was added by the Boundary and Municipal Corporation Acts.

ERROR by the defendants on an order of the Queen's Bench Division giving judgment for the Crown on a demurrer to a return to a mandamus. The facts which appeared on the rule for the mandamus being made absolute were the same as those in the present case, and will be found reported *ante*, Vol. X., p. 121.

The mandamus was addressed to two justices of the county of Berks, and commanded them to hear and determine a complaint preferred by the treasurer of the county of Berks against the trea-

surer of the borough of New Windsor under the circumstances set out in the writ and the return, the material parts of which were as follows:

Prior to the year 1832 the borough of New Windsor consisted of the parish of that name and part of the parish of Clewer, which had never contributed to the county rate. The Boundary Act (2 & 3 Will. 4, c. 64) added to the parliamentary borough of New Windsor a part of Clewer, which had previously contributed to the county rate, and this part so added was by the Municipal Corporations Act (5 & 6 Will. 4, c. 76) made part of the municipal borough of New Windsor.

By sect. 112 of the Municipal Corporations Act, boroughs which have separate courts of quarter sessions are rendered free from all liability to contribute to the county rate otherwise than as in that Act thereafter provided.

By sect. 117 it is enacted that the treasurer of every county shall send a copy of the account of the expenditure for certain purposes therein specified to the council of every borough situate within such county which has a separate court of quarter sessions, "and which before the passing of 2 & 3 Will. 4, c. 64 was chargeable with or liable to contribute in whole or in part to the county rate of such county, and shall make an order on the council of such borough for the payment of such sum as would have been chargeable, if this Act had not passed, upon such borough as the same shall be bounded according to the provisions of this Act."

For several years the treasurer of the borough paid to the county treasurer the proportion charged; but in 1871 the council of the borough denied their liability, and the justices of the county refused to hear a complaint by the treasurer of the county against the treasurer of the borough, whereupon a mandamus commanding them to do so was issued.

The return to the mandamus was made by two of the justices of the county of Berks on behalf of the treasurer of the borough of New Windsor.

It recited the charter of the borough granting a separate Court of Quarter Sessions, and containing a non-intromittant clause; it alleged that no part of the borough did, before the passing of the Boundary Act, contribute to the county rate, that

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.
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the part of Clewer which was added by the Boundary and Municipal Corporations Act had become liable to borough rates and general district rates.

The return proceeded to point out the distinction between boroughs with courts of quarter sessions of limited jurisdiction and with charters not containing non-intromittant clauses, and boroughs such as New Windsor, which had never prior to the passing of the Municipal Corporations Act contributed in any way to the county rate, and concluded by denying the liability of the borough under sect. 117 of the Municipal Corporations Act, and by stating that the justices had dismissed the complaint of the county treasurer, and refused to make any order on the council of the borough.

To this return there was a demurrer and joinder.

The Queen's Bench Division, following the decision in the case of *Reg. v. New Windsor*, reported *ante*, Vol. X., p. 121, gave judgment for the Crown on the demurrer, and the defendants brought error.

Matthews, Q.C. (with him *Bullen*) for the appellants.—The contention on behalf the appellants is, that the borough of New Windsor is not liable to contribute to the county rate, because it was not so liable before the passing of the Boundary Act, and that the addition to the borough of part of a parish which had up to that time contributed to the county rate cannot impose on the old borough of New Windsor any liability to contribute to the county rate, inasmuch as the non-intromittant clauses of the charter must now apply to the part so added, and consequently the county justices can have no jurisdiction to levy a rate. The case of *Reg. v. Birmingham* (10 Q. B. 116) does not govern this case, as the lands and tenements within the area of what afterwards became the borough, did contribute to the county rate, Birmingham being an entirely new borough; it is therefore a decision, on a state of things quite different from those in this case, as the borough of New Windsor is a borough the area of which never contributed to the county rate. The part of the county added to the borough will now be liable to borough rates, and should therefore be relieved from the county rate, if this be not so, the whole borough will contribute, as there is no power to apportion the contribution to the county rate to the new part of the borough thus added. They cited

Talbot v. Hubble, 2 Str. 1154;
Blankley v. Winstanley, 3 Term R. 279;
Bates v. Winstanley, 4 Mau. & Sel. 429;
Mercer v. Davis, 10 B. & C. 617;
James v. Green, 6 Term Rep. 228;
Weatherhead v. Drury, 11 East, 168;
Reg. v. Shepherd, 2 Ad. & Ell. 298;
Reg. v. East Loos, 31 L. J. 245, M. C.;
Reg. v. Clarke, 5 B. & Ald. 685;
Reg. v. New Sarum, 7 Q. B. 941;
 5 & 6 Will. 4, c. 76, ss. 112, 117, 141;
 19 Geo. 2, c. 29, ss. 1, 5; 56 Geo. 3, c. 51;
 15 & 16 Vict. c. 81.

Oave, Q.C. and *Greene* for the respondent were stopped by the Court.

COLERIDGE, C.J.—We do not think it necessary to hear further argument on behalf of the respondents in this case, and it has been intimated to us that no fresh points have arisen on which the counsel for the appellant wishes to address us. At the commencement of the argument I was of opinion that the construction contended for on be-

half of the appellant, the treasurer of the borough of New Windsor, must prevail, and that the judgment of the court below could not be supported. On further consideration, however, I think that my first impression was not correct, and that although there are undoubtedly difficulties in construing the Act of Parliament in the way in which it has been construed by the Queen's Bench Division, still the difficulties in adopting the construction contended for by the appellant are greater. The case comes before us on demurrer to a return to a *mandamus* which issued, directing two justices of the county of Berks to make an order on the treasurer of the borough of New Windsor, for the payment of the proportion of the sums of money expended out of the county rate for other purposes than the costs arising out of the prosecution, maintenance, conveyance, and transport of offenders committed for trial in the county of Berks, and other than out of coroner's inquests, as would have been chargeable after deducting all sums of money received in aid of the county rate if the Municipal Corporations Act had not passed. The question for our decision arises on the construction of sect. 117 of 5 & 6 Will. 4, c. 76. The important words are, "The treasurer of every county shall keep an account of the sums of money expended out of the county rate for other purposes . . . and shall send a copy of the account to the council of every borough in which a separate court of quarter sessions shall be holden, and which, before the passing of 2 & 3 Will. 4, c. 64, was chargeable with or liable to contribute in whole or in part to the county rate of such county, and shall make an order on the council of every such borough for the payment of such proportion of such sum as would have been chargeable if this Act had not passed upon such borough, as the same shall be bounded according to the provisions of this Act." Now, the question is whether these words apply to the borough of New Windsor. This borough is an old borough, and has had from time immemorial a separate court of quarter sessions, and a charter containing a non-intromittant clause. By the Boundary Act a part of the county of Berks was added to the borough for the purposes of Parliamentary elections. It was afterwards enacted by the Municipal Corporations Act that the boundaries of the municipal borough of New Windsor should be co-extensive with those of the Parliamentary borough, so that that part of the county of Berks, which I will for the sake of brevity call Clewer, which had been added to the Parliamentary borough of New Windsor, then became part of the municipal borough for all purposes. Prior to the passing of the Boundary Act it is clear that the borough of New Windsor did not contribute to the county rate, while it is also clear that Clewer did. Now we have to see whether New Windsor was at the time of the passing of the Municipal Corporations Act a borough which was "chargeable with or liable to contribute in whole or in part to the county rate" before the passing of the Boundary Act. The answer to that depends on the construction to be given to the words "whole or in part." If these words are to be taken as expressing the area of the borough, then New Windsor was a borough part of the area of which was liable to contribute to the county rate as being at that time part of the county of Berks. I do not say that it is quite clear that this is the true

[CT. OF APP.]

REG. v. MONCK AND ANOTHER.

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and only true construction, and I admit the force of the arguments which have been adduced in support of the contrary construction. It is said that there were boroughs which did, before the Boundary Act, contribute to the county rate, and that, because their charter did not contain a non-intromittant clause, but it is also clear, I think, that the only reason which prevented the boroughs from being called on to contribute to county rates was that the non-intromittant clause prevented the county justices from levying a rate within a borough where they had no jurisdiction. It was further contended that there were some boroughs where the whole borough, as incorporated and represented by burgesses, was composed of two parts, one part having a non-intromittant clause and the other part not having any such clause, such as is the case in the borough of Leicester, and that therefore there are two classes of boroughs, one class containing such boroughs as New Windsor, to which sect. 117 does not apply, and another containing boroughs such as Leicester, to which the section may be held to apply. It was further urged on behalf of the appellant that, as the whole borough pays the contribution to the rate, the consequence would follow that every borough which had before the Boundary Act been exempt from county rates, and which had been enlarged by that Act, would thereby become liable to pay such portion of the county rate as had previously been assessed upon the area of the newly added portion of the borough. Without doubt these considerations do tell in favour of the appellant, and it does appear that in practice the view thus contended for has prevailed, and that the treasurers of counties have not hitherto availed themselves of that which, according to the principles of the decision of the court below, in this case they have a right to do. Now, in considering whether the construction contended for by the appellant is right, it seems to me, speaking for myself, not unimportant to examine whether that contention harmonizes with or conflicts with the general tenor of the whole of the Act. and for that purpose I refer to sect. 141, which provides for the incorporation of towns and boroughs not yet incorporated, and enables the Crown to extend to the inhabitants of such boroughs the powers and provisions contained in the Act. It is clear that it is contemplated that the power given in this section will be freely used, and it does to my mind weigh against the appellant's contention and in favour of the respondent, that if the view taken by the former be correct that then the provisions of sect. 117 cannot be extended to any new borough, whereas, on the contrary assumption, the case of new boroughs will give rise to no difficulty, as the area which lies within them did contribute to the county rate before the incorporation of the new borough, and so that portion of the new borough will continue to be assessed to the county rate. Reference has been made to the cases of such new boroughs as Birmingham, Manchester, and Brighton, and the case for the respondent is certainly strengthened by the consideration of what would be the effect upon the rateable area of a county, were that portion which has hitherto contributed to the county rate to be entirely withdrawn from contributing, owing to a charter having been granted to a borough. The case of *Reg. v. Birmingham (ubi sup.)* has decided that this Act can be applied to new

boroughs, and that new boroughs do come within the sect. 117, or what is called the other purposes clause, even though the area known as the borough of Birmingham had not contributed to the county rate before the incorporation of the new borough, which included the old nominal borough and the newly added portions of the county of Warwick. Now, if this be so as to the whole it is not easy to see why the same conclusion should not hold good as to part of a borough. If, then, upon the construction of the statute and upon authority the contention of the respondent appears to be good, will anything like injustice follow upon our deciding in favour of the respondent? It seems that the only way in which the exemption of boroughs arose was through the failure of the jurisdiction of the county justices, and through the technical difficulties in the way of levying a rate; if this be so, then there is no reason why, when new legislation is being carried into effect, the exemption should not be removed, and the incidence of the rate be re-adjusted. That many boroughs never contributed at all to the county rate is clear, and the reason for this exemption was that there was no means of effecting a levy; but this reason does not hold good with regard to a portion of a county which has been put into a borough; for then the authority of the county justices is brought in over the borough, as far, at all events, as regards the portion which, previously to its addition to the borough, contributed to the county rate. I am, therefore, of opinion that the judgment of the court below should be affirmed, and that the grammatical construction of the section must be considered with regard to the object of the whole Act, and the practical application of the whole statute, and taking all those considerations together, I think that the section will fairly bear the construction which we are putting upon it. I agree with the remarks made by Lord Blackburn in this case when it came before the Queen's Bench Division on the rule for a mandamus, and for all these reasons I think that the judgment of the court below should be affirmed.

BRAMWELL, J.A.—I at first thought that our judgment must be for the appellant, but I have come to the conclusion that the judgment of the Queen's Bench Division was correct. I am of opinion that it was intended that new boroughs should contribute to that portion of the county rate for which it is sought in this case to make the borough of New Windsor liable. It seems, indeed, reasonable that those who enjoy benefits should share the cost, and it cannot be supposed that when Brighton, to take an example, was incorporated, it was intended that it should be relieved from all contribution to county rates, and that the rest of Sussex should have to make up the deficiency which would be caused by the withdrawal of so valuable a rateable property as the town of Brighton from the county, although the inhabitants would still enjoy the benefit of the county bridges and other things supported by the county rates. Sect. 117 in my opinion applies to new boroughs and to new places added to old boroughs, and I think that the words of the section bear out this view. If the words of the Act mean that accounts are to be sent and orders are to be made upon every borough which at the time of the passing of the Boundary Act was liable, then, of course, the appellant is entitled to

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succeed, and the judgment of the Queen's Bench Division must be reversed; but if they mean, as they certainly may, and, as I think, do, to every borough which is a borough liable to contribute at the time of the sending the notice and making the order, then New Windsor is liable, and our judgment must be for the respondent. If that be so, then New Windsor is a borough which at the time of the copy of the account being sent and the order being made, has as part of its area a district which did, at the time of the passing of the Boundary Act, contribute to the county rate. The old borough which never contributed, does not now contribute, and the exemption which has always existed remains; but the new part of the borough does not by being incorporated with the borough gain an exemption which it never had before. If we are asked to consider the consequences of our decision, and cases are put such as that of Godmanchester and Huntingdon, where by incorporation Huntingdon, which was wholly exempt, became liable to pay half the rates of Godmanchester, we can but say that the Legislature must have thought either that such details come within the rule of *de minimis*, or that the same reasoning applied as was held to apply in the case of the rating of mines. For it is admitted that this injustice or hardship has been imposed on certain boroughs such as Leicester, and therefore the Legislature must have either overlooked the hardship involved or disregarded it. I think that the statute rightly bears the meaning which was given to it in the court below, and that our judgment should affirm that of the Queen's Bench Division.

BRETT, J.A.—With regard to the argument of injustice, I hold that where a statute is capable of two constructions, one of which leads to manifest injustice, and the other in no way tends to injustice, then it is probably right to assume that the Legislature intended the second construction; but where one construction leads to injustice being inflicted on one class, and the other construction would inflict injustice on another class, the argument of injustice falls to the ground; and, further, if the alleged injustice is so far from manifest that it requires elaboration to make it plain, then it can hardly be assumed to have been so present to the mind of the Legislature as to enable any contention as to their intention to be founded upon it. Nor in this case does there seem to me to be injustice; there would be injustice to the county were the borough to escape from paying contribution; but that a part of the borough which was formerly liable to county rates should continue to be so liable, does not savour of injustice, and this view is confirmed by the history of the case, and by the remarks of Lord Blackburn as to the origin of the exemption, and the technical difficulties which led to its continuance. Injustice to the counties would in the case of the new boroughs, such as Brighton, result from our deciding the other way, for the borough would have the use of county property for nothing, when they probably contribute to the causes of expenditure almost as much as does all the rest of the county taken together. The ordinary rules of construction must be applied to sect. 117, the section on which our decision must turn, and so construing it, I am of opinion that there is really only one borough mentioned in it, and not two boroughs, as contended by the appellant. There

was once an old borough of New Windsor, and there is the present existing borough as added to by the Boundary Act, including the Clewer district, added under the Parliamentary Reform Act and the Municipal Corporations Act, and this is the borough with which sect. 117 deals, and with it alone. The words "every borough" mean every borough now existing, "and which" refers to every borough now existing, that is the area which is within the ambit of the now existing borough; if this be so, then there is only one borough referred to in this section, and the section applies to all boroughs to which additions have been made by the Boundary Act. The case of *Reg. v. Birmingham* (*ubi sup.*) was decided on that ground, and the Queen's Bench Division followed that decision. I am of opinion that both decisions are right, that no injustice is done, and that by affirming this judgment, we do not transgress any rule of construction, but that we are following out the plain grammatical meaning of the statute, and giving effect to the words and the intention of the Act of Parliament.

Judgment affirmed.

Solicitor for appellant, Lott.

Solicitors for respondent, Newman, Stretton, and Hilliard.

Saturday, April 28, 1877.

BLAKE v. BEECH. (a)

Practice—Appeal—Conviction for keeping gaming house—Criminal matter—Jurisdiction—Judicature Act 1873, s. 47.

A conviction before justices under 16 & 17 Vict. c. 119, s. 3, for keeping a gaming house, is a "criminal cause or matter" within sect. 47 of the Judicature Act 1873, and the Court of Appeal has therefore no jurisdiction to hear an appeal from a judgment on a case stated by justices of the High Court quashing the conviction.

APPEAL from a decision of the Divisional Court of Appeal from inferior courts.

Robert Blake was convicted before borough justices, at Bolton, for keeping a gaming house contrary to the 16 & 17 Vict. c. 119, s. 3.

A case for the opinion of the Divisional Court of Appeal was however stated by the justices under 20 & 21 Vict. c. 43. The Divisional Court of Appeal quashed the conviction on the ground that no information was laid against and no summons issued to the defendant. Special leave to appeal was given to the respondent in the Divisional Court of Appeal under sect. 45 of the Judicature Act 1873.

The case in the court below will be found fully reported *ante*, Vol. X., p. 219.

Arbutnot, for the appellant (respondent below.)

—It will be contended that this is a "criminal cause or matter" within sect. 47 of the Judicature Act 1873, and that the court therefore has no jurisdiction to hear the appeal. A conviction under the 16 & 17 Vict. c. 119, is not a "criminal cause or matter." The court heard an appeal in *Howes v. Peake* (35 L. T. Rep. N.S. 584; L. Rep. 1, Ex. Div. 385; 46 L. J. 15, M. C.), and there the appellant was fined for keeping a refreshment house without a licence. The cases of *Reg. v. Steel* (35 L. T. Rep. N.S. 534; L. Rep. 2 Q. B. Div. 37; 46 L. J. 1, M. C.), and *Reg. v. Fletcher* (35 L. T.

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

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Reg. N.S. 538; L. Rep. 2 Q. B. Div. 43; 46 L. J. 4, M. C.), differ from this case. There there was no case stated or leave given to appeal. Sect. 45 of the Judicature Act 1873, says that "all appeals" from inferior courts is to go to the Divisional Court, and that the determination of such appeal by the Divisional Court shall be final, unless special leave to appeal is given to appeal to the Court of Appeal. Reading sects. 45 and 47 together it appears that all appeals, whether on a criminal matter or otherwise, may be taken from the Divisional Court to the Court of Appeal if special leave be given. In other words, sect. 47 does not apply to cases which have come before the Divisional Court, and as to which special leave to appeal has been given. [BARR, J.A.—If the case is clearly a criminal matter, and the Divisional Court gives leave to appeal, do you say an appeal would lie then?] It is submitted that it would if the case is within sect. 45. [BRAMWELL, J.A.—Sect. 45 provides the mode of appeal in cases in which there may be an appeal; sect. 47 states the cases in which no appeal shall lie.]

Baylis, Q.C. and Wheeler, for the respondents, were not called on to argue.

Lord COLERIDGE, C.J.—It appears to me that we have no jurisdiction to hear this appeal, because the subject matter of it is a criminal matter, and within the case of *Reg. v. Steel (sup.)*, a decision in which I entirely concur.

BRAMWELL and BRETT, JJ.A., concurred.

Appeal dismissed.

Solicitors for the respondent, *Chester, Urquhart, and Co.*

Solicitors for the appellant, *Gregory, Rowcliffe, and Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Wednesday May 9, 1877.

TASSELL (app.) v. OVENDEN (resp.) (a)

Licensed premises—Grocer's shop—Closing time—Open for sale of liquors—37 & 38 Vict., c. 43, s. 9.

The appellant, who was licensed to sell by retail intoxicating liquors to be consumed off his premises, was convicted by justices under sect. 9 of the Licensing Act 1874, of keeping open such premises for the sale of intoxicating liquors during prohibited hours.

The appellant's premises consisted of a shop for the sale of drapery and grocery, and during the prohibited hours the wines and spirits were all locked up in a large wooden case, upon which was a printed notice that in accordance with the Licensing Act wines and spirits could not be supplied after 10 o'clock at night.

Held, upon a case stated that when licensed premises were open under such circumstances, the magistrates should satisfy themselves that they were so open for the purpose of sale of intoxicating liquors before they convicted the owner; and that as the appellant had no such intention, the conviction must be quashed.

This was a case stated by three of Her Majesty's Justices of the Peace in and for the County of Kent, under the Statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court

on questions of law which arose as hereinafter stated.

1. At a petty sessions holden at the Sessions House, Week-street, Maidstone, in the County of Kent, in and for the East Division of the Lathe of Aylesford, in the said County of Kent, on Monday the 5th March 1877, an information and complaint preferred by David Ovenden, a superintendent in the County of Kent constabulary (hereinafter called the respondent), against John Tassell of the Parish of Headcorn, in the said County of Kent, grocer, draper, and licensed dealer in wines and spirits (hereinafter called the appellant) under sects. 3 & 9 of the Act 37 & 38 Vict., c. 43, charging for that "he the said John Tassell, on Saturday, the 24th Feb. 1877, at the parish of Headcorn in the said county during a certain time, to wit, at twenty-five minutes past ten o'clock in the afternoon of the said 24th Feb., at which time premises for the sale of intoxicating liquors by retail situate elsewhere than in the Metropolitan District or the Metropolitan Police District, or a town or populous place, as severally defined by the Licensing Act 1874, are directed to be closed by and in pursuance of the said Act, unlawfully did keep open certain premises for the sale of intoxicating liquors by retail situate at Headcorn aforesaid, and being elsewhere than in the said Metropolitan District or the said Metropolitan Police District, or in such town or populous place as aforesaid, for the sale of intoxicating liquors, to wit, wines and spirits contrary to the form of the statute in such case made and provided," was heard and determined, the said parties respectively being then present; and upon such hearing the appellant was duly convicted of the said offence, and the justices adjudged him to forfeit and pay the sum of 1l., to be paid and applied according to law, and also to pay to the said respondent the sum of 10s. for his costs in this behalf.

2. The appellant being dissatisfied with this determination upon the hearing of the said information and complaint, as being erroneous in point of law, pursuant to sect. 2 of the said statute, 20 & 21 Vict., c. 43, duly applied to the said justices in writing to state and sign a case setting forth the facts and the grounds of such determination as aforesaid, for the opinion of this court, and he duly entered into a recognizance as required by the statute in that behalf.

3. The said justices, in compliance with the said application and the provisions of the said statute, and by consent of the said parties, stated and signed the following case.

4. Upon the hearing of the information and complaint, it was proved, or admitted as facts, that the appellant has, and occupies, a shop in Headcorn aforesaid, where he sells drapery, grocery, and wines and spirits, not to be consumed on such premises.

5. On the day named in the information and complaint a police constable, at twenty-five minutes past ten o'clock at night, found the appellant's shop open in the usual way of his trade; he went in and told appellant his shop ought to be closed at ten o'clock at night. The appellant drew the police constable's attention to a large wooden case that was standing in the shop, and to a printed notice that was hanging on the case. The constable observed that the front of the case was closed with interlaced shutters, and at the end of

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the last shutter there was a lock. The appellant told the constable that the case was locked, and took hold of the shutters to show they were properly secured by the lock; he also produced a key but did not try the lock with it. The wooden case above mentioned was 8ft. by 5ft., and capable of holding thirty dozen of bottles; it stood close to the entrance of the shop before the ordinary counter, and any person entering the shop could immediately see the contents when the shutters were not up, but when up the contents could not be seen. The notice hanging on the case was as follows (copy notice): "Notice.—Customers are informed that in accordance with the new Licensing Act, Messrs. W. and A. Gilbey's wines and spirits cannot be supplied in this shop after ten o'clock at night." And there was a similar notice placed in the shop window.

6. There was no proof of any sale or exposure of intoxicating liquors at the time in question, not that liquors were kept in any other place in the shop other than in the said wooden case.

7. It was contended on behalf of the appellant that he had not committed any offence against sects. 3 and 9 of the Licensing Act 1874, under which the information was laid; generally that the shop was kept open for the sale of grocery and drapery, which the appellant was entitled to do, notwithstanding the sections of the Act before referred to, which require him to close at ten o'clock, provided there was a *bona fide* intention on his part not to sell intoxicating liquors after that hour, and that he had done as much as he could to show that such was his intention. The justices, however, were of opinion that the sects. 3 and 9 of the Licensing Act 1874, were exceptional, and it was imperative that the appellant should close his licensed premises at ten o'clock at night.

8. If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information and complaint is to be dismissed.

Tickell argued for the appellant.—The sections which relate to this matter are the 3rd and 9th of the Licensing Act 1874 (37 & 38 Vict. c. 49). By the 3rd section: "All premises in which intoxicating liquors are sold by retail shall be closed as follows (that is to say): . . . (3) If situate elsewhere than in the metropolitan district or the metropolitan police district, or such town or populous place as aforesaid," from ten at night to six in the morning. And by sect. 9: "Any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors, although purchased before the hours of closing, to be consumed in such premises, shall for the first offence be liable to a penalty not exceeding ten pounds, and for any subsequent offence to a penalty not exceeding twenty pounds." In this case there is not only no evidence to support a conviction under these sections, but the evidence distinctly contradicts any intention to break the law. The case of *Brigden v. Heighes* (L. Rep. 1 Q. B. Div. 330; 34 L. T. Rep. 242) is, moreover, an authority against this conviction.

Biron, for the respondent.—Sect. 3 directs all premises in which intoxicating liquors are sold by retail to be closed during certain hours, and does not authorise the closing to be limited to a box containing the liquors; and the penalty is imposed by sect. 9 on a person who opens, or keeps open such premises during those hours. [FIELD, J.—The premises must be kept open for sale of intoxicating liquors to expose the licensed person to a penalty.] That is not the necessary construction of the clause; the words "for the sale of intoxicating liquors" may be taken as mere description of the premises. It is not necessary, therefore, to show any selling during prohibited hours to make the open premises an offence. As to the case of *Brigden v. Heighes*, the state of facts was different from this, and the ground of that decision does not apply here. There the appellant had two separate shops, and at ten o'clock shutters were put up between them, so that the grocer's shop was left in darkness. Mellor, J. said in his judgment, "the only fact they have proved is that the draper's shop was open when the other shop was closed, although from the circumstances which they state they seem to think it possible that the separation was hardly a sufficient inclosure. That may be, but when such a case arises they must furnish some evidence to show that the separation is not one in reality. There is nothing of the kind in this case. I do not think that the fact that the two shops are the same premises in the sense that they are under the same roof at all affects the case. The access of one shop to the other being closed at night, and this being shown to have been the case here, I do not see anything to prevent a draper carrying on the business of a grocer, provided that the premises upon which the sale of liquor takes place are sufficiently divided from those in which no liquor is sold at all." Here there is no division at all; the grocer's shop which was open during prohibited hours being the actual premises licensed for the sale of intoxicating liquors. [MELLOR, J.—Mr. Manisty, as counsel for the appellant in that case, seems to concede your interpretation of the statute.] That case certainly does not govern this.

Tickell in reply.—*Brigden v. Heighes* decided that the keeping premises open for the purpose of sale is the gist of the offence. [FIELD, J.—No. That point was not present to my mind. MELLOR, J.—Sect. 3 is an absolute prohibition to the opening of licensed premises at all during these hours, and although sect. 9 may give rise to doubt, the two must be taken together.] If the respondent's construction of sect. 9 be right, everybody visiting the premises for the purpose of buying groceries after ten o'clock might be convicted under sect. 25 of the Licensing Act 1872. [FIELD, J.—That seems to be so.]

MELLOR, J.—We need not trouble Mr. Tickell any further. These matters may be difficult of proof, but our conclusion of the effect of sect. 9 is not merely that the doors of licensed premises must all be closed at the time fixed. Magistrates must consider whether the precautions taken are sufficient; and if the premises are open, they must further consider whether they are opened or kept open for the purpose of sale of intoxicating liquors. I glean from the statements in this case that the justices concluded the appellant to be acting in good faith, and although the premises were open, they considered he had no intention to

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sell liquors during prohibited hours. I am fortified in this construction of the offence created by sect. 9 by the effect which the other construction would give to sect. 25 of 35 & 36 Vict. c. 94. By that section any person found upon licensed premises during prohibited hours may be convicted "unless he satisfies the court that he was an inmate, servant, or a lodger on such premises, or a *bond fide* traveller, or that otherwise his presence on such premises was not in contravention of the provisions of this Act with respect to the closing of licensed premises." These two Acts are to be read as one. Taking these sections together, I think it safer to hold that magistrates must be satisfied that premises are open for the purpose of sale before they are justified in convicting under such circumstances as these. I agree with Mr. Biron that *Brigden v. Heighes* was decided on the ground that the grocer's shop was *bond fide* closed at ten o'clock, but the point upon which this case must turn was not present to our minds. We thought there was no evidence that the premises were open within the meaning of the Act, and although we are represented to have concurred with Mr. Manisty's arguments, we did not consider whether premises open with no purpose of sale came within the offences created by the 9th section of the Act of 1874. This conviction will, therefore, be quashed.

FIELD, J.—I am of the same opinion, and I quite agree that we are not bound in this case by the authority of *Brigden v. Heighes*. Here the appellant kept his licensed premises open during prohibited hours, but the magistrates seem to have found his intention was *bond fide* not to sell or expose for sale any intoxicating liquors, or to open or keep open his premises for the purpose of selling such liquors after the hour of closing. The magistrates seem to have been of opinion that notwithstanding these findings the law was too strong for them, but I think not. Under the circumstances they should not have convicted.

Judgment for appellant.

Solicitors for appellant, T. and G. Braikenridge.
Solicitors for respondent, Palmer, Bull, and Fry,
for Scudamore and Fry, Maidstone.

Monday, June 18, 1877.

WOMBWELL v. CORPORATION OF BARNSELY. (a)

Arbitration under Lands Clauses Act—Taxation of costs—Agreement between parties—8 & 7 Vict. c. 73, s. 38—Lands Clauses Consolidation Act 1869 (32 & 33 Vict. c. 18, s. 1).

The Corporation of Barnsley demanded of a neighbouring landowner a statement of his interest in certain lands required for the disposal of sewage under the Lands Clauses Consolidation Act 1845, and in answer a claim was made for compensation, and notice given to settle by arbitration. Arbitrators and umpire were duly appointed, but before award the parties agreed in writing that the corporation should have immediate possession of the lands required upon certain terms as to payment of interest; the corporation were to pay all costs incidental to the agreement, arbitration, and conveyance of the land as between solicitor and client, and the time for making the award might be extended. Upon delivery of the bill of costs after the award, the

corporation applied to have taxation, under the Lands Clauses Consolidation Act 1869, by a master.

Held, that the parties had contracted themselves out of the application of that Act, and that the costs might be taxed in Chancery under 6 & 7 Vict. c. 73, s. 38.

THIS was a motion for a rule for *mandamus* on behalf of the mayor, aldermen, and burgesses of Barnsley, calling upon Master Manley Smith to tax the costs incurred by Col. Adolphus Ulick Wombwell in respect of an arbitration concerning the value of some lands obtained by the corporation from Col. Wombwell under the Lands Clauses Consolidation Acts.

The following agreement sets out the circumstances of the arbitration until the 15th Feb. 1876, the date thereof:

An agreement made and entered into this 15th Feb. 1876, between Adolphus Ulick Wombwell, of Thorporch Hall, near Tadcaster, in the county of York, Esq., late Lieut.-Col. of the 12th Regiment of Lancers, of the one part, and the mayor, aldermen, and burgesses of the borough of Barnsley, in the county of York, of the other part. Whereas by a notice in writing dated the 27th Oct. 1875, under the hand of William Harrison Peacock, the town clerk of the said borough, for and on behalf of the said mayor, aldermen, and burgesses acting as the Urban sanitary authority within the district of the said borough, the said mayor, aldermen, and burgesses demanded from the said Adolphus Ulick Wombwell a statement in writing of the particulars of his estate and interest in certain lands therein mentioned and thereby required for the purpose of disposing of the sewage of the said borough of Barnsley by way of irrigation upon the surface of and of filtration through the said lands, and also of the claims made or the amount of compensation demanded by the said Adolphus Ulick Wombwell in respect thereof. And whereas by a notice in writing dated the 29th Oct. 1875, under the hand of Charles Newman, of Barnsley aforesaid, gentleman, as agent for and on behalf of the said Adolphus Ulick Wombwell, addressed to the said mayor, aldermen, and burgesses, it was stated that the said Adolphus Ulick Wombwell claimed an estate for life in the said lands, and further that the said Adolphus Ulick Wombwell, on behalf of himself and the other parties entitled and capable of making a conveyance of the fee simple in possession of the lands specified in the said notice, claimed the sum of 80,000*l.* for the purchase of the said lands specified in the said notice (excepting all minerals lying within and under the same) as required for the purpose aforesaid, and for compensation for the damage that might be sustained by the said Adolphus Ulick Wombwell and the said other parties competent to convey as aforesaid by reason of the execution of the works for which the said lands and premises were so required as aforesaid, or of the exercise as regards such lands and premises of the powers vested in the said urban sanitary authority as in the said first recited notice is mentioned. And notice was further given to the said mayor, aldermen, and burgesses that unless they agreed to pay the sum of money thereinbefore claimed it was the desire of the said Adolphus Ulick Wombwell, and he thereby elected that the amount to be paid in respect of the said claims should be settled by arbitration in the manner prescribed in "the Lands Clauses Consolidation Act 1845;" and that the said Adolphus Ulick Wombwell had by writing under his hand bearing even date with the notice now in recital nominated and appointed Samuel Dickinson Martin, of Leeds, in the county of York, to be the arbitrator on behalf of himself and the said other parties in the matters aforesaid, and did thereby request the said mayor, aldermen, and burgesses to nominate and appoint some person to act as arbitrator on their behalf in the said matters.

And whereas, by writing dated the 29th Oct. 1875, under the hand of the said Adolphus Ulick Wombwell, he, the said Adolphus Ulick Wombwell, in pursuance of the provisions of the Lands Clauses Consolidation Act 1845, nominated and appointed the said Samuel Dickinson Martin to be the arbitrator on his behalf of and

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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the last shutter there was a lock. The appellant told the constable that the case was locked, and took hold of the shutters to show they were properly secured by the lock; he also produced a key but did not try the lock with it. The wooden case above mentioned was 8ft. by 5ft., and capable of holding thirty dozen of bottles; it stood close to the entrance of the shop before the ordinary counter, and any person entering the shop could immediately see the contents when the shutters were not up, but when up the contents could not be seen. The notice hanging on the case was as follows (copy notice): "Notice.—Customers are informed that in accordance with the new Licensing Act, Messrs. W. and A. Gilbey's wines and spirits cannot be supplied in this shop after ten o'clock at night." And there was a similar notice placed in the shop window.

6. There was no proof of any sale or exposure of intoxicating liquors at the time in question, not that liquors were kept in any other place in the shop other than in the said wooden case.

7. It was contended on behalf of the appellant that he had not committed any offence against sects. 3 and 9 of the Licensing Act 1874, under which the information was laid; generally that the shop was kept open for the sale of grocery and drapery, which the appellant was entitled to do, notwithstanding the sections of the Act before referred to, which require him to close at ten o'clock, provided there was a *bond fide* intention on his part not to sell intoxicating liquors after that hour, and that he had done as much as he could to show that such was his intention. The justices, however, were of opinion that the sects. 3 and 9 of the Licensing Act 1874, were exceptional, and it was imperative that the appellant should close his licensed premises at ten o'clock at night.

8. If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information and complaint is to be dismissed.

Tickell argued for the appellant.—The sections which relate to this matter are the 3rd and 9th of the Licensing Act 1874 (37 & 38 Vict. c. 49). By the 3rd section: "All premises in which intoxicating liquors are sold by retail shall be closed as follows (that is to say): . . . (3) If situate elsewhere than in the metropolitan district or the metropolitan police district, or such town or populous place as aforesaid," from ten at night to six in the morning. And by sect. 9: "Any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors, although purchased before the hours of closing, to be consumed in such premises, shall for the first offence be liable to a penalty not exceeding ten pounds, and for any subsequent offence to a penalty not exceeding twenty pounds." In this case there is not only no evidence to support a conviction under these sections, but the evidence distinctly contradicts any intention to break the law. The case of *Brigden v. Heighes* (L. Rep. 1 Q. B. Div. 330; 34 L. T. Rep. 242) is, moreover, an authority against this conviction.

Biron, for the respondent.—Sect. 8 directs all premises in which intoxicating liquors are sold by retail to be closed during certain hours, and does not authorise the closing to be limited to a box containing the liquors; and the penalty is imposed by sect. 9 on a person who opens, or keeps open such premises during those hours. [FIELD, J.—The premises must be kept open for sale of intoxicating liquors to expose the licensed person to a penalty.] That is not the necessary construction of the clause; the words "for the sale of intoxicating liquors" may be taken as mere description of the premises. It is not necessary, therefore, to show any selling during prohibited hours to make the open premises an offence. As to the case of *Brigden v. Heighes*, the state of facts was different from this, and the ground of that decision does not apply here. There the appellant had two separate shops, and at ten o'clock shutters were put up between them, so that the grocer's shop was left in darkness. Mellor, J. said in his judgment, "the only fact they have proved is that the draper's shop was open when the other shop was closed, although from the circumstances which they state they seem to think it possible that the separation was hardly a sufficient inclosure. That may be, but when such a case arises they must furnish some evidence to show that the separation is not one in reality. There is nothing of the kind in this case. I do not think that the fact that the two shops are the same premises in the sense that they are under the same roof at all affects the case. The access of one shop to the other being closed at night, and this being shown to have been the case here, I do not see anything to prevent a draper carrying on the business of a grocer, provided that the premises upon which the sale of liquor takes place are sufficiently divided from those in which no liquor is sold at all." Here there is no division at all; the grocer's shop which was open during prohibited hours being the actual premises licensed for the sale of intoxicating liquors. [MELLOR, J.—Mr. Manisty, as counsel for the appellant in that case, seems to concede your interpretation of the statute.] That case certainly does not govern this.

Tickell in reply.—*Brigden v. Heighes* decided that the keeping premises open for the purpose of sale is the gist of the offence. [FIELD, J.—No. That point was not present to my mind. MELLOR, J.—Sect. 3 is an absolute prohibition to the opening of licensed premises at all during these hours, and although sect. 9 may give rise to doubt, the two must be taken together.] If the respondent's construction of sect. 9 be right, everybody visiting the premises for the purpose of buying groceries after ten o'clock might be convicted under sect. 25 of the Licensing Act 1872. [FIELD, J.—That seems to be so.]

MELLOR, J.—We need not trouble Mr. T. any further. These matters may be difficult to prove, but our conclusion of the effect of the Act is not merely that the doors of licensed premises must all be closed at the time fixed; we must consider whether the premises are sufficiently separated to be kept open for the purpose of selling intoxicating liquors. I glean from the case that the justices were acting in good faith, and were open, they c

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the last shutter there was a lock. The appellant told the constable that the case was locked, and took hold of the shutters to show they were properly secured by the lock; he also produced a key but did not try the lock with it. The wooden case above mentioned was 8ft. by 5ft., and capable of holding thirty dozen of bottles; it stood close to the entrance of the shop before the ordinary counter, and any person entering the shop could immediately see the contents when the shutters were not up, but when up the contents could not be seen. The notice hanging on the case was as follows (copy notice): "Notice.—Customers are informed that in accordance with the new Licensing Act, Messrs. W. and A. Gilbey's wines and spirits cannot be supplied in this shop after ten o'clock at night." And there was a similar notice placed in the shop window.

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8. If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information and complaint is to be dismissed.

Tickell argued for the appellant.—The sections which relate to this matter are the 3rd and 9th of the Licensing Act 1874 (37 & 38 Vict. c. 40). By the 3rd section: "All premises in which intoxicating liquors are sold by retail shall be closed as follows (that is to say): . . . (3) If situate elsewhere than in the metropolitan district or the metropolitan police district, or such town or populous place as aforesaid," from ten at night to six in the morning. And by sect. 9: "Any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors, although purchased before the hours of closing, to be consumed in such premises, shall for the first offence be liable to a penalty not exceeding ten pounds, and for any subsequent offence to a penalty not exceeding twenty pounds." In this case there is not only no evidence to support a conviction under these sections, but the evidence distinctly contradicts any intention to break the law. The case of *Brigden v. Heighes* (L. Rep. 1 Q. B. Div. 330; 34 L. T. Rep. 242) is, moreover, an authority against this conviction.

Biron, for the respondent.—Sect. 8 directs all premises in which intoxicating liquors are sold by retail to be closed during certain hours, and does not authorise the closing to be limited to a box containing the liquors; and the penalty is imposed by sect. 9 on a person who opens, or keeps open such premises during those hours. [*FIELD, J.*—The premises must be kept open for sale of intoxicating liquors to expose the licensed person to a penalty.] That is not the necessary construction of the clause; the words "for the sale of intoxicating liquors" may be taken as mere description of the premises. It is not necessary, therefore, to show any selling during prohibited hours to make the open premises an offence. As to the case of *Brigden v. Heighes*, the state of facts was different from this, and the ground of that decision does not apply here. There the appellant had two separate shops, and at ten o'clock shutters were put up between them, so that the grocer's shop was left in darkness. *Mellor, J.* said in his judgment, "the only fact they have proved is that the draper's shop was open when the other shop was closed, although from the circumstances which they state they seem to think it possible that the separation was hardly a sufficient inclosure. That may be, but when such a case arises they must furnish some evidence to show that the separation is not one in reality. There is nothing of the kind in this case. I do not think that the fact that the two shops are the same premises in the sense that they are under the same roof at all affects the case. The access of one shop to the other being closed at night, and this being shown to have been the case here, I do not see anything to prevent a draper carrying on the business of a grocer, provided that the premises upon which the sale of liquor takes place are sufficiently divided from those in which no liquor is sold at all." Here there is no division at all; the grocer's shop which was open during prohibited hours being the actual premises licensed for the sale of intoxicating liquors. [*MELLOR, J.*—Mr. Manisty, as counsel for the appellant in that case, seems to concede your interpretation of the statute.] That case certainly does not govern this.

Tickell in reply.—*Brigden v. Heighes* decided that the keeping premises open for the purpose of sale is the gist of the offence. [*FIELD, J.*—No. That point was not present to my mind. *MELLOR, J.*—Sect. 3 is an absolute prohibition to the opening of licensed premises at all during these hours, and although sect. 9 may give rise to doubt, the two must be taken together.] If the respondent's construction of sect. 9 be right, everybody visiting the premises for the purpose of buying groceries after ten o'clock might be convicted under sect. 25 of the Licensing Act 1872. [*FIELD, J.*—That seems to be so.]

MELLOR, J.—We need not trouble Mr. *Tickell* any further. These matters may be difficult of proof, but our conclusion of the effect of sect. 9 is not merely that the doors of licensed premises must all be closed at the time fixed. Magistrates must consider whether the precautions taken are sufficient; and if the premises are open, they must further consider whether they are opened or kept open for the purpose of sale of intoxicating liquors. I glean from the statements in this case that the justices concluded the appellant to be acting in good faith, and although the premises were open, they considered he had no intention to

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sell liquors during prohibited hours. I am fortified in this construction of the offence created by sect. 9 by the effect which the other construction would give to sect. 25 of 35 & 36 Vict. c. 94. By that section any person found upon licensed premises during prohibited hours may be convicted "unless he satisfies the court that he was an inmate, servant, or a lodger on such premises, or a *bond fide* traveller, or that otherwise his presence on such premises was not in contravention of the provisions of this Act with respect to the closing of licensed premises." These two Acts are to be read as one. Taking these sections together, I think it safer to hold that magistrates must be satisfied that premises are open for the purpose of sale before they are justified in convicting under such circumstances as these. I agree with Mr. Biron that *Brigden v. Heighes* was decided on the ground that the grocer's shop was *bond fide* closed at ten o'clock, but the point upon which this case must turn was not present to our minds. We thought there was no evidence that the premises were open within the meaning of the Act, and although we are represented to have concurred with Mr. Manisty's arguments, we did not consider whether premises open with no purpose of sale came within the offences created by the 9th section of the Act of 1874. This conviction will, therefore, be quashed.

FIELD, J.—I am of the same opinion, and I quite agree that we are not bound in this case by the authority of *Brigden v. Heighes*. Here the appellant kept his licensed premises open during prohibited hours, but the magistrates seem to have found his intention was *bond fide* not to sell or expose for sale any intoxicating liquors, or to open or keep open his premises for the purpose of selling such liquors after the hour of closing. The magistrates seem to have been of opinion that notwithstanding these findings the law was too strong for them, but I think not. Under the circumstances they should not have convicted.

Judgment for appellant.

Solicitors for appellant, T. and G. Braikenridge.
Solicitors for respondent, Palmer, Bull, and Fry,
for Soudamore and Fry, Maidstone.

Monday, June 18, 1877.

WOMBWELL v. CORPORATION OF BARNSLEY. (a)

Arbitration under Lands Clauses Act—Taxation of costs—Agreement between parties—6 & 7 Vict. c. 73, s. 38—Lands Clauses Consolidation Act 1869 (32 & 33 Vict. c. 18, s. 1).

The Corporation of Barnsley demanded of a neighbouring landowner a statement of his interest in certain lands required for the disposal of sewage under the Lands Clauses Consolidation Act 1845, and in answer a claim was made for compensation, and notice given to settle by arbitration. Arbitrators and umpire were duly appointed, but before award the parties agreed in writing that the corporation should have immediate possession of the lands required upon certain terms as to payment of interest; the corporation were to pay all costs incidental to the agreement, arbitration, and conveyance of the land as between solicitor and client, and the time for making the award might be extended. Upon delivery of the bill of costs after the award, the

corporation applied to have taxation, under the Lands Clauses Consolidation Act 1869, by a master.

Held, that the parties had contracted themselves out of the application of that Act, and that the costs might be taxed in Chancery under 6 & 7 Vict. c. 73, s. 38.

THIS was a motion for a rule for *mandamus* on behalf of the mayor, aldermen, and burgesses of Barnsley, calling upon Master Manley Smith to tax the costs incurred by Col. Adolphus Ulick Wombwell in respect of an arbitration concerning the value of some lands obtained by the corporation from Col. Wombwell under the Lands Clauses Consolidation Acts.

The following agreement sets out the circumstances of the arbitration until the 15th Feb. 1876, the date thereof:

An agreement made and entered into this 15th Feb. 1876, between Adolphus Ulick Wombwell, of Thorparch Hall, near Tadcaster, in the county of York, Esq., late Lieut.-Col. of the 12th Regiment of Lancers, of the one part, and the mayor, aldermen, and burgesses of the borough of Barnsley, in the county of York, of the other part. Whereas by a notice in writing dated the 27th Oct. 1875, under the hand of William Harrison Peacock, the town clerk of the said borough, for and on behalf of the said mayor, aldermen, and burgesses acting as the Urban sanitary authority within the district of the said borough, the said mayor, aldermen, and burgesses demanded from the said Adolphus Ulick Wombwell a statement in writing of the particulars of his estate and interest in certain lands therein mentioned and thereby required for the purpose of disposing of the sewage of the said borough of Barnsley by way of irrigation upon the surface of and of filtration through the said lands, and also of the claims made or the amount of compensation demanded by the said Adolphus Ulick Wombwell in respect thereof. And whereas by a notice in writing dated the 29th Oct. 1875, under the hand of Charles Newman, of Barnsley aforesaid, gentleman, as agent for and on behalf of the said Adolphus Ulick Wombwell, addressed to the said mayor, aldermen, and burgesses, it was stated that the said Adolphus Ulick Wombwell claimed an estate for life in the said lands, and further that the said Adolphus Ulick Wombwell, on behalf of himself and the other parties entitled and capable of making a conveyance of the fee simple in possession of the lands specified in the said notice, claimed the sum of 30,000*l.* for the purchase of the said lands specified in the said notice (excepting all minerals lying within and under the same) as required for the purpose aforesaid, and for compensation for the damage that might be sustained by the said Adolphus Ulick Wombwell and the said other parties competent to convey as aforesaid by reason of the execution of the works for which the said lands and premises were so required as aforesaid, or of the exercise as regards such lands and premises of the powers vested in the said urban sanitary authority as in the said first recited notice is mentioned. And notice was further given to the said mayor, aldermen, and burgesses that unless they agreed to pay the sum of money thereinbefore claimed it was the desire of the said Adolphus Ulick Wombwell, and he thereby elected that the amount to be paid in respect of the said claims should be settled by arbitration in the manner prescribed in "the Lands Clauses Consolidation Act 1845;" and that the said Adolphus Ulick Wombwell had by writing under his hand bearing even date with the notice now in recital nominated and appointed Samuel Dickinson Martin, of Leeds, in the county of York, to be the arbitrator on behalf of himself and the said other parties in the matters aforesaid, and did thereby request the said mayor, aldermen, and burgesses to nominate and appoint some person to act as arbitrator on their behalf in the said matters.

And whereas, by writing dated the 29th Oct. 1875, under the hand of the said Adolphus Ulick Wombwell, he, the said Adolphus Ulick Wombwell, in pursuance of the provisions of the Lands Clauses Consolidation Act 1845, nominated and appointed the said Samuel Dickinson Martin to be the arbitrator on his behalf of and

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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concerning the premises. And whereas by writing dated the 23rd Nov. 1875, under the hand of the said William Harrison Peacock, the town clerk of the said borough of Barnsley, and the clerk to the said urban sanitary authority, and also under the corporate common seal of the said borough, the said mayor, aldermen, and burgesses, acting as such urban sanitary authority as aforesaid, nominated and appointed Edward Lancaster, of Barnsley, aforesaid, land agent, to be the arbitrator on the part of the said mayor, aldermen, and burgesses for the purposes of the said arbitration. And whereas the said Samuel Dickinson Martin and Edward Lancaster did by writing under their hands dated the 6th Jan. 1876, before entering upon their said arbitration, nominate and appoint Thomas Barham Foster, of Manchester, civil engineer, to be their umpire. And whereas the said arbitrators and umpire have not yet made their award in the said matters, and the said mayor, aldermen, and burgesses are desirous of obtaining immediate possession of the said lands and tenements. Now, therefore, it is hereby agreed as follows:—

1. The said mayor, aldermen, and burgesses shall be forthwith let into possession of the said lands and premises comprised in the first hereinbefore recited notice, subject to their arranging with the tenants or tenant thereof.

2. The said mayor, aldermen, and burgesses shall, in addition to the amount to be settled by arbitration as the sum to be paid for the said lands and premises, and compensation as aforesaid, pay interest on such sum until the same shall be fully paid at the rate of 5l. per centum per annum from the time of taking possession of the same premises or any part thereof.

3. The said mayor, aldermen, and burgesses shall pay to the said Adolphus Ulick Wombwell the price and interest as aforesaid, irrespective of any sum which they the said mayor, aldermen, and burgesses may be liable to pay to the tenants or tenant as compensation for the value of their or his unexpired term or interest in such lands, and for the damage done to them or him in their or his tenancy of the said lands and premises as aforesaid, they, the said tenants, being tenants from year to year.

4. The said mayor, aldermen, and burgesses shall pay all and every the costs and expenses of the said Adolphus Ulick Wombwell of and incidental to this agreement and the said reference and arbitration, and to the conveyance of the said lands and premises, including valuers' and surveyors' charges and solicitors' charges as between solicitor and client.

5. The said arbitrators shall have power, and they are hereby authorized, to extend the time for hearing evidence and making their award herein until the 23rd of May next, before the said arbitration shall devolve upon the said umpire, anything in the said Lands Clauses Consolidation Act 1845, to the contrary thereof in anywise notwithstanding. As witness the hand of the said Adolphus Ulick Wombwell, and the said mayor, aldermen, and burgesses of the borough of Barnsley, have hereunto affixed their common seal the day and year first above written.

Sealed with the corporate common seal of the borough of Barnsley, in the presence of
JOSEPH BRADLEY,
Clerk to Mr. Peacock,
Solicitor,
Barnsley.

RICHARD CARTER,
Mayor,
[Seal.]

To this agreement were appended three memoranda, dated respectively the 17th April, the 9th May, and the 13th June, 1876, by which the time for the award was extended to the 1st Sept. 1876.

On the 9th Aug. 1876, the umpire duly made his award, reciting the facts mentioned in the said agreement, but not referring in any way to the agreement itself, and also reciting that on the 15th July 1876, it was mutually agreed that certain additional lands should be purchased and taken by the corporation from Col. Wombwell at an amount to be settled by the umpire. He proceeded to award the sum of 19,585l. 3s. to be paid under

the notice to treat, and the sum of 448l. 14s. to be paid under the agreement for purchase of additional lands, amounting in all to 20,033l. 17s. to be paid by the corporation to Col. Wombwell.

A bill of the costs incurred by Col. Wombwell was delivered to the Corporation of Barnsley, whose solicitors applied by summons at chambers to have the said bill taxed in accordance with sect. 1 of the Lands Clauses Consolidation Act 1869 (32 & 33 Vict. c. 18). It is enacted by that section that "Where in England, under the Lands Clauses Consolidation Act 1845, or any Act incorporating the same, any question of disputed compensation is determined by arbitration, the costs of and incidental to the arbitration and award shall, if either party so requires, be taxed and settled as between the parties by any one of the taxing masters of the Superior Courts of law, and such fees may be taken in respect of the taxation as may be fixed in pursuance of the enactments relating to the fees to be demanded and taken in the offices of such masters, and all those enactments, including the enactments relating to the taking of fees by means of stamps, shall extend to the fees in respect of the said taxation."

Master Manley Smith, upon the hearing of this summons, was of opinion that he ought to proceed to tax under the Lands Clauses Consolidation Act; that the agreement of the 15th Feb. 1876, was collateral to the arbitration, and though it might affect the scale of allowance, it ought not to prevent taxation. By consent of the parties, however, he adjourned the matter in order that the corporation might move the court for this rule, Col. Wombwell undertaking to show cause against it in the first instance.

Charles, Q.C. (with him *Jeune*) accordingly now moved on behalf of the Corporation of Barnsley.—The 4th clause of the agreement of the 15th Feb. 1876, which it is contended on the other side ousts the jurisdiction of a master of this court, merely provides a scale of taxation by which the master may be guided. *Bramwell, B.* said in *Eccles v. Mayor, &c., of Blackburn* (30 L. J. 358, Ex., at p. 370), "The master cannot tax costs as between party and party on two different scales, unless there is some agreement between the parties to enable him to do so." Here there is nothing to prevent the master from taxing according to the terms of the agreement. The objection to this taxation is founded on the case of *Doulton v. Metropolitan Board of Works* (L. Rep. 5 Q. B. 533), but there was in that case an express provision that the costs, charges, and expenses should, "in case of difference, be from time to time settled by the arbitrator;" and, accordingly, it was held by *Lush, J.* that this was not a case within the Lands Clauses Consolidation Act 1845, and, therefore, the provision as to taxation of costs in the Lands Clauses Consolidation Act 1869, did not apply.

A. Wills, Q.C. (with him *W. G. Harrison, Q.C.* and *Bowen*), showed cause in the first instance on behalf of Colonel Wombwell.—According to the agreement the 4th clause indemnifies Colonel Wombwell from "all and every the costs and expenses of and incidental to this agreement, and the said reference and arbitration, and to the conveyance of the said lands and premises, including valuers' and surveyors' charges, and solicitors' charges as between solicitor and client." It would be impossible to tax under the Lands Clauses

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Consolidation Act 1869, the charges in respect of the agreement of the 15th Feb. 1876, or those in respect of the conveyance of the lands and premises. One taxation, however, of the whole costs would be sufficient under sect. 38 of the Attorneys and Solicitors' Act 1843 (6 & 7 Vict. c. 73), by which it is enacted, "That where any person, not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained, shall be liable to pay, or shall have paid such bill either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall be made thereupon, and the same course pursued in all respects as if such application was made by the party so chargeable with such bill as aforesaid." By the previous sect. 37, it is provided, amongst other things, that "upon the application of the party chargeable by such bill within such month, it shall be lawful, in case the business contained in such bill or any part thereof, shall have been transacted in the High Court of Chancery, or in any other Court of Equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity, for the Lord High Chancellor or Master of the Rolls." . . . "and they are hereby respectively required to refer such bill, and the demand of such attorney or solicitor, executor, or administrator, or assignee, thereupon to be taxed and settled by the proper officer of the court in which such reference shall be made without any money being brought into court." With the exception that this bill should be taxed by the proper officer in Chancery instead of by the arbitrator, the case of *Doulton v. Metropolitan Board of Works* is an authority exactly in point with respect to this case. The agreement there provided that the reference and award should be subject to the Lands Clauses Consolidation Act, 1845, except as modified by the agreement, and the modifications are almost exactly the same as in this agreement of the 15th Feb. 1876. In both are provisions for the costs of the agreements and conveyances, and valuers' and solicitor's charges. The objection of Lush, J., to the motion, which was similar to this, was, "If the Act were held to apply, the costs might have to be taxed by two different persons. I think that sect. 1 of the Lands Clauses Consolidation Act 1869, can only be taken to apply to arbitration pure and simple, begun and carried out under the Lands Clauses Acts. Where there are special agreements concerning matters to which those statutes do not apply, the Act of 1869 is not applicable." The object of the agreement was to save the corporation from having to deposit a sum of money they would otherwise have been liable for, and the consideration for this advantage was the better scale of costs allowed to the landowner by the Chancery taxation.

Charles, Q.C., in reply.—This motion is merely to obtain the costs of the arbitration, if there are any charges for the agreement or conveyance, the master would disallow them. There must be two taxations in any event, for the conveyance is not yet completed. This is an agreement collateral to

the arbitration, and contains nothing to deprive the corporation of the benefit of the Act of 1869. [*LUSH, J.*—The agreement indemnifies Colonel Wombwell, but there is nothing in the Act of 1869, to prevent his solicitor from recovering against him the costs taxed off under that Act.] The solicitor may have the same right if the taxation take place in Chancery, the words "as between solicitor and client," in the 4th clause of the agreement apply only to solicitors' charges, not to the other costs and expenses of Colonel Wombwell.

MELLOR, J.—I confess that I feel considerable difficulty in this matter. If this were the first time the point had been raised I should have much doubted the propriety of depriving a party to such an arbitration of the benefit of this Act of 1869. But upon the authority of the decision of my brother Lush in *Doulton v. Metropolitan Board of Works*, I am willing to hold that the parties have here agreed to take themselves out of the operation of that Act. The object of the 1st section no doubt was to give such taxations to persons skilled in like matters, and the provision is to apply where any question of disputed compensation, under the Lands Clauses Act 1845, or any Act incorporating the same, is determined by arbitration. Mr. Charles contends that there is nothing in the Act as to the scale upon which the taxation is to be carried out, and that the duty imposed upon a master may be regulated by agreement. I feel the weight of that contention, but on the other side it is reasonably maintained that there is nothing to prevent parties from agreeing to exclude the Act from applying to their arbitration. Here the agreement was that the corporation should pay all and every the costs and expenses of Col. Wombwell "of and incidental to this agreement and the said reference and arbitration, and to the conveyance of the said lands and premises, including valuers' and surveyors' charges and solicitors' charges as between solicitor and client." These words mean, I think, to indemnify Col. Wombwell from all expenses attending the whole proceeding, and in order to do that the parties have agreed to remove themselves from the application of the Act of 1869. But does the clause mean to make the corporation liable for any costs which the solicitors may charge? I think not; it may well be that the costs should be taxed under the Attorneys' and Solicitors' Act referred to by Mr. Wills. A taxing officer in Chancery is a most suitable tribunal for this work, and he would not be limited to the treatment of the costs of the arbitration only. I think, therefore, we should not compel this taxation to be undertaken by a master under the Lands Clauses Consolidation Act 1869, and this rule will be refused.

LUSH, J.—I think also there is no power to compel Col. Wombwell to have these costs taxed under the Act of 1869. It is competent to the parties to an arbitration under the Lands Clauses Acts to contract themselves out of the Act of 1869, and I think the agreement here has that effect. I think it means that Col. Wombwell should be indemnified from all costs with which his solicitor would have a right to charge him. Those costs may be ascertained in the Court of Chancery, not only by Col. Wombwell or his solicitor, but under sect. 38 of the Attorneys' Act, by the Corporation of Barnsley, who have to pay them. There is no difficulty about it, and it

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seems to me to be the best course, and that which was intended by the parties.

Rule refused.

Solicitors for Col. Wombwell, *Singleton* and *Tattershall*, for *Newman and Sons*, *Barnsley*.

Solicitors for the Corporation, *Norton, Rose, Norton and Brewer*, for *Benjamin Marshall*, *Barnsley*.

Thursday, May 17, 1877.

REG. v. INHABITANTS OF CENTRAL WINGLAND. (a)

Extra-parochial place, repair of highway by—20 Vict. c. 9—25 & 26 Vict. c. 61, ss. 17, 32, 35—27 & 28 Vict. c. 101, ss. 3, 9.

An extra-parochial place which is annexed to a union under 20 Vict. c. 19, is not liable to indictment for non-repair of a highway.

THIS was an indictment of the Inhabitants of Central Wingland for non-repair of a highway. The indictment followed a common form, and the only plea of the defendants was "Not Guilty."

At the trial of the indictment before Amphlett, L.J., at the Lincoln Spring Assizes, 1876, the following facts were, by agreement of counsel, placed on the learned judge's notes:

Prior to the passing of the Nene Outfall Act 1827 (7 & 8 Geo. 4, c. lxxxv.), all the lands which now form Central Wingland were un-reclaimed salt marshes and extra-parochial. Pursuant to the Nene Outfall Act 1827, these lands were embanked and reclaimed from the sea, and by sect. 176 of that Act were declared to be extra-parochial. By sect. 180 of the same Act it was provided that Thomas Pear, surveyor, should set out so much of the said lands as he should think proper for public roads and highways, and he accordingly made an award, dated 20th Dec. 1836, setting out amongst others the road now in question as a public highway. The Nene Outfall Commissioners, under the said Act, became the owners of the whole of Central Wingland, and on the 20th Aug. 1840, they sold by auction, under conditions of sale, a portion of their said land adjoining the road in question. Under the ninth of the said conditions of sale the purchasers were required to enter into certain covenants to repair the highway according to their frontages. Pursuant to the said ninth condition of sale, Thomas Pear made an award dated 7th Dec. 1840, which included the said road. The purchasers of the said lands entered into the covenants required by the said ninth condition of sale by a deed of covenant, dated 9th Jan. 1841. [Deed put in.] The highway in question was set out or commenced to be set out under the direction of the said Thomas Pear, in the year 1843. Since the passing of 20 Vict. c. 19, Central Wingfield has been added to the Holbeach Union by an order of the Poor Law Board, dated 2nd May 1866, and an overseer and a guardian were appointed from time to time. In May 1875, Joseph Faulkner was appointed surveyor of highways for Central Wingland by the justices of the parts of Holland, in Lincolnshire, under the provisions of the Highway Acts. It was contended by the defendants that this appointment was invalid. Central Wingland is not a highway district, and no highway board has been appointed for any district in which Central Wingland is included. No highway rate has ever been made in Central Wingland.

(a) Reported by J. M. LELY Esq., Barrister-at-Law.

The road in question was at the time of the trial and had been for some time out of repair. On 21st Jan. 1876, the prosecutor took out a summons against Joseph Faulkner, as such overseer as aforesaid in respect of the non-repair of such highway. The said Joseph Faulkner appeared at Spalding, on Feb. 1st 1876, before the justices of the parts of Holland, in answer to the said summons, and admitted the said road to be a public highway, but denied the liability of the inhabitants to repair it. The case was adjourned to the 15th Feb., when the justices ordered the present indictment to be prepared at the then next Lincoln assizes.

The learned judge directed a verdict of guilty, with leave to move to enter a verdict for the defendants.

The following enactments are material:

20 Vict. c. 19, s. 1:

Every place entered separately in the report of the Registrar-General on the last census which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall for all the purposes of the assessment to the poor rate, the relief of the poor, the county police, or borough rate, the burial of the dead, the removal of nuisances, the registration of births and deaths, be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report; and the justices of the peace having jurisdiction over such place or over the greater part thereof shall appoint overseers of the poor therein; and with respect to any other place being or reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, such justices may appoint overseers of the poor therein, notwithstanding anything contained in 7 & 8 Vict. c. 101. [The Poor Law Amendment Act 1844.]

25 & 26 Vict. c. 61 (The Highway Act 1862) s. 17:

The highway board shall maintain in good repair the highways within their district, and shall, subject to the provisions of the Act as respects the highways in each parish within their district perform the same duties, have the same powers, and be liable to the same legal proceedings as the surveyor of such parish would have performed, had, and been liable to if this Act had not passed. It shall be the duty of the district surveyor to submit to the board at their first meeting in every year an estimate of the expenses likely to be incurred during the ensuing year for maintaining and keeping in repair the highways in each parish within the district of the board, and to deliver a copy of such estimate, as approved or modified by the board so far as the same relates to each parish, to the waywarden of such parish.

Sect. 32:

Where, in pursuance of 20 Vict. c. 19, any place is declared to be a parish, or where overseers of the poor are appointed for any place, such place shall, for the purposes of this Act, be deemed to be a parish separately maintaining its own highways; and where in pursuance of the same Act any place is annexed to any adjoining parish, or to any district in which the relief of the poor is administered under a local Act, such place shall, for the purposes of this Act, be deemed to be annexed to such parish or district for the purposes of the maintenance of the highways, as well as for the purposes in the said Act mentioned.

27 & 28 Vict. c. 101 (Highway Act 1864) s. 9:

The justices in petty sessions may appoint overseers, or otherwise deal with any extra-parochial place with a view to constituting it a highway parish or part of a highway parish, in the same manner as the justices may deal with such place for the purpose of constituting it a place or part of a place maintaining its own poor, in pursuance of the powers for that purpose given by 20 Vict. c. 19.

Sect. 5:

Any parish, township, tithing, hamlet, or other place having a known legal boundary in which there are no highways repairable at the expense of the place, or in

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which the highways are repaired at the expense of the place, or in which the highways are repaired at the expense of any person, body politic or corporate by reason of any court, tenure, limitation or appointment of any charitable gift, or otherwise howsoever than out of a highway rate or other general rate, shall, for the purposes of the Highway Acts, be deemed to be a place separately maintaining its own highways.

A rule was afterwards obtained to set aside the verdict for the Crown and to enter a verdict for the defendants, on the grounds that on the facts admitted at the trial the defendants were entitled to the verdict, that the justices had no power to appoint a surveyor, or to constitute the parish a highway parish, the same not being in a highway district, that the Nene Outfall Act provides that Central Wingland shall at all times be deemed extra-parochial, and is not repealed by the General Highway Acts, and that the provisions of the Highway Act 1835, s. 23, had not been complied with. Against this rule

Merewether, Q.C. and *Dugdale*, for the prosecution, now showed cause, and relying principally on sect. 32 of the Highway Act of 1862, argued that the defendants were subject to the law of highways generally, so as to be separately indictable, and that inasmuch as the question was not one between one part of the inhabitants and another, but between the inhabitants and the public, the Highway Acts ought not to be construed literally in favour of the defendants.

Graham, for the defendants, supported the rule, and argued that as no highway board had been appointed, the justices had no jurisdiction to appoint a surveyor, and that the words "for the purposes of this Act," in sect. 32 of the Highway Act of 1862 had reference solely to the administrative purposes of the Highway Acts, and imposed no liability to indictment for non-repair. He cited

Reg. v. Midville, 4 Q. B. 240; 2 G. & D. 522.

MELLOR, J.—I am of opinion that this rule ought to be made absolute. The case is one of some difficulty and complexity, the question being whether the object of the statute was to change the liability of parishes, or to throw the obligation to repair upon the surveyor. Mr. Merewether assumes, and he is bound to assume, that the defendants are liable to an indictment, but he has failed to make out his case. The soil of Central Wingland was vested by the Nene Outfall Act in commissioners, and declared to be extra-parochial for ever. These commissioners sold portions of the soil on condition that the purchasers would repair in proportion to their frontages. By the operation of 20 Vict. c. 19, Central Wingland became a parish for the purposes of the poor-rate and other specific purposes set forth in the second section of that Act. But highway rates are certainly not included in that section. Mr. Merewether, however, contends that by sect. 32 of the Highway Act 1862, the liability is thrown upon the defendants. [The learned judge read the section and proceeded:] No doubt the scheme of the Act of 1862 was that the difficulties in the way of a perfect highway system which were caused by the interposition of extraparochial places should be obviated, and that the new law should prevail generally throughout England. But I think that this section does not give a power to proceed against this particular parish; the words "for the purposes of this Act" show that

for the parish to be liable, it was first necessary that a highway district should be appointed, and this has not been done. Neither do any other of the enactments referred to render the indictment maintainable. The rule, therefore, must be absolute.

FIELD, J.—I am very clearly of the same opinion. This indictment charges that the defendants are bound to repair a certain highway. On such an indictment it is incumbent on the prosecution to prove that the defendants are a parish. That is laid down very clearly by *R. v. Ecclesfield* (1 B. & Ald. 359), which is the foundation of all the authorities on the subject. The place was never a parish for any purpose till the passing of 20 Vict. c. 19, which was passed to obviate the many difficulties which arose from the chain of communication being broken up by extraparochial places, but though it applied to many public purposes, it did not refer to highways. We then come to the 32nd section of the Act of 1862. [Section read.] Now if this section had stopped at the words "separately maintaining its own highways," Mr. Merewether would no doubt have had a very strong case. But the section goes on to speak of "places annexed to adjoining parishes," and to provide that these places shall, "for the purposes of this Act," be deemed to be annexed to the adjoining parishes "for the purposes of maintaining the highways." Now what are the purposes of the Act? Clearly to provide a machinery for forming "highway districts" and "highway parishes." Following out this interpretation, we find that the inhabitants of Central Wingland come within the operation of sect. 10, so as to be able to elect a waywarden. But they are not liable to be separately indicted.

Rule absolute.

Solicitors for the prosecution, *Baxter and Co.*

Solicitor for the defendants, *Mossop*, for *Mossop*, of Long Sutton.

April 25 and June 13, 1877.

WEBB v. KNIGHT.(a)

Adulteration — Dilution — Quality of article — Question of fact—38 & 39 Vict. c. 63.

A purchaser asked for a pint bottle of gin at the appellant's licensed premises. The barman inquired at what price, saying there were two kinds, one at 2s., the other at 1s. 4d. a pint. The purchaser chose the latter, and was supplied with a liquid which proved on analysis to be 43.15 per cent. under proof. It was found that the custom of the trade in the district was to buy gin from the distillers about 20 under proof, and to sell at prices from 2s. to 1s. a pint. The appellant was convicted under sect. 6 of the Sale of Food and Drugs Act 1875, for selling to the prejudice of the purchaser an article of food which was not of the nature, substance, and quality of the article demanded.

Held, upon a case stated, that in the absence of any custom in the neighbourhood as to the amount of dilution corresponding to a particular price, the breach of the statute was a question of fact for the magistrates; and that the court could not interfere with any common sense view of the matter taken by them.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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THIS is a case stated by one of her Majesty's justices of the peace in and for the county of Stafford, and the stipendiary magistrate for the district of the borough of Stoke-upon-Trent, and certain places adjoining within the said district in the said county, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with the decision, upon the question of law which arose, as hereinafter stated, on the 19th Jan. 1877, at Stoke-upon-Trent, in the said county, the appellant having duly entered into a recognizance to prosecute the appeal:

1. Upon the hearing of a certain information preferred by the respondent against the appellant, under sect. 6 of the Act 38 & 39 Vict. c. 63, "That on the 7th Nov. 1876, at the parish of Burslem, in the said county, the appellant unlawfully did sell to the prejudice of one William Gifford, the purchaser of a certain article of food, to wit, one pint of gin, which was not of the nature, substance, and quality of the article demanded by such purchaser." I convicted the appellant of the said offence, and adjudged him to pay the sum of 10s. for his said offence, to be paid and applied according to law, and also to pay to the said respondent the sum of 1l. 16s. for his costs in that behalf; and it was further adjudged that if the said several sums should not be paid forthwith, the said William Webb should be imprisoned in the House of Correction at Stafford, in the said county, and there kept to hard labour for the space of fourteen days, unless the said several sums should be sooner paid.

2. The following facts were proved before me.

(1.) The said William Gifford, the assistant to the respondent, who is the authorised inspector under the said Act, 38 & 39 Vict. c. 63, went to the appellant's licensed house, known by the sign of the Nile Street Hotel, at Burslem, on the 9th Nov., and asked for a pint of gin. The appellant's barman, John Ward, asked Gifford at what price he wanted it, stating that they had it at 2s. and 1s. 4d. per pint. Gifford selected a pint at 1s. 4d., which was supplied to him. He admitted on cross-examination that the prices of gin varied from 2s. to as low as 1s. 1d., and that he had purchased gin for analysis as low as 1s. Gifford then divided the pint of gin into three parts, two of which were sealed by the appellant, and retained by Gifford. The other portion was sealed by Gifford and left with the appellant. Gifford, at the time he sealed the samples, marked them A. 584.

(2.) The two samples of gin marked A. 584 were handed to the respondent on the same day; and on the 10th Nov., 1876, the respondent handed the said two samples to Mr. Wentworth Scott, the duly authorised analyst for the district A. in North Staffordshire for analysis.

(3.) On or about the 18th Nov., 1876, the said analyst forwarded his certificate of analysis to the respondent, of which the following is a copy:—

County of Stafford
(Northern Division).
Sale of Food and Drugs Act, 1875.
Certificate of analysis,
District A.

No. 41,
Sample of gin.
Marked A. 584, sealed with key.
Received Nov. 10.h, 1876.

From J. E. Knight, Food Inspector,
County Analyst's Laboratories,
Wolverhampton, 18th Nov., 1876.

I, the undersigned, public analyst for the County of Stafford, do hereby certify that I have analysed chemically, and have otherwise examined the sample of gin referred to above, and that I find the same very largely adulterated, the under-mentioned per centages or proportions of foreign ingredients being present therein—
Water 43.15 per cent.

In my opinion the said sample is not so adulterated as to be injurious to health.

To Major Knight, Stafford.

WENTWORTH L. SCOTT.

(4.) The appellant called witnesses, and proved that when he bought the gin of the distillers it was seventeen under proof, and that it was the custom of the trade, in this district, to purchase gin at degrees varying from seventeen to twenty-two under proof, and that the prices at which gin is usually sold by the trade in the district are, for the best gin 2s., and for common gin 1s. 4d., and as low as 1s.

3. On the part of the appellant it was further contended the article of food, namely, the pint of gin sold to Gifford as the purchaser, could not be to the prejudice of the said purchaser, as he had selected a low priced gin, and that he got his value in genuine spirit diluted only by the addition of water to accommodate the purchaser in the price to be paid, and that, therefore, he got a more diluted or less strong spirit, and that it was a well known fact that in the sale of gin the custom of the trade was that pure gin was an article not sold for consumption in licensed houses, and that there was no standard of alcoholic strength retailers were required to sell, and that under all the circumstances the custom regulating the traffic in gin, could not be affected by the before-named statute.

4. On behalf of the respondent it was contended that, when a purchaser asked for gin, it was to the prejudice of the purchaser if he got gin mixed with a large per centage of water.

5. I, however, was of opinion that when a purchaser asked for gin, he did not expect to be supplied with gin and a large per centage of water added thereto by the vendor, and that though there is no recognised standard of alcoholic strength for gin, but that it varies from proof to twenty under proof, a purchaser may well believe that when he asks for best gin he will obtain that of a strength about proof or a few degrees under, and when he asks for lower priced gin he will obtain gin of a quality between that and twenty under proof, at any rate, if he asks for gin, he might expect to obtain an article not more than twenty or twenty-two under proof. If the contention of the appellant were right, there would be no limit to the amount of water he might be entitled to add, because it was admitted in evidence that gin was sold at a less price per gallon than was paid for it, and that the profit was made only by the quantity of water that was added to the gin after it was received from the distiller's. I was of opinion that such a contention was contrary to the decision of the learned judge in the case of *Pashler v. Stevenitt*, reported in 40 J. P. 357, and I consequently gave my decision against the appellant.

6. The question of law upon which this case is stated for the opinion of the court therefore is: 1st, Was the pint of gin and water sold to Gifford as gin, to the prejudice of the purchaser, within

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the meaning of the said Act? If the court should be of opinion that the said conviction was right, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of a contrary opinion, then the said conviction is to be quashed.

Given under my hand and seal this 5th Feb., 1877. H. C. GREENWOOD.

Upon the first argument of the case (the 25th April), the court (Mellor and Lush, JJ.) ordered that it should be remitted to the magistrate who stated and signed the same, in order that he might amend the same by stating whether the liquid sold was of the nature, substance, and quality of gin usually sold at that price in the neighbourhood:

The following was the amended case stated pursuant to the order of the court:

"As to whether the liquid sold was of the nature, substance, and quality of gin usually sold at that price in the neighbourhood, I can only refer to several other cases of a similar character to the present, awaiting to abide the decision of the High Court of Justice in this case, and by consent using the certificates, as also the prices paid for the gin in each case, of which the following is a list:

PRICES PAID.	NAMES OF VENDOR.	PER CENTAGE OF WATER.
2s. per pint. ...	Hannah Bell	29.8 per cent.
1s. 10d. " ...	Joseph Bosworth .	31.5 "
1s. 4d. " ...	Elizabeth Hancock .	32 "
1s. " ...	Charles Lochett ...	51.1 "
2s. " ...	Thomas Pover	44.18 "
1s. 4d. " ...	Charles Green	40.3 "
1s. 8d. " ...	Albert Turner	52.28 "

"I convicted the appellant, inasmuch as he had not brought himself within the exception of the 25th section of the Act."

June 13.—*Poland* again argued for the appellant.—Although the magistrate has not directly answered the question for which the court remitted the case to him, it may be taken that he now finds gin to vary in price and strength in the neighbourhood; and it becomes therefore more difficult than before to say that this is a case within the application of the statute. By sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser under a penalty not exceeding 20l.; provided that an offence shall not be deemed to be committed under this section in the following cases, that is to say: (1), Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof; (2), Where the drug or food is a proprietary medicine, or is the subject of a patent in force, and is supplied in the state required by the specification of the patent; (3), Where the food or drug is compounded as in this Act mentioned; (4), Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation." By sect. 7: "No person shall sell any compound article of food or compounded drug which is not composed of ingredients in accordance with the demand of the purchaser, under a penalty not exceeding 20l."

Sect. 25, to which reference is made by the magistrate, provides that the defendant is to be discharged if he can prove that he bought the adulterated article in the state in which he sold it, with a written warranty. Here the article sold is admittedly of the nature and substance of the article demanded by the purchaser; as to the quality, a purchaser demanding gin at 1s. 4d. a pint could only mean to ask for gin so mixed with water as to be obtained at that price. [LUSH, J.—All gin must be diluted with water to prepare it as an article of commerce.] Water is not a foreign ingredient. In the case referred to before the magistrate (*Pashler v. Stevenitt*, 35 L. T. Rep. N. S. 862), the purchaser merely asked for a bottle of gin, without mentioning quality or price. [LUSH, J.—Is not this like the mustard case which we had before us lately?] *Sandys v. Markham* was a refusal by justices to convict under this Act for selling mustard adulterated by flour. It seems from the Justice of the Peace (Jan. 27, 1877) that the case was remitted to the justices to find the facts more precisely, and there is no further report of it. To quash this conviction would not affect the object of this legislation against adulteration, for the purchaser here obtained the article for which he asked.

Bosanquet for the respondent.—The amendment by the magistrate is no answer whatever to the question of the court. We must therefore consider the effect of the statements in the original case, from which it appears that the purchaser asked for gin, not gin and water, and obtained this compound. The steps afterwards taken by the analyst are exactly those prescribed by the Act of Parliament, and the certificate which is made evidence distinctly states that the analyst finds the sample of gin very largely adulterated, the foreign ingredient of water being present to to the extent of 43.15 per cent. The finding of fact by the magistrate is that this dilution was greater than any purchaser of gin would expect, and therefore was within the mischief to be remedied by the statute. In the case of *Pashler v. Stevenitt* the strength of the sample of gin was just the same as in this case, 44 per cent. under proof, and Cleasby, B. said in his judgment "The justices have come to the conclusion that a mixture of alcohol and water, so far as 44 per cent. below proof, is not of the quality of gin as known commercially, but a fraudulent increase of the measure of the liquid. It is impossible for us to say they were wrong, and they were therefore justified in convicting the appellant." Grove, J. added, "We cannot decide whether upon the weight of the evidence, the case comes within the first exception or not; that is a question for the magistrates." . . . "If 44 per cent. beyond the ordinary proportion be not adulteration, it must be difficult to discover anything to which the statute could apply. It is really a question of fact, and I think the justices have decided it rightly." [MELLOR, J.—I certainly see no objection to the grounds of that decision.]

Poland, in reply.

MELLOR, J.—I confess I should have been much better satisfied if we had received an answer to our question. The magistrate I suppose could not give us one, so we must come to the best conclusion we can upon the facts stated. A reasonable view must be taken of such a matter as this, and if there were a general custom well known in

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the neighbourhood that a person asking for gin at 1s. 4d. a pint would get this mixture, there could be no breach of the statute by the seller. Such a custom is not found in this case, and without a guide of that kind it must be left to the common sense of the magistrates to come to a conclusion. If they show a reasonable consideration of the facts, and decide upon a common sense view, we ought not to interfere. This was the effect of the judgment in *Pashler v. Stevenitt* by a court of co-ordinate jurisdiction with ourselves, and we ought I think to follow it. I can see no distinction between this case and that, and we must therefore affirm the present conviction.

LUSH, J.—I am, of the same opinion. As we cannot get the information we desired, we must see if we have upon the case stated any ground for impugning the conviction. The Act says no person shall sell to the prejudice of the purchaser any article of food which is not of the nature, substance, and quality of the article demanded. Now the article demanded here was gin at 1s. 4d. a pint, and the article sold by the appellant was of the proper nature and substance. Whether it was of the proper quality depends I think upon facts which we cannot get at. A purchaser must know, as it seems to me, that if he wants cheap gin he will get diluted gin; but how much water should be allowed for a particular reduction of price is a matter which a magistrate ought to be able to determine better than we can. I can see no reason for saying that the finding in this case is wrong; and that being so, it must be decisive. Moreover, it accords with another finding which was adopted by another Division in *Pashler v. Stevenitt*, and we ought I think to follow that case. The appeal therefore will be dismissed.

Judgment for respondent.

Solicitor for the appellant, *Henry Tyrrell*.

Solicitor for the respondent, *Thos. White and Sons*.

Thursday, June 7, 1877.

(Before MELLOR and LUSH, JJ.)

BROWN (app.) v. GREAT EASTERN RAILWAY COMPANY (resps.) (a)

Railway company—Bye-laws—Passenger failing to produce ticket—Demand of fare—Penalty or forfeiture.

By one of the bye-laws of a railway company it was provided that any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket, should be liable to pay the fare from the station whence the train originally started.

Held, that, before the bye-law could be enforced by the company, a demand must have been made for the amount of the fare at the time the offence was committed.

Semble 1. That such a bye-law is not void for uncertainty.

Semble 2. That the fare to be so paid is in the nature of a penalty or forfeiture.

This was a case stated by two of the justices of the Metropolitan Police District, under the 20 & 21 Vict. c. 43, which was as follows:

It was proved on the part of the respondents, the Great Eastern Railway Company, that the

appellant did travel by one of the company's trains from some station on their railway to Stratford, on the 28th Dec. last; that he was then and there asked by one Croft, he being one of the company's ticket collectors, in the ordinary course of duty, to show his ticket; that the defendant refused to do so; that he was then asked from what station he had come, and that he was then understood to reply "from ——" (which was not on the company's line), and that he afterwards added that "the collector knew very well where he had come from, and that he was a season ticket holder."

The Great Eastern Railway Company have duly made and published under the various statutes relating to their railway bye-laws for the regulation of their various lines. Bye-law No. 1 is as follows:

No passenger will be allowed to enter any carriage on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket, specifying the class of carriage and the stations, for conveyance between which such ticket is issued. Every passenger shall shew and deliver up his ticket (whether a contract or season ticket, or otherwise) to any duly authorised servant of the company, whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey.

It was admitted at the hearing that the appellant did hold a second-class season ticket from Brentwood Station to Liverpool-street Station on the respondents' railway. It was also admitted that the train in which the defendant was travelling started from Colchester, and that the fare from that place was 7s. 6d., or 4s. more than the fare from Brentwood, the place from which the season ticket was available.

At the hearing it was urged on behalf of the appellant that the information ought to be dismissed on the ground that no demand for the sum required to be paid was made upon him at the time when the offence was committed, and therefore the provisions of the said bye-law had not been complied with by the respondents.

And it was further urged that the justices had no jurisdiction on the ground that the act done was not within the bye-law, as such bye-law only required the fare to be paid from whence the train originally started to the end of the journey, which payment was not a penalty or forfeiture, and therefore not recoverable by virtue of the said bye-law and the 8 & 9 Vict. c. 20, s. 145, which enacts that:

Every penalty or forfeiture imposed by this or the special Act, or by any bye-law made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices. . . . and it shall be lawful for the justices to convict the offender, and upon such conviction to adjudge the offender to pay the penalty or forfeiture incurred, as well as such costs attending the conviction as the justices shall think fit.

It was also contended that an order upon the appellant to pay the amount required by the respondents would constitute a penalty, and the case of *Dearden v. Townsend* (13 L. T. Rep. N. S. 323; L. Rep. 1 Q. B. 10; 35 L. J. 50, M. C.) was called to our attention on this point.

We were of opinion that the sum of 7s. 6d., the full second class fare from Colchester, was recoverable as a forfeiture under the said bye-law,

(a) Reported by A. H. FORTNA, Esq., Barrister-at-Law.

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in conjunction with the 8 & 9 Vict. c. 20, s. 14, and appellant was ordered to pay that amount, with costs.

The questions upon which the opinion of the court is desired are:

1. Whether a demand for the sum required by the respondents to be paid was necessary at the time the offence was committed, or whether the proceedings taken before us were a sufficient requirement under the said bye-laws.

2. Whether the extra payment required to be made under the said bye-law (the appellant being a season ticket holder from Brentwood only) was a forfeiture, and recoverable within the meaning of the statute 8 & 9 Vict. c. 20; or whether it constituted a penalty, and consequently came within the principles laid down in *Dearden v. Townsend*.

If the court shall be of opinion that a demand of the amount required by the respondents was necessary at the time of the offence, or that the amount so required constituted a penalty, the order made by us upon the appellant is to be discharged.

If the court shall be of opinion that there was a sufficient requirement by the respondents, or that the amount so required constituted a "forfeiture," then the order made by us is to stand.

J. Brown, Q.C. (McLeod with him) for the appellant.—I do not contend that the appellant was not bound to produce his ticket; he was wrong, no doubt, in not doing so. But in order to be able to enforce the bye-law, the officer of the company should have demanded at the time the amount of fare claimed. The company were aware of the amount, the passenger was not. In previous cases notice has always been alleged; here it is negatived. [*LUSH, J.*—That argument would hold equally good supposing the appellant had been sued in County Court.] That is so. But in any case the amount of fare charged is not in the nature of a penalty or forfeiture (*Chilton v. London and Croydon Railway Company*, 8 L. T. Rep. O. S. 366; 16 M. & W. 212; 16 L. J. 89, Ex.), and is, therefore, not recoverable before magistrates. If this were a penalty or forfeiture the bye-law would be bad, because the company have no power to demand a higher sum than 5*l.* as a forfeiture (8 & 9 Vict. c. 20, s. 109) (a), and the fare under this bye-law might exceed that amount. The penalty ought to be stated in the bye-law.

Metcalfe, Q.C. (Austin Metcalfe with him) for the company.—This case was rightly decided by the magistrates. *Chilton v. London and Croydon Railway Company* (*ubi sup.*) is a different case. The question there was as to the arrest of a passenger, and it was for an offence against the Act, and not against the bye-laws. The amount of fare would most probably exceed the amount that would have been due for the distance actually travelled. The amount awarded by the magistrates is in the nature

(a) For better enforcing the observance of all or any such regulations, it shall be lawful for the company . . . to make bye-laws, and from time to time to repeal or alter such bye-laws, and make others, provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act. . . . And any person offending against any such bye-law shall forfeit for every such offence any sum not exceeding 5*l.*, to be imposed by the company in such bye-laws as a penalty for any such offence &c.

of a penalty or forfeiture. A sufficient demand was made for the fare by summoning the appellant before the magistrates. The appellant refused to show his ticket in such a manner as to waive any necessity for the demand of the fare. There is no fare on the company's line exceeding 5*l.*, so that under any circumstances the bye-law is within sect. 109 of 8 & 9 Vict. c. 20.

MELLOR, J.—I must say that it strikes me that, upon general principles of law, it is the duty of a company who seek to impose terms upon the public by means of bye-laws like the present to inform a passenger at the time when his ticket is demanded, and he refuses to produce it, that he is liable to pay some fixed sum, a sum such as may be recognised as within the terms of the Act of Parliament. I think it would be far safer to impose a specific sum under 5*l.* as a penalty for such an offence. Nevertheless, I think it is sufficient if none of the fares which could be demanded under the bye-law should exceed the sum of 5*l.* But it is clear to me that it would be manifestly unjust, if a man is willing to pay the amount, that he should be told by the company that he must be taken before a magistrate, and thus have to incur the expenses of litigation, in addition to the sum he would have to pay under the bye-laws. The effect of the bye-law is to exclude persons travelling without a ticket, but until the person has got into a carriage he is not subject to the bye-law. If, however, he has got into a carriage, he has become a passenger, and is bound to shew a ticket; and if he fails, the company may recover the fare from the place whence the train started. The offence is committed when the person has refused or failed to produce his ticket; but in order that the company may recover, they ought to make a demand of the amount of the fare claimed, for it is exclusively within their knowledge, for the passenger may not know either the amount of the fare or the place from whence the train started. Therefore it is necessary that a demand should be made in order to afford the passenger an opportunity of paying. Although I am of opinion that the expression of *Parke, B.* in *Chilton v. Croydon Railway Company* (*ubi sup.*), that the sum demanded was a fare and not a penalty, may have been warranted by the circumstances of that case, still here I am inclined to think that the amount of the fare to be recovered is in the nature of a penalty or forfeiture. However, I do not think it is necessary for me to decide that point, for I am of opinion that a demand for the amount of the fare should have been made when the appellant refused or failed to produce his ticket, and that the decision of the magistrates is therefore erroneous, and must be reversed.

LUSH, J.—I should say, if it were necessary to decide the point, that the fare due under this bye-law is in the nature of a penalty, for the amount of the fare from the original station whence the train starts is generally a larger sum than the passenger would have had to pay from the station whence he started, and he has to pay it for some act or omission on his own part. I am also of opinion that the bye-law is not bad merely because it does not fix the exact amount that is to be paid. For it has been held that a bye-law is good which imposes a reasonable charge, the exact amount of which must be subsequently ascertained; for instance, a bye-law that every burgess pay a

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reasonable sum for building of law courts, or for cleaning the borough upon the coming of the judges, or for his proportion of pontage and murage, &c. (Com. Dig., Tit. "Bye-law" (B. 4). Therefore I am of opinion that this bye-law is not bad because upon the face of it it might include a larger sum than 5*l*. However, it is not necessary to decide that point, as I am of opinion that, as the amount was uncertain, and had to be ascertained by reference to the place from which the train originally started, and that as that fact is presumably better known by the company than by the passenger, it was necessary that a demand should have been made at the time for the amount of the fare. The ground on which I decide this case is, that before proceedings are taken under the bye-law, notice of the amount claimed must be given to the passenger.

Conviction quashed.

Solicitor for appellant, *W. W. Brown.*

Solicitor for respondent, *Shaw.*

Wednesday, June 13, 1877.

NEWARK UNION (apps.) v. GLANFORD BRIGG UNION (resps.). (a)

Poor law—Irremovability—Break of residence—One night's absence.

A pauper had resided for fifteen years continuously in the respondents' union, and received relief for the last two years and a half of that period from the respondents. Having received notice to quit the house in which he lived, he took a house as weekly tenant in the neighbouring union; he sold some of his furniture, and removed the rest and his family into the house he had taken. After sleeping there one night, he found for the first time, upon his application for weekly relief, that his new residence was not in the respondents' union, and on the same day he moved back again to another house inside the respondents' union. He again became chargeable, and the respondents removed him to his last place of settlement, which was in the appellant's union.

Held, upon appeal from this order of removal, that this break of residence was sufficient to destroy the pauper's status of irremovability in the respondents' union; and that the order of removal was right.

1. This is a special case stated by consent of parties and by order in an appeal against an order dated the 1st Aug. 1876, and made by two of her Majesty's justices of the peace for the parts of Lindsey and county of Lincoln, for the removal of a pauper named Joseph Crosby, together with his wife and child, from the union of the respondents to that of the appellants.

2. Due notice of the appeal to the Court of Quarter Sessions was given.

3. The pauper resided in the parish of Scawby, in the respondents' union, for fifteen years continuously, when he became unable to work, and became chargeable to the respondents' union.

4. He still continued to reside in Scawby, and to receive relief from the respondents continuously for two years and a half.

5. During such period the pauper resided in different houses, and on the 3rd Aug. 1875, he took

a house of one William Wilson at 2*s*. per week, for which he paid the rent until his tenancy was determined on the 13th May 1876, by a week's notice to quit.

6. In the month of March 1876, William Wilson's house was sold, and the pauper, having received notice to quit, arranged (through his wife) to take a house situate in the parish of Bigby, in the Caistor Union, belonging to one George Dent, from the 14th May 1876, as weekly tenant. The pauper sold a portion of his furniture, and on the 15th May 1876, removed into Dent's house with all his family, and all his unsold goods, chattels, furniture, and effects, and resided and slept in such house one night, namely, the night of the said 15th May 1876. Dent's house is distant about half a mile from Wilson's, and when the pauper hired the former house, he was not aware that in going to live there he was removing into another union.

7. On the 16th May 1876, being the weekly pay day, the pauper went as usual to the relieving officer of the respondents' union for relief, but was informed that, as he had removed into another union, his residence in the respondents' union had been broken, and relief could not be given him from such union.

8. The pauper thereupon went and hired a house in the township of Glanford Brigg, also in the respondents' union, and moved into such house on the said 16th May 1876. The pauper subsequently made a fresh application to the relieving officer of the respondents' union for relief, and on the 23rd May 1876, was again relieved by the respondents.

The question for the court is whether the removal by the pauper from the respondents' into the said Caistor Union, under the circumstances above set out, constitutes such a break in the residence as to destroy the pauper's status of irremovability in the respondents' union.

If the court should be of opinion that such break of residence has destroyed the pauper's status of irremovability, then the order of the justices is to stand, and judgment affirming the same is to be entered at the sessions accordingly. If the court should be of opinion that such break of residence has not destroyed the status of irremovability, then judgment quashing the said order is to be entered.

Cave, Q.C. (with him *Horace Smith*) argued for the appellants.—This unintentional absence of the pauper for one night from the respondents' union cannot be such a break of residence as to destroy his status of irremovability. In *Reg. v. St. Leonard's, Shoreditch* (L. R. 1 Q. B. 21) an absence under similar circumstances for twenty-one successive nights was held to be no break of residence, and mere sleeping out of a parish was said to be insufficient to establish any departure from the parish at all. [*MELLOR, J.*—That, however, was on the assumption of the pauper's continuance of intention to return.] Here there was no intention to leave the union. *Reg. v. Whitby* (L. R. 5 Q. B. 325) is another authority in favour of the appellants; one night's absence being held insufficient to destroy a status of irremovability. [*LUSH, J.*—That was the case of a lunatic, who could not, it was said, exercise any intention to return or stay away.]

Appleton appeared for the respondents, but was not heard.

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MELLOR, J.—There must, in my opinion, be an actual desertion of the old premises and an occupation of the new to constitute a break of residence under such circumstances as these; but there is no necessity to consider here how short an occupation can destroy a status of irremovability. The question is whether the facts make a break in the pauper's residence in this case. He was turned out of his house in the respondents' union; he sold some of his furniture, and made a complete desertion of his old premises. He removed the rest of his goods and his family into a house in the neighbouring union, having taken the new house for a week. He and his family slept one night under the new tenancy, and fully intended to continue their residence there, until they discovered the house was out of the respondents' union. I think the pauper could not, by moving back again into another house inside the union the next day pretend that his residence in the union was continued. It is nothing to us that he never meant to leave the union, he clearly meant to change his residence, and had no intention to return to the union from the house which he had taken at the time he moved. We must say this was a break of residence sufficient to destroy the pauper's irremovability; and therefore the order of removal must be affirmed.

LUSH, J.—I also am of opinion that the pauper ceased to reside in the respondents' union, and therefore he was no longer irremovable.

Judgment for respondents.

Solicitors for the appellants, Swann and Co., for Newton and Wallis, Newark-upon-Trent.

Solicitors for the respondents, Collyer, Bristow, Withers, and Russell, for Hett, Freer, Hett, and Hett, Brigg.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Jan. 23, 24, 25, 26, 27, 29, 30, 31; Feb. 1;
May 12, 1877.

(Present: The LORD CHANCELLOR (Cairns), Lord SELBORNE, Sir J. W. COLVILLE, the LORD CHIEF BARON (Kelly), Sir ROBERT PHILLIMORE, Lord JUSTICE JAMES, Sir MONTAGUE E. SMITH, Sir ROBERT P. COLLIER, Lord JUSTICE BRETT, Lord JUSTICE AMPHLETT; and, as Episcopal Assessors, the ARCHBISHOP of CANTERBURY and the BISHOPS of CHICHESTER, ST. ASAPH, ELY, and ST. DAVIDS.)

RIDSDALE v. CLIFTON. (a)

Illegal vestments at communion—Alb and chasuble—1 Eliz. c. 2, s. 25—Advertisements of Elizabeth—Eastward position during prayer of consecration—"Before the people," meaning of—Administering wafer bread at communion—Crucifix—Faculty—Public Worship Regulation Act 1874.

It is not lawful for the officiating minister to wear during the service of the Holy Communion the vestments known as an alb and a chasuble.

By the first book of Edward VI. (1549) the minister is directed, while celebrating the Holy Communion, to wear "a white alb, plain with a vestment"

(chasuble), "or cope." By 1 Eliz. c. 2 s. 25, it was enacted that "Such ornaments of the church, and of the ministers thereof, shall be retained and be in use, as was in this Church of England by authority of Parliament in the second year of King Edward VI. (1549), until other order shall be therein taken by the authority of the Queen's Majesty, with the advice of her commissioners, appointed under the Great Seal of England for causes ecclesiastical, or of the metropolitan of this realm." In 1566, advertisements were issued by the metropolitan and other prelates, which contained the following direction: "Every minister saying any public prayer, or ministering the sacraments, or other rites of the Church, shall wear a comely surplice with sleeves, to be provided at the charge of the parish." The rubric of the present Prayer Book (1662) directs that "Such ornaments of the church, and of the ministers thereof, at all times of their ministration shall be retained and be in use as were in this Church of England, by the authority of Parliament, in the second year of the reign of King Edward VI." (1549).

Held (affirming the decision of the Court of Arches), that the ornaments rubric of 1662 does not repeal all legislation on the question subsequent to 1549, but must be read as subject to any further order taken under 1 Eliz. c. 2, s. 25; that the advertisements of Elizabeth were a "taking other order," within the Act, by the Queen, with the advice of the metropolitan; and that, as the advertisements enjoined the use of the surplice at the administration of the Holy Communion, they rendered the use of albs or chasubles, at that administration, unlawful.

It is not unlawful for the officiating minister, while saying the prayer of consecration in the communion service, to stand at the west side of the communion table, with his face to the east and his back to the people, provided that the communicants present, or the bulk of them, being properly placed, are able, if they wish it, to see him break the bread and take the cup in his hands. (Decision of the Court of Arches reversed.)

Semble, that evidence that persons sitting immediately behind the officiating minister could not see him perform the manual acts mentioned is not sufficient to establish the charge of illegality.

It is not unlawful for the minister to use in the administration of the communion bread made in the form of circular wafers, provided that the substance is bread such as is usual to be eaten, and not a composition of flour and water unleavened, such as the word wafer usually denotes. (Decision of the Court of Arches reversed.)

On the top and in the centre of a screen, stretching across a church at the entrance to the chancel, was placed a figure of our Saviour on the cross, in full relief, and about eighteen inches long, facing the congregation.

Held, that the faculty authorising the erection of the screen having been granted without any knowledge that it was to be surmounted by a crucifix, did not authorise the erection of the crucifix, which, therefore, in the absence of a proper faculty, had been unlawfully set up and retained.

Held further (affirming the decision of the Court of Arches), that the ordinary ought not to grant a

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(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.
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faculty for the crucifix, it being in danger of becoming the object of superstitious reverence.

Semble, that, in proceedings under the Public Worship Regulation Act, where the only objection to an ornament in a church is, that it has been set up without a faculty, the court will, before pronouncing judgment, give the person charged an opportunity of applying for a faculty.

A previous decision of the Judicial Committee of the Privy Council between other parties, and an Order of the Sovereign in Council founded thereon, is not necessarily conclusive in all similar cases subsequently coming before that tribunal.

Hebbert v. Purchas (L. Rep. 3 P. C. 605) followed as to the vestments, and differed from as to the illegality of the eastward position during the prayer of consecration, and as to the sufficiency of the averment with regard to the wafer-bread.

This was an appeal from a decision of Lord Penzance, sitting as Dean of Arches, in a proceeding brought before him, under the Public Worship Regulation Act 1874, by three parishioners of St. Peter's, Folkestone. The representation put forward by the complainants is set out in the report of the proceedings in the Court of Arches (35 L. T. Rep. N. S. 432). The judgment of that court was on all the charges in favour of the complainants. From that judgment, in respect of the charges numbered in the representation 2, 4, 5, and 11 respectively, the present appeal was brought.

Sir Fitzjames Stephen, Q.C. A. Charles, F. H. Jeune, and Dr. Phillimore for the appellant.

Dr. Stephens, Q.C. and B. Shaw for the respondents.

Sir Fitzjames Stephen, Q.C. for the appellant.—The appeal in this case is on four points. The first point is as to whether certain vestments worn at the time of the celebration of the Holy Communion are legal; the second, as to whether the administration of what is known as wafer-bread in celebrating the Holy Communion is legal; the third, as to whether what is known as the eastward position, which means the clergyman's standing with his face to the east while reading the consecration prayer in the communion service, is legal; and the fourth, as to whether a crucifix in a church is legal. As to the first three of these points, the decision of your Lordships in the case known originally as *Elphinstone v. Purchas* (L. Rep. 3 P. C. 245), and in its later stages as *Hebbert v. Purchas* (L. Rep. 3 P. C. 605) was conclusive in the court below, and I consequently did not attempt there to argue them. I now ask to be allowed to argue that the decision of your Lordships in respect of those matters was wrong. In support of that request, I would first urge the view taken by the learned judge in the court below, expressed in the following words: "The question of vestments is one which stands in a peculiar position in respect of the judicial decisions of which it has been the subject. Dr. Lushington, Sir John Dodson, and Sir Robert Phillimore have all held what are called the Edwardian vestments to be lawful. By the Court of Appeal in *Liddell v. Westerton* (Moore's Sp. Rep.), consisting of some of the ablest judges of our time, Lord Cranworth, Lord Wensleydale, Lord Kingsdown, Sir John Patteson, and Mr. Justice Maule, with the late and present Archbishops of Canterbury, it was affirmed in the following words, that "the same dresses and the

same utensils or articles which were used under the first Prayer Book of Edward VI. may still be used.' . . . The later case of *Martin v. Mackenochie* (L. Rep. 2 P. C. 365) . . . affords not a mere judicial dictum, but a direct authority as to the true meaning of the rubric, judicially announced as the *ratio decidendi* of the court, and acted upon as the basis of its ultimate decision. With this decision, the subsequent one of *Hebbert v. Purchas* (L. Rep. 3 P. C. 605), condemning the vestments which are among the 'ornaments' prescribed by the first Book of Edward VI., appears to be directly in conflict. . . . I cannot doubt that, of two judgments delivered in the Appellate Court, which are in any degree inconsistent, I am bound in pronouncing the decision of the inferior court to obey and carry out that which was addressed directly to the matter in issue here, and which also was the last pronounced. As this result was inevitable, the learned counsel have done well, I think, not to argue the question, and as the question has been argued, I forbear to express my own opinion on the subject. I must therefore hold that Mr. Ridsdale has offended against the law in celebrating the communion in a chasuble and in an alb, and admonish him to refrain from doing so in future. If this decision is wrong, it must be corrected by the Appellate Court." Lord Penzance, therefore, is of opinion that there are two conflicting decisions of your Lordships. Secondly, your Lordships have under similar circumstances reconsidered a previous decision. In *Fenton v. Hampton* (11 Moo. P.C. 347), which turned upon the power of the Legislative Assemblies in the British Colonies to commit for contempt, Pollock C.B., said: "The subject is not new to this court; it has been discussed before on more than one occasion. In the case of *Beaumont v. Barrett* (1 Moo. P.C. 59), from Jamaica, it was decided that the assembly possessed of supreme legislative authority had the power of punishing contempt. But in the year 1842, the same question, in substance, came before this committee on an appeal from Newfoundland, and was twice argued;" &c. Further, there are in this case special circumstances why your Lordships' decision in *Hebbert v. Purchas* should not be held conclusive of the points which it decides; namely, that in that case, owing solely to his poverty, Mr. Purchas was not represented by counsel, and that the questions turned upon the result of the most minute investigations of ecclesiastical history, which it would have been almost impossible for their Lordships to have had in their mind without the assistance of the accumulated special labour and learning of which I am the mouthpiece. [The LORD CHANCELLOR.—Their Lordships are of opinion that you may pursue your arguments on the points you have referred to; and they will consider hereafter how the previous decisions affect the question.] The question of the legality or otherwise of these vestments turns upon the construction to be put upon the words of the ornaments rubric in the present Prayer Book, which is as follows: "That such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained, and be in use, as were in this Church of England, by the authority of Parliament, in the second year of the reign of king Edward the Sixth." It is admitted that the words "by authority of Parliament in the second year of the reign of

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King Edward the Sixth," refer to the first Prayer Book of Edward VI.; and it is further admitted that by that book the vestments in question are lawful. I can therefore put my argument on this part of the case in the form of a syllogism, the very words of the major premias being identical with those used in the judgment in *Westerton v. Liddell* (Moore's Sp. Rep.): The same dresses and the same utensils as were used under the first Prayer Book of Edward VI. may still be used; the vestments in question were used under that Prayer Book: these vestments may therefore still be used. But this Court having taken a different view of the matter in *Hebbert v. Purchas*, it remains to consider the facts and deductions upon which that view was based. The judgment in that case was based upon the supposition that the vestments in question were forbidden by certain advertisements issued in the reign of Elizabeth, and by the canons of 1604, and the committee appear to have been of opinion that the first Prayer Book of Edward VI. is to be taken as the rule, but subject to any modifications introduced by the advertisements of Queen Elizabeth or the canons of 1604; and consequently that the surplice is lawful, but the chasuble and alb not. Now first, we deny that the advertisements of Elizabeth had the force of law; we say they were mere administrative notices. And we say further, that even if they had the force of law, they had not the intention of forbidding, and do not forbid, the use of the vestments in question, but had a totally different purpose. Secondly, we deny that in consequence of the advertisements of Elizabeth these vestments were discontinued; and we shall show that they were all destroyed and discontinued before the advertisements were issued. Thirdly, we deny that the Prayer Book of James I. received its authority from the canons of 1604. Fourthly, we deny that the ornaments rubric in the Prayer Book of 1662 (the one now in use) was a compromise in deference to the objections of the Puritan party at the Savoy Conference in 1661. I will now consider whether the Act upon which we rely has been repealed by subsequent Acts; and this is really a question of history. The Act of Uniformity, 2 & 3 Edw. 6, c. 1 (1549), prescribed under very heavy penalties the use of the Prayer Book published in June of the same year, and which is known as the first Prayer Book of Edw. VI. That book contained the following rubric: "Upon the day, and at the time appointed for the ministration of the Holy Communion, the priest that shall execute the holy ministry shall put upon him the vesture appointed for that ministration; that is to say, a white albe plain, with a vestment or cope. And where there may be many priests or deacons, there so many shall be ready to help the priest in the ministration as shall be requisite; and shall have upon them likewise the vestures appointed for their ministry, that is to say, albes with tunicles." In 1552, the second Prayer Book of Edward VI. was published, and this, no doubt, left out the above rubric. In 1553, Queen Mary came to the throne, and the services of the Mass were restored. In 1559, the first year of Elizabeth's reign, an Act of Uniformity (1 Eliz. c. 2) was passed, authorising the Prayer Book of Elizabeth, published in the same year, and imposing penalties of surprising stringency—such, for instance, as imprisonment for life, and which,

it may not be generally known, are still in force—on persons not conforming to this book. Now, the Prayer Book of Elizabeth is substantially identical with the second Prayer Book of Edward VI., with this exception; that such ornaments of the Church and of the ministers thereof, are to be retained and be in use as were prescribed by the first Prayer Book of Edward VI. To this Act there is a proviso (sect. 25) that the above order as to ornaments shall hold good "until other order shall be therein taken by the authority of the Queen's majesty, with the advice of the commissioners appointed and authorised under the Great Seal of England for causes ecclesiastical, or of the metropolitan of this realm." But this does not make the Act, or anything in it, in any sense provisional only, as their Lordships seem to have considered in *Hebbert v. Purchas*. The Act of Elizabeth is spoken of in *Westerton v. Liddell* (Moore's Sp. Rep.) as a compromise. If the view here taken is correct, it becomes in the highest degree improbable that a compromise so effected would be disturbed by subsequent Acts of the Legislature in the same reign, or that the Queen (whose taste for a high order of ritual is matter of history) would have consented to any diminution of that amount of ceremonial observance in the Church services which had been conceded to her. In the same year, viz. 1559, were published the Injunctions of Queen Elizabeth. They do not bear directly on the question of vestments, but they do so indirectly, and my contention with regard to them is that they had no legislative authority whatever. They are like the Injunctions of Edward VI., which your Lordships have recently held, in *Philpotts v. Boyd* (L. Rep. 6 C. P. 435), were not legislative but administrative acts. Their extraordinary character is a strong argument against their validity as laws. It could hardly be maintained that the Queen had power to issue orders of this character having the force of law; she undoubtedly had the power to give them administrative force. I submit that the issuing of these injunctions was one of those high handed acts of authority that Elizabeth so frequently indulged in. The interpretations put upon these injunctions by the archbishops and bishops, and published in 1561, have even less colour of authority. (Strype's Ann. vol. 1, pt. 1, p. 2135, and 1 Strype's Parker, p. 183.) The 14th injunction is as to the proper observance of Sunday. The interpretation put upon it by the bishops is as follows: "That incorrigible Arians, Pelagians, or Freewillmen, be sent into some one castle in North Wales, or Wallingford, and there to live of their own labour and exercise, and none other be suffered to resort unto them but their keepers until they be found to repent their errors;" (1 Strype's Annals of the Reformation, pt. 1, 319.) It never could have been law that the Archbishop of York and the Bishop of Ely should interpret an injunction as to the observance of Sunday to mean that Arians and others should be confined in Wallingford Castle or North Wales. From 1559 to 1562 there was a very strong Puritan reaction throughout England: (1 Cardwell's Documentary Annals, p. 244.) The letter of Elizabeth, written on the 22nd Jan. 1561, shows this reaction to have set in, and the Queen's anxiety that the Church services should be conducted with as much reverence and ceremony as conveniently could be. And this letter further shows that the legal ad-

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visers of the Crown prepared any document that was to have the force of law. In 1562 was held a synod, which is one of the turning points in the history of the Church of England, it being at the Synod of 1562 that the Thirty-nine Articles were promulgated. A proposition appears to have been framed to the effect that the use of copes, vestments, and surplices, be taken away; but this appears to have been thought too strong and not to have been proposed. Subsequently, a paper embodying certain resolutions seems to have been drawn up, which also is thought to go too far, and is never submitted to the synod. These resolutions leave kneeling at communion optional, and abolish the cross at baptism, organs, and singing in churches, and the cope and surplice. In the end, the proposition that was put to the synod was, that the surplice alone should be worn; and this was lost by a majority of one: (Styrye's Annals, vol. 1, marginal, pp. 315, 317, 334, 337.) It would be impossible, I submit, under the circumstances of the case, to produce more cogent evidence than in 1502 the cope and chasuble were legal. I now pass to the advertisements of Queen Elizabeth. With regard to these, their Lordships in *Hebbert v. Purchas* (*ubi sup.*), say: "In the year 1564 appeared the advertisements of Elizabeth. They make order for the vesture of the minister in these words: 'In the ministration of the Holy Communion in cathedral and collegiate churches, the principal minister shall wear a cope, with gospeller and epistoler agreeably, and at all other prayers to be said at the communion table to use no copes, but surplices. That every minister saying any public prayers, or ministering the sacraments or other rites of the church, shall wear a comely surplice with sleeves, to be provided at the charge of the parish.'" (1 Cardwell, Doc. Ann. 326.) These advertisements their Lordships thought to have been actively in use very shortly after their publication, and were led to think so by an inventory of the ornaments of 150 parishes in the diocese of Lincoln, 1565, 1566, published by Mr. Edward Peacock. Further on in their judgment (L. Rep. 3 P. C. 648) their Lordships say: "The chasuble, alb, and tunicle were swept away with severe exactness in the time of Queen Elizabeth." They refer again and again to the fact that these advertisements were published in 1564, and that in consequence of that publication the ornaments in question were destroyed throughout Lincolnshire. The sole authority on which they rely for these facts being Peacock's Inventory. Now I shall be able to show your Lordships that these advertisements were not issued till 1566, and that consequently the destruction of ornaments described in Peacock's Inventory could not possibly have taken place under the authority of these advertisements. [Having quoted authorities on this point he proceeded:] The vestments, therefore, were disused, not by reason of the authority of the advertisements, but by reason of their unpopularity and the powerlessness of the Church against the popular will. As to the advertisements, therefore, first, they are not law at all; secondly, if law, they are not inconsistent with the first Prayer Book of Edward VI. According to that Prayer Book, surplices were ordered to be worn; and by the advertisements obedience to this part of the rubric was specially enjoined. In construing the advertisements quoted above, it is important to consider

the effect of the words, "To be provided at the charges of the parish." The vestments had been destroyed; it was not likely, therefore, that the bishops would lay stress upon more expensive or a greater number of vestments than were indispensable; the great object was to get the parishes at all events to provide surplices that the services might be decently performed. There was a second Prayer Book published in the reign of Elizabeth, and this retained the ornaments rubric in the same form as in the first. This rubric, therefore, continued to be printed under the Queen's authority for a quarter of a century after, according to the judgment in *Hebbert v. Purchas*, it had been repealed by the advertisements. The canons which are supposed to have had the effect of repealing the ornaments rubric are the 24th and 58th. The 24th directs the use of the cope in cathedrals and collegiate churches upon principal feast days, "according to the advertisements for this end, anno 7 Elizabeth." The 58th canon is, "Every minister saying the public prayers, or ministering the sacraments or other rites of the Church, shall use a decent and comely surplice with sleeves, to be provided at the charge of the parish." They order that a surplice should be worn; they do not order that the other vestments should not be worn. It would be more correct to say that the canons were founded on the Prayer Book, than that it was founded on them. It was suggested to their Lordships in *Hebbert v. Purchas* (*ubi sup.*), that these canons prescribed a minimum degree of observance, but they held for various reasons that this could not be maintained. The 14th canon does, however, undoubtedly prescribe such a minimum degree. In the Prayer Book of 1604, daily morning and evening prayer is expressly enjoined; the 14th canon puts a distinct obligation upon the clergyman to read it on holydays. The effect of that is, that the minister is bound to read the service on holydays by both the canons and the rubric; to read it every day only by the rubric. So, by the canons and the rubric, the surplice must be worn; by the rubric alone the other vestments. The single obligation does not repeal the double one. In 1641, a committee of the House of Lords was appointed "to take into consideration all innovations in the Church respecting religion": (Cardwell's Conf., pp. 238, 274; 2 Collier's Ecclesiastical Hist., p. 289.) According to the view taken by that committee, the vestments ordered to be used by Edward VI.'s Prayer Book were still ordered to be used by the book of 1604, as they suggest a question, "Whether the rubric should not be mended where all vestments in time of Divine service are now commanded which were used by Edward VI." The Nonconformist ministers objected to the Prayer Book of 1662, because it sanctioned and continued the vestments of Edward VI.'s rubric: (Cardwell's Conf., p. 311.) The answers of the bishops to the ministers show that they considered that the rubric was continued, as they support the ceremonies of Edward VI. The specific things objected to are the surplice and the cross in baptism; but they are objected to on general grounds, and defended on general grounds. And those general grounds are as applicable to the chasuble and alb as to the surplice. The bishops do not suggest that the statement that the rubric of the second year of Edw. VI. is continued unaltered is incorrect.

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The argument that the word "retained" is not applicable to an obsolete state of things is met by the historical fact that the word "retained" would have been no more appropriately used in reference to the state of things immediately antecedent to the use of the term in the time of Elizabeth than in 1662. It is admitted that these vestments had ceased to be generally used, although there are stray instances of their use up to 1770. But concurrently with their disuse, there is a consensus of authorities asserting their legality. The following authorities were then cited:—Bennett's Paraphrase of the Book of Common Prayer, edit. 1709, and Nichols' Commentary on the Book of Common Prayer, both of which are referred to in Dr. Stephens on the Book of Common Prayer, l. 351; Wheatley's Rationale of the Book of Common Prayer, edit. 1710; Johnson's Clergyman's Vade Mecum, edit. 1715; Gibson's Codex, edit. 1713, pp. 226, 362, 472, &c., 2nd edit., pp. 201, 297, 390; Burn's Ecclesiastical Law, 9th edit. 760, iii., 437; Baxter's Life, edit. 1696, Lib. ii., Pt. ii., p. 369, Pt. iii., p. 38. The view of the court in *Hebbert v. Purchas* (*ubi sup.*), seems to have been that these vestments could not have ceased to have been used in the face of a highly penal enactment, unless there had been legislative authority for doing so; and they alluded to the case of *Macdougall v. Purrier* (4 Bli. H. of L. Cas. (N. S.), 433), in which the House of Lords presumed the enrolment in Chancery of a decree of commissioners appointed by an Act of Henry VIII. for settling the tithes in London, although no such enrolment could be found, on the principle, *Omnia præsumuntur ritè acta*. So far from it being improbable that the practice of wearing vestments would have died out, it is the universal experience in history, and especially ecclesiastical history, for customs to fluctuate, and the legal give place to the usual. Secondly, as to the legality of wafer bread at communion. The objection is to the shape of the bread. My short answer is that the Prayer Book prescribes no particular shape. There is no charge of using anything other than bread, the words in the charge being "bread or flour in the form of circular wafers." [The LORD CHANCELLOR.—Do you raise a dispute of fact as to whether it was bread?] It was bread. [The LORD CHANCELLOR.—Do I understand you to say that it really was leavened bread?] The term "bread" does not necessarily imply leavened bread. The charge here is copied *verbatim* from that in *Hebbert v. Purchas*. [The LORD CHANCELLOR.—You will of course take your own course; but we think it right to point out to you that the gravamen of the charge being the use of the wafer as distinct from the bread, and the use of the wafer being admitted, it may be contended on the other side that there is a substantial charge to be met.] As a proposition of law, supposing the wafer to be ordinary bread, there is nothing illegal in its thinness and circular form; and, as a proposition of fact, the evidence fails to prove that the substance seen by the witnesses or composing the wafer is anything else but common bread. The word "wafer" is not a description of substance but of form. It is used to describe anything that is thin and round, of whatever material. The rubric of the present Prayer Book is as follows: "And to take away all occasion of dissension and superstition which any person hath

or might have concerning the bread and wine, it shall suffice that the bread is such as is usual to be eaten; but the best and purest wheat bread that may conveniently be gotten." The rubrics in the second Prayer Book of Edward VI., in that of Elizabeth, and in that of James I. are the same as this, with two exceptions, that after the word "eaten" occur the words "at the table with other meals," and that the words "all occasion of dissension and" are omitted. One of the injunctions of Queen Elizabeth, which were issued between the 1st and 24th June 1559, is as follows: "Where, also, it was, in the time of King Edward VI., used to have the sacramental bread of common fine bread, it is ordered for the more reverence to be given to these holy mysteries, being the sacraments of the body and blood of our Saviour Jesus Christ, that this same sacramental bread be made and formed plain, without any figure thereupon, of the same fineness and fashion round, though somewhat bigger in compass and thickness, as the usual bread and wafer heretofore named singing cakes, which served for the use of the private mass:" (Cardwell's Doc. Ann., I. 202, edit. 1839.) Sir R. Phillimore, in *Hebbert v. Purchas*, treated this injunction as a contemporary exposition of the rubric in the Prayer Book of Elizabeth. But the Privy Council, in the same case, say that the injunction is a superseding of the rubric, and not at all reconcilable with it. All that the injunction says is that the bread is to be made plain, and round, though somewhat thicker than the wafer known as singing cakes. All that the rubric says is that it shall suffice that the bread be such as is usually eaten. Bishop Cosin said "this liberty of using wafer bread was continued in divers churches of the kingdom—Westminster for one—until the 17th of King Charles, A.D. 1643" (Works v. 481.) The following authorities also show that wafer bread was commonly used in the time of Queen Elizabeth. Letters from Archbishop Parker to Sir W. Cecil and to the Bishop of Norwich, 17th of May and 14th of June, 1574, Parker Correspondence, pp. 277, 457, the Lords of the Council and others to the Bishop of Chester, 26th July, 1580; Lord Burleigh and Sir Francis Walsingham to the Bishop of Chester, 21st Aug. 1580, 1 Cardwell's Doc. Ann. 18 Doc. xx.; the Dean and Chapter of Christ Church to Archbishop Parker, 1564, 1 Strype's Parker, 364; 1 Cardwell's Doc. Ann. 356, Doc. lxxiii., No. 4; 2 Burnet's History of the Reformation. Thirdly, as to the legality of the eastward position of the celebrant at the communion. The legality of the practice in question must depend entirely on the construction of the rubric. The rubric before the communion service directs that the table "shall stand in the body of the church or in the chancel, where morning and evening prayer are appointed to be said. . . . And the priest standing at the north side of the table shall say the Lord's Prayer with the collect following." (All the following rubrics in the communion service read down to the prayer of consecration.) That is the whole direction, and the questions are what is meant by "the north side of the table," "before the table," and "before the people." One of the injunctions of Queen Elizabeth, regarding tables in churches, orders "that the holy table in every church be decently made, and set in the place where the altar stood, and there commonly covered, as thereto belongeth, and as

shall be appointed by the visitors, and so to stand, saving when the communion of the sacrament is to be distributed; at which time the same shall be so placed in good sort within the chancel, as whereby the minister may be more conveniently heard of the communicants in his prayer and ministrations, and the communicants also more conveniently and in more number communicate with the said minister. And after the communion is done, from time to time the same holy table to be placed where it stood before:" (1 Cardwell's Doc. Ann. p. 201.) What Mr. Ridsdale did on this occasion is not forbidden directly or indirectly by the rubrics in question, and his way of performing the service was legal. That there may be other legal modes of performing the service, and indeed that there must be other legal modes, does not affect the proposition. The table may be of any shape, it may be in any position, and it may stand anywhere in the body or main chancel of the church. The rubric before the prayer of consecration in the Second Book of King Edward VI. was as follows: "Then the priest standing up shall say as follows." But in the present Prayer Book this has been altered to "When the priest, standing before the table, hath so ordered the bread and wine, that he may with the more readiness and decency break the bread before the people, and take the cup into his hands, he shall say the prayer of consecration." [The LORD CHANCELLOR.—What meaning would you give to the words "before the table?" If a table is pushed against a wall, the wall is at the back of the table; whoever stood opposite the wall would be before the table. [The LORD CHANCELLOR.—Supposing the table is in the middle of the church?] Then anyone at the table, whatever side of it he is on, will be equally standing before the table. In the coronation service, which is as old as the 12th century, when the Queen takes the coronation oath, she is described as kneeling before the table or altar. In the case of *Martin v. Mackonochie* (L. Rep. 2 P. C. 365), Mr. Mackonochie was prosecuted for kneeling where the Prayer Book does not enjoin it. The view of this rubric taken by the Privy Council in that case is inconsistent with the view taken of it in *Hebbert v. Purchas*: (Works of St. Augustine, Book II., and Selborne's Ecclesiastical Law, were also cited during the argument on this point.) The fourth and last point is as to the crucifix. It has been agreed by counsel on the other side to waive the question of the necessity of a faculty, and to argue the point on the broad ground of its legality or illegality as a decoration. [The LORD CHANCELLOR intimated that their Lordships could not consent to consider the question without regard to the absence of a faculty.] A faculty was obtained for the screen, and the crucifix was afterwards added to the screen. The question is, whether this figure is a decoration forbidden by law. [The LORD CHANCELLOR.—Do you maintain that if it is a decoration, but not forbidden by law, it does not require a faculty?] No; in that case it is covered by the faculty authorising the screen; if any part of the screen was an unlawful ornament, it would not of course be covered by any faculty. Further, this is a proceeding under the Public Worship Regulation Act, and the only words of that Act that affect the question of a faculty are with reference to ornaments forbidden by law. Other proceedings might be pos-

sible with reference to the absence of a faculty. [The LORD CHANCELLOR.—What is your view of the 14th section of the Public Worship Regulation Act? That section appears to us to assume the possibility of an objection to the want of a faculty being taken in proceedings under the Act, as it provides a mode of meeting the technical objection.] The words of the Public Worship Regulation Act refer only to decorations forbidden by law. A crucifix is a fitting and solemn decoration for a church, and there is not the slightest danger of its becoming the object of superstitious reverence.

A. Charles followed on the same side.

Dr. Stephens, for the respondents.—The meaning of the word "retained" in the Ornaments Rubric of 1662, must be interpreted on the principles laid down by Blackstone on Statutes, p. 66. It would be a misinterpretation of the statute to apply the word "retained" to the chasuble and alb, such vestments having since 1559 not been used in any parish church in this country, and having been publicly destroyed by authority. The statute 3 & 4 Edw. 6, c. 10, ss. 1, 5, and the preface in the Book of Common Prayer, "Of ceremonies, why some be abolished and some be retained," illustrates the meaning of the word. In the report of the commission that recommended that this rubric should be altered, the word "continued" is used in the same sense as "retained." Ornaments, as described in the first Book of Edward VI., are not lawful when the services and ceremonies to which they belonged no longer form part of the Book of Common Prayer, but become monuments of superstition. The chrism and the crucifer were enjoined by the first Book of Edward VI., but when the services of which they were a part had been repealed by Parliament and disused in the church, they ceased to be lawful: (Liturgies of Edw. 6, p. 112.) Other ornaments became illegal in the same way. The canons of 1603 show what was the opinion as to the state of the law at that time, and were regarded as so doing, in the question what were the prohibited degrees of marriage, which arose in *B. v. Chadwick* (11 Q. B. 233, 241). So the Act of Uniformity of 1662 is evidence as to what was then in use, and what was not in use could not be "retained." The adverse user, extending over three centuries, is conclusive on this point, particularly when it is remembered that this adverse user is not secret but open; that it is by authority, the prelates in their visitations being expressly charged to see that everything is done rightly, that it is continuous, and that it has existed without any attempt being made, either through malice or on the part of those who desire to restore a high ritual, to enforce this alleged law imposing the chasuble and alb. By the Ornaments Rubric of the present Prayer Book, two conditions are prescribed as the test of the legality of any ornament, one directly the other by the language used. The first is that it must have been authorised by Parliament in 1549, and the second that it must have been in use in 1662. I submit that these vestments do not apply to the second condition. Secondly, as to the position of the priest during the prayer of consecration. That must depend on the legal position of the table. The whole difficulty has arisen from assuming that the present position of the table is the legal one. This is not so by the Prayer Books of 1552, 1559, 1606, 1662. The rubric gives to the ordinary power to appoint where morning and evening prayers are to be said.

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The communion table must be either in the body of the church, or, if in the chancel, then in that part of the chancel where morning and evening prayer are to be said, except when there is no communion. [The LORD CHANCELLOR.—Do you carry your argument so far as to maintain that it is illegal to place the Lord's table along the east wall?] Certainly. (Rubric at beginning of communion service read.) The first book of Edward VI. contained no directions as to the placing of the table owing to the fact that it was then fixed to the east wall, where it remained until an order was issued to take down all altars, and set up a table in some convenient part of the church for the purpose of the Holy Communion: (1 Cardwell's Doc. Ann. A.D. 1550.) The Order in Council of 1550 required the table to be set up in some convenient place in the chancel. In 1550 the use of the vernacular language in divine service was beginning to be appreciated, and therefore care was taken that everything that was done should be seen and heard. In 1661 the table was usually placed tablewise, that is, from east to west. In 1640 there was an Order of Council enjoining that all clergy should take care that the communion table should stand as it had been long accustomed. The accustomed place referred to was in the body of the chancel. The altarwise position of the table was due to the clergy in opposition to the laity; the Laudian party attached great importance to it: (Charge of the Bishop of Ripon on his third triennial visitation in the autumn of 1876; Cardwell's Doc. Ann. 234; *Hebbert v. Purchas* (*ubi sup.*); Report of Parliament Nov. 20th 1604; Proceedings in Kent 1640, published by Camden Society 1861.) [The LORD CHANCELLOR.—There is no charge as to the position of the table in this case, and their Lordships have not therefore to consider it. But suppose a clergyman to be proceeded against for placing the table at the east wall, upon what would you found the charge?] Upon the rubric at the beginning of the Communion Service. The table must be in that part of the chancel where morning and evening prayer are appointed to be said. That is not complied with by placing it at the east wall: (Resolutions of Houses of Lords and Commons of August 27th 1643 referred to.) Therefore, from 1559 to the Restoration of Charles II. the table was not placed altarwise. Did the Act of Uniformity of 1662 change this? The use of the surplice was the only thing complained of by the Puritans at the Savoy Conference; no complaint is made of any alteration in the position of the table. On 4th Aug. 1662 the Puritans still held their benefices, so that in those parishes undoubtedly the table was still kept in its place. Is it probable that the attempt to place the table altarwise having in 1640 excited a great commotion, it could be done in 1662, in the face of the Resolutions of the Houses of Parliament without anything being said? (He referred to the preamble of the Act of Uniformity 1662 and to the Fourth Report to the House of Lords of the Ecclesiastical Commissioners as to changes in the rubric.) As to the position of the priest with regard to the table, and the distinction between side and end: (Webster's Dict., sub. v. end; Canons of the Laudian Convocation; 2 Cardwell's Doc. Ann. 252; 4 Rushworth's Parl. Ann. 351; Dean and Chapter of Canterbury to Archbishop Parker 1564; 1 Strype's Parker 364; Bloxham's Architecture; Dean Howson's Before the Table; 4 Cobbett's Parliamentary Hist., pp.

415, 417.) Those who were most opposed to the altarwise position of the table, after the Act of Uniformity of 1662, became merged in the body of Nonconformists; and that explains the table so soon resuming the altarwise position. The laity became negligent and indifferent; the doctrine of the Mass having apparently gone for ever, little importance was attached to the table being again in the position of the altar. That doctrine has now resumed its importance. That "before the table" means in front of it on the west side is mere assumption. If the table was in its legal position, the assumption would not have arisen; "before the table" would then mean facing the table. In *Martin v. Mackonochie* (*ubi sup.*) the question was as to the posture of the priest, and the words "before the table" had no bearing on the question. The words "before the table" occur in the Rubric to the marriage service, and in 5 Hall's Fragmenta Liturgica, Non-jurors, pp. 10, 32. From this it would appear that to stand before the table means to stand with the face towards it. "Before" does not mean in front of, but facing; properly placed, the table has no special front. It was one of the charges against Laud, Cosin, and others that they said this Prayer of Consecration with their backs to the people. Cosin defends himself against the charge by denying the truth of it. In translating "Before the people," the Welsh Prayer Book, uses the word which means "in sight of." [The LORD CHANCELLOR.—Before you pass to the next point we wish to draw the attention of counsel on both sides to one matter. The Act of Uniformity of Charles provides that the prayers may be said at the universities in Latin; perhaps counsel will ascertain whether any translation was made into Latin for this purpose, and inform us.] In 1665, three years only after 1662, there was a translation of the Prayer Book made by the Dean of Peterborough into Greek, printed at Cambridge, and dedicated to Sheldon, then Chancellor of the University of Oxford. In that, the words "Before the table" are translated *ἔμπροσθεν τοῦ τραπέζης* and the words, "Before the people" *ἔμπροσθεν τοῦ λαοῦ* [Sir Fitzjames Stephen subsequently read a letter from Mr. Bright, Professor of Ecclesiastical History at Oxford, in which he says that in the Latin translation of the Prayer Book, "Before the table" is translated *Ante mensam*, and "Before the people," *Coram populo*]. As to the wafer-bread, I submit that "bread such as is used to be eaten" is a matter both of substance and form, and bread is not usually eaten in the form of circular wafers: (Nichols' Prayer Book, supplement, p. 28, edit. 1712, "Puritan offences against Common Prayer answered.") Our reformers removed the wafer for fear of superstition: (Cardwell's Doc. Ann. p. 254, line 30 Order as to sacramental bread.) By the 20th Canon of the Canons of 1603, fine white bread is ordered to be provided and no allusion is made to wafer bread: (Cardwell's Conf., 3rd edit. 1849, 342, W.) Lastly, as to the crucifix. Sir Fitzjames Stephen divides all ornaments of the church into (1) things used in the service, and (2) architectural decorations. But this division is not exhaustive, as there is a third class which consists of objects of ecclesiastical devotion. To this last class belongs the rood: (1 Cardwell's Doc. Ann. 206.) In the reigns of Edward VI., Mary, and Elizabeth, the figure of Our Saviour placed as charged here was called the rood: (Stow's Annals, p. 206.) In the

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Exeter Beredos case, the crucifix was not one of the figures on the reredos; that case, therefore, gave no sanction to the erection of a crucifix on the reredos, much less on the screen. What was allowed in *Philpotts v. Boyd* was allowed on the ground that it had been set up for the purpose of decoration only. The rood has for ages been the object of worship and is therefore in danger of receiving superstitious reverence. He cited 1 Rock's Church of our Fathers, 305; Sarum Missal (edit. 1861); 1 Cardwell's Doc. Annals, p. 7; 3 & 4 Edw. 6, c. 10, ordering all images to be destroyed; and the words of Mr. Justice Keating with reference to that Act in the Exeter Beredos case.

Shaw followed on the same side.

Sir Fitzjames Stephen, Q.C., in reply.

May 12.—The LORD CHANCELLOR.—The appeal of *Ridsdale v. Clifton*, in which their Lordships have now to state the recommendation which they propose humbly to make to Her Majesty, is an appeal to Her Majesty in Council brought by the Rev. Charles Joseph Ridsdale, clerk, incumbent, or perpetual curate of St. Peter, Folkestone, against an order or decree pronounced by Lord Penzance, as judge or official principal of the Arches Court of Canterbury, on the 3rd Feb. 1876. This judgment specified various matters as to which it declared that the appellant had offended against the laws ecclesiastical; but the appeal is brought in respect of four only of these matters, and it is to these only that the observations of their Lordships need be directed. The four matters as to which the appeal complains of the judgment are these:—1. The wearing during the service of the Holy Communion of vestments known as an alb and a chasuble. 2. The saying the Prayer of Consecration in the service of the Holy Communion while standing at the middle of the west side of the Communion Table, in such wise that the people could not see the appellant break the bread or take the cup into his hand. 3. The use, in the service of the Holy Communion, of wafer-bread or wafers, to wit, bread or flour made in the form of circular wafers, instead of bread such as is usual to be eaten. 4. The placing and unlawfully retaining a crucifix on the top of the screen separating the chancel of the church from the body or nave. There were eight other charges against the appellant, as to all of which he was admonished by the learned judge, but as to none of which is there any appeal. Of the four charges which are the subject of appeal, the first three were considered by the learned judge to be covered by the decision of this committee in the case of *Hebbert v. Purchas*, and by the Order of Her Majesty in Council made in that case; and as to them he did not exercise any independent judgment. The fourth charge, as to the crucifix, the learned judge did not consider to be covered by authority otherwise than indirectly and by implication. Their Lordships have had to consider, in the first place, how far, in a case such as the present, a previous decision of this tribunal between other parties, and an Order of the Sovereign in Council founded thereon, should be held to be conclusive in all similar cases subsequently coming before them. If the case of *Hebbert v. Purchas* is to be taken as absolutely conclusive of every other case, with the same or similar facts, there can be no doubt that the decision of the learned judge on the first three heads, being in accord-

ance with that of *Hebbert v. Purchas*, was correct. In *Hebbert v. Purchas*, the defendant did not appear, either before the Dean of Arches or before the Judicial Committee; but, after the decision of the Judicial Committee was pronounced against him, he presented a petition praying for a rehearing. The Judicial Committee to whom that petition was referred were of opinion that, to have granted such an application would have been to violate the spirit of the 2 & 3 Will. 4, c. 92, which transferred the powers of the Court of Delegates to the Sovereign in Council, and provided that every judgment, order and decree should be final and definitive, and that no commission should thereafter be granted or authorised to review any judgment or decree made under that Act. All that this decided was the finality of that judgment *inter partes*; and the propriety of its being held final in that case was the more obvious from the fact that a defendant not appearing in the primary court or on the appeal might be supposed to be lying by, taking the chance of a decision in the first instance, and then trying to get rid of it when it turned out to be unfavourable. The present case, however, raises the question of finality not *inter partes*, but as against strangers. In the case of decisions of final courts of appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions, as a general rule, to be final as to third parties. The law as to rights of property in this country is to a great extent based upon and formed by such decisions. When once arrived at, these decisions become elements in the composition of the law, and the dealings of mankind are based upon a reliance on such decisions. Even as to such decisions it would, perhaps, be difficult to say that they were, as to third parties, under all circumstances and in all cases absolutely final, but they certainly ought not to be reopened without the very greatest hesitation. Their Lordships are fully sensible of the importance of establishing and maintaining, as far as possible, a clear and unvarying interpretation of rules the stringency and effect of which ought to be easily ascertained and understood by every clerk before his admission to Holy Orders. On the other hand, there are not, in cases of this description, any rights to the possession of property which can be supposed to have arisen by the course of previous decisions; and in proceedings which may come to assume a penal form, a tribunal, even of last resort, ought to be slow to exclude any fresh light which may be brought to bear upon the subject. It is further to be borne in mind that in the case of *Hebbert v. Purchas*, the Judicial Committee, although they had before them a learned and able judgment of the then Dean of Arches in favour of Mr. Purchas on the points now raised, had not the advantage of an argument by Mr. Purchas's counsel on those points. These considerations have led their Lordships to the conclusion that, although very great weight ought to be given to the decision in *Hebbert v. Purchas*, yet they ought, in the present case, to hold themselves at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from those reasons, to decide upon their own view of the law. Their Lordships will now proceed to consider the first charge against the appellant, namely, that of wearing an alb and chasuble. They will, however, premise that they do not

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propose to express any opinion upon the vestures proper to be worn by bishops, as to which separate considerations may arise; and in referring to the dress of the parochial clergy, they will, for greater convenience, use the term "vestments" for the purpose of denoting the alb and chasuble or cope, as distinguished from the surplice. The argument of the appellant on this head, which was very clearly and very forcibly stated, may be thus summed up. The Ornaments Rubric, he contends, in the Revised Prayer Book of 1662 is now the only law as to the vesture of the clergy. It contains within its one sentence all that is now enacted upon that subject. It sweeps away all previous law as to the vesture of the clergy, whether that law was to be found in statute, canon, injunction, or otherwise. It authorises the use of all ornaments which had the parliamentary authority of the First Prayer Book of Edward VI. The vestments in question are among the ornaments which had this parliamentary authority; therefore it authorises the use of the vestments in question. To this reasoning, if the first proposition in the series be correct in point of fact and law, no exception could probably be taken. Their Lordships, however, are unable to accept that proposition. They are of opinion that it is a misapprehension to suppose that the rubric note of 1662 as to ornaments was intended to have, or did have, the effect of repealing the law as it previously stood, and of substituting for that previous law another and a different law, formulated in the words of that rubric note, and of thus making the year 1662 a new point of departure in the legislation on this subject. Before, however, proceeding to trace the history of the law, their Lordships must observe upon the expression in the argument which asserts that the Ornaments Rubric "authorises" the use of the vestments in question. In the opinion of their Lordships, if the only law as to the vesture of the clergy is to be found in the Ornaments Rubric, the use of the vestments of the first Edwardian Prayer Book is not merely authorised, it is enjoined. It is not an enactment ordering the accomplishment of a particular result, and suggesting or directing a mode by which the proposed result may be attained. The sole object of the rubric is to define the mode of performing an existing ministration. If the rubric is taken alone the words in it are not optional, they are imperative; and every clergyman who, since 1662, has failed, or who may hereafter fail, to use in the administration of the Holy Communion the vestments of the first Edwardian Prayer Book has been, and will be, guilty of an ecclesiastical offence rendering him liable to heavy penalties. Any interpretation of the rubric which would leave it optional to the minister to wear or not to wear these vestments, not only would be opposed to the ordinary principles of construction, but must also go to the extent of leaving it optional to the minister whether he will wear any official vesture whatever. If the rubric is not imperative as to the alb, and the chasuble or cope, in the communion office, it cannot be imperative as to the surplice in the other services, or any of them. It is necessary now to ascertain the state of the law before the Act of Uniformity and Rubric of 1662; and then to examine whether any and (if any) what alteration was made by that Act and Rubric. In the first Book of Edward VI. (1549),

the directions as to the vestures of the ministers officiating in the public services of the Church (omitting all that relates to hoods and the directions as to bishops) were as follows: In the saying and singing of matins and evensong, baptising and burying, the minister was to use a surplice. In the administration of the Holy Communion the celebrant was to "put upon him a white albe plain, with a vestment or cope," and the assistant-ministers (priests or deacons) were to "have upon them likewise the vestures appointed for their ministry, namely, albes with tunicles." These directions were omitted from the second Book of King Edward (1552); and instead of them a rubric was inserted immediately before the order for morning prayer in these words: "And here it is to be noted that the minister, at the time of the communion, and at all other times in his ministration, shall use neither alb, vestment, nor cope; but . . . being a priest or deacon, he shall have and wear a surplice only." This book was "annexed and joined" to the statute 5 & 6 Edw. 6, c. 1, and was established as law thereby. King Edward died within a few months after the time appointed (for this statute to take effect, and the reaction under Queen Mary followed. Upon the accession of Queen Elizabeth, the Legislature, reverting to the state of matters which had existed when the second Book of Edward was introduced, determined at once to restore the Liturgy and offices of religion contained in that book, with a few specified alterations, but to leave the question of the vestures of the ministers of the Church open for further consideration. The natural course under these circumstances was that adopted, viz., to "retain" the use of the vestures which had been authorised before 1552, until a final settlement of that question could conveniently be made. No new or revised Prayer Book was annexed to Queen Elizabeth's Act of Uniformity (1 Eliz. c. 2); but the second book of King Edward, "with the alterations and additions therein, added and appointed by this statute," (viz., "one alteration or addition of certain lessons to be used on every Sunday in the year, and the form of the Litany, altered and corrected, and two sentences only added in the delivery of the sacrament to the communicants," as specified in the 3rd section), was directed to stand and be in full force and effect from the 24th June 1559. The enactment, however, that the second Book of King Edward was to be used, with these alterations and additions, "and none other or otherwise," (sect. 3), was further qualified by the provisos contained in the 25th and 26th sections, of which the former is in these words: "Provided always, and be it enacted, that such ornaments of the church, and of the ministers thereof, shall be retained and be in use, as was in this Church of England by authority of Parliament in the second year of King Edward VI., until other order shall be therein taken by the authority of the Queen's Majesty, with the advice of her commissioners, appointed under the great seal of England for causes ecclesiastical, or of the metropolitan of this realm." In this manner, and not by any textual alteration of the rubrics in the second book of King Edward, the directions as to ornaments of the first book were kept in force until other order should be therein taken, in the way provided by the Act. The authorities whose duty it was to issue to the people, in 1559, a printed Book of Common Prayer, made con-

formable to the statute, prefixed to the book so issued by them a copy, *in extenso*, of the Statute of Elizabeth itself; and they also of their own authority, not by way of enactment or order, but by way of a memorandum or reference to the statute, substituted a new admonitory note or rubric for the note immediately preceding the order of morning prayer in the second book of King Edward. That note or rubric, as is pointed out by Bishop Gibson (Codex, Ed. 1761, p. 296), was not inserted by any authority of Parliament. It was meant to be a compendious and convenient summary of the enactment on this subject. If it was an accurate summary, it was merely a repetition of the Act. If it was inaccurate or imperfect, the Act, and not the note, would be the governing rule. It is of importance to bear in mind that the Ornaments Rubric, which it is now contended contains the whole enactment or law relating to the vesture of the clergy, was not, when originally introduced in 1559, and was not meant to be, an enactment at all; and it in fact ended with a reference to the statute 1 Elizabeth, cap. 2, set out in the beginning of the Prayer Book, in terms which showed that the rubric claimed no intrinsic authority for itself. The statute, by its 25th section, had enacted that the ornaments of 1549 should be retained and be in use, but only until other order should be therein taken, by the authority of the Queen, with the advice therein mentioned. The enactment was therefore in its nature provisional, and prepared the way for the subsequent exercise of a power reserved to the Queen. If that power was not exercised, the enactment in the 25th clause would remain absolute. If the power was exercised, the order made under the power would not be an order in derogation or by way of repeal of the Act; but the order would be in pursuance of and read into the Act as if that which was done by virtue of the reserved power had originally been enacted in the statute. Did, then, Queen Elizabeth ever take other order within the meaning of the 25th section? Their Lordships do not think it necessary to dwell upon the injunctions of Queen Elizabeth, and still less upon the interpretation of those injunctions; because they cannot satisfy themselves, either that the injunctions pointed to the vestments now in controversy, or that they were issued with the advice required by the section of the Act of Parliament. But their Lordships are clearly of opinion that the advertisements (a word which in the language of the time was equivalent to "admonitions" or "injunctions") of Elizabeth, issued in 1566, were a "taking of order," within the Act of Parliament, by the Queen, with the advice of the metropolitan. It is not disputed that these advertisements were issued with the advice of the metropolitan, and, indeed, also with the advice of the Commissioners for causes ecclesiastical; but it is said that they were not a taking of order by the Queen. The Queen had in the most formal manner, by her royal letters, commanded the metropolitan and other prelates to prepare these advertisements, directing them "so to proceed by order, injunction, or censure, according to the order and appointment of such laws and ordinances as were provided by Parliament, and the true meaning thereof, so as uniformity of order might be kept in every church, and without variety or conten-

tion." There was no particular form required by statute or by law in which the Queen was to take order, and it was competent for her Majesty to do so by means of a royal letter addressed to the metropolitan. The advertisements were issued by the prelates as orders prepared under the Queen's authority. Immediately after their issue, on the 21st May, 1566, Grindal, Bishop of London, writes (MS. from Dom. Eliz., vol. 39, No. 76) to the Dean of St. Paul's, requiring him to put them in force, and stating that they were issued by the Queen's authority, and that he (Grindal) would proceed to deprive any who should disobey them. The Articles of Archbishop Parker (1 Card. Doc. An. 320) speak of them as advertisements set forth "by public authority." In 1583, in articles presented to the Queen (163 State papers, Domestic. No. 31) herself by the archbishop and some of the bishops, they are referred to as the "Book of Advertisements," and in the margin as the "advertisements set out by her Majesty's authority." Against this it is said that there is, nevertheless, other matter in the "Parker Correspondence" (lately for the first time published in a collected form, though it was partially known to some historical writers of the last century, who drew from it similar inferences), from which it ought to be inferred, as a matter of fact, that the Book of Advertisements was published without Queen Elizabeth's sanction. Their Lordships cannot lend any countenance to the suggestion that the legitimate inference to be drawn from the tenor and language of public documents, from the acts done under them, and from the public recognition of their authority, could in any case be controlled by expressions found in a correspondence of this character. As, however, much of the argument against the authority of the advertisements was founded on this correspondence, their Lordships think it right to say that they draw from the correspondence, as a whole, a conclusion opposite to that in support of which it was referred to. The first draft of the Book of Advertisements was prepared by the archbishop and his colleagues very soon after the receipt of the Queen's letter of the 25th Jan. 1564-5, in the form of an order running in the Queen's name; and it appears, from passages in several letters, that they wished the civil power to undertake as much as possible of the formal responsibility of promulgating and enforcing the proposed new order, and that they anticipated very great difficulty if, without that support, the principal share of the burthen should be thrown upon the ecclesiastical jurisdiction. An opposite view, however, prevailed at court, where some of the Queen's Ministers and courtiers were more favourable than she was herself to the views of the puritans, and where it was as well understood as it was by the archbishop that the measure would encounter much unpopularity and opposition, so far as it was contrary to those views. It further appears that in the first draft of the book (which is printed at length in the Appendix to Strype's "Life of Parker," No. 28, p. 84), there were several doctrinal articles, and other articles (about the temporalities of bishops, the employment of schoolmasters, and the dissolution of marriages within the prohibited degrees), which were afterwards omitted, and the legality of all or some of which, under any powers then vested in the Crown, might have been more than doubtful.

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That the archbishop knew that no new "order" could legally be taken by the sole authority of himself and his brother commissioners, is abundantly clear. When, on the 8th March, 1564-5, he sent the first draft to Secretary Cecil to be submitted to the Queen he wrote: "If the Queen's Majesty will not authorise them, the most part be like to lie in the midst for execution of our parts; laws be so much against our private doings." That draft was not approved; he sent it again a year afterwards (12th March 1565-6), with a letter containing this passage: "And where once, this last year, certain of us consulted and agreed upon some particularities in apparel (when the Queen's Majesty's letters were very general), and for that by statute we be inhibited to set out any constitutions without licence obtained of the Queen, I sent them to your honour to be presented. They could not be allowed then, I cannot tell of what meaning; which I now send again, humbly praying that, if not all, yet so many as be thought good may be returned with some authority, at the least way for particular apparel; or else we shall not be able to do so much as the Queen's Majesty expecteth for us to be done." That the Archbishop, both from his communications (in every stage of this business) with the Secretary of State (whose answers to him do not appear in the correspondence), and also from personal interviews with the Queen, must have had the Queen's pleasure distinctly made known to him, is no less certain. In a letter dated the 12th April 1566, he gives an account of an audience which he had on the 10th March preceding (exactly two days before his letter of the 12th March to Cecil), when he had explained to the Queen the difficulty of enforcing the uniformity desired by her Majesty. "I answered, that these precise folk would offer their goods and bodies to prison rather than they would relent, and her Highness willed me to imprison them." In his official letter to Grindal, dated the 28th March 1566, inclosing the book of advertisements, he refers to another interview which they had both then recently had with the Queen by her own command, in which she charged them "to see her laws executed, and good orders decreed and observed." In the letter which he wrote on the same 28th March to the Secretary of State, submitting the advertisements in their final form (together with the draft of the letter to Grindal) for approval, he says: "I pray your honour to peruse this draft of letter and the book of advertisements, with your pen, which I mean to send to my Lord of London. This form is but newly printed, and yet stayed till I may hear your advice. I am now fully bent to prosecute this order and to delay no longer, and I have weeded out of these articles all such of doctrine, &c., which, peradventure, stayed the book from her Majesty's approbation, and have put in but things advantageous, and, as I take them, against no law of the realm." They could only be "against no law of the realm" if they were issued by the Queen's authority. For what purpose were they sent to Cecil, except to obtain that authority for their promulgation, in the form and manner proposed? It is true that the words follow (which were relied upon by the appellant's counsel): "And where the Queen's Majesty will needs have me assay with mine own authority what I can do for order, I trust I shall not be stayed hereafter, saving that I would pray your honour to have

your advice to do that more prudently, in this common cause, which must needs be done." Their Lordships understand by this that the Queen had determined that the new order, made with her authority and approbation, should be enforced by the Metropolitan, through the ecclesiastical jurisdiction, without aid from the Privy Council or the secular power; not that the new order itself was to be without warrant, except from the sole authority of the Metropolitan, to whom, without the authorisation of the Crown, the law had given no power to make any such order. The facts that this duty was undertaken by the Archbishop reluctantly and possibly against his own judgment, that his wishes and opinions were on several points overruled, and that the book of advertisements was promulgated, not in the form which he would have preferred, but in that imposed upon it by the Royal will, all tend to prove that it was promulgated in that form with, and not without, the Queen's authority. If, indeed, the legal effect of the advertisements were to be judged of (as their Lordships do not think it ought to be) by the private opinion of Archbishop Parker, there is in the correspondence distinct evidence that Parker, after the advertisements were issued, considered them to be an execution of the statutory power. Writing to the Lord Treasurer, Nov. 15, 1573 (Correspondence, p. 450), seven years after the advertisements were issued, he says: "The world is much given to innovations, never content to stay to live well. In London our fonts must go down. . . . I do but marvel what some men mean . . . with such alteration, when order hath been taken publicly this seven years by commissioners, according to the statute, that fonts should not be removed." The advertisements had ordered (1 Card. Doc. Ann. 326), "that the fonte be not removed," and this circumstance, and the expressions "order taken," "this seven years," and "Commissioners" (the advertisements having been signed by the bishops as commissioners), make it clear that Parker was referring to the advertisements. But the advertisements could not have been a "taking of order publicly" "according to the statute" unless they had the direct authority of the Queen. Their Lordships now turn to the part (Card. Doc. Ann.) of the Book of Advertisements which deals with the vestures of the ministers. It is in these words:—"In the ministration of the Holy Communion in cathedral and collegiate churches, the principal minister shall wear a cope, with gospeller and epistoller agreeably; and, at all other prayers to be said at that Communion Table, to use no copes, but surplices. That the dean and prebendaries wear a surplice with a silk hood in the choir; and, when they preach, to use their hoods. Item, that every minister saying any public prayers, or ministering the sacraments, or other rites of the church, shall wear a comely surplice with sleeves, to be provided at the charge of the parish." It was not seriously contended that albs or chasubles could, in any reasonable or practical sense, or according to any known usage, be worn, or could be meant to be worn, concurrently with the surplice. If, therefore, the use of the surplice, at the administration of the Holy Communion, was rendered lawful and obligatory by these "Advertisements," the use of albs or chasubles, at that administration, was thereby rendered unlawful. Their Lordships do not forget that the Book of

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Advertisements also contains orders upon other distinct subjects not within the 25th section of the statute; as to some of which it was suggested in argument that the Queen had no legislative power. But this, whether the suggestion be well or ill-founded, is, for the present purpose, immaterial. The proof of the subsequent reception and enforcement as law of the order established by the Book of Advertisements as to the vestures of the ministers of the church in the administration of the Holy Communion throughout the Church of England from 1566 to the Great Rebellion, and again between the Restoration and St. Bartholomew's Day in 1662, is complete. After 1566, vestments, albs, and tunicles (copes also, in parish and non-collegiate churches) are mentioned in the official acts of the bishops and others, performed in the public exercise of their legal jurisdiction, only as things associated with superstition, and to be defaced and destroyed. They were so treated by a Royal Commission sent to Oxford by Queen Elizabeth in 1573, and by the Visitation Articles of Archbishops Grindal and Sandys (York, 1571 and 1578); and Abbot and Laud (1611 and 1637); of Bishops Aylmer, Bancroft, and King (London, 1577, 1601, and 1612), and others. The surplice, on the other hand, in a long series of Visitation Articles (sometimes accompanied by injunctions) of not less than thirty-two archbishops and bishops, of sixteen dioceses in England, commencing with Archbishop Parker in 1567 (1 Card. Doc. Ann. 320), and ending with Bishop Juxon in 1640 (2 Rep. Rit. Com. 589), besides those of various archdeacons, is consistently treated as the vesture required by law to be used by all ministers of the church, not only in their other ministrations, but expressly in the administration of both Sacraments. Among the most stringent in this respect are the articles of Bishops Andrewes, Overall, and Wren. After the Restoration (if, as seems probable, the visitations of Cosin and other bishops in 1662, whose articles of that year do not expressly refer to the Act 13th and 14th Car. 2, c. 4, were held under the state of the law prior to that Act), we have not only Bishop Cosin (Works, v. 4, 509, 510), but Bishops Ironside of Bristol, Morley of Winchester, and eight others of as many dioceses (whose articles of 1662 are stated in the Appendix to the second Report of the Ritual Commissioners to have been the same on this point with those of Morley), all administering strict inquiries, to the same effect. This, however, is not all. There is direct proof in the same class of documents, and in others of a still more public and authoritative kind, that the advertisements were accepted as law, as having the Queen's Authority. In a visitation held in 1569, Bishop Parkhurst, of Norwich, inquired (not expressly mentioning the surplice), "Whether your Divine service be said or sung in due time and reverently, and the sacraments duly and reverently ministered in such decent apparel as is appointed by the laws, the Queen's Majesty's Injunctions, and other orders set forth by public authority in that behalf." That he was referring to the advertisements, and "by public authority" meant the authority of the Queen, seems clear from one of his "Injunctions to the Clergy" (the fourth), at the same visitation, about perambulations, where he orders the clergy on those occasions not to use surplices or superstitious ceremonies, "but only give good thanks, and use such good order of

prayers and homilies as be appointed by the Queen's Majesty's authority in that behalf." The use of homilies at perambulations was prescribed, not by the Injunctions of 1559, but by the advertisements. Bishop Cox, of Ely, in his injunctions issued between 1570 and 1574, directed "that every parson, vicar, and curate shall use in the time of the celebration of Divine service to wear a surplice, prescribed by the Queen's Majesty's Injunctions and the Book of Common Prayer; and shall keep and observe all other rights and orders prescribed in the same Book of Common Prayer, as well about the celebration of the sacraments, as also in their comely and priestly apparel, to be worn according to the precepts set forth in the book called Advertisements. And in his accompanying Articles he inquired, "Whether any, licenced to serve any cure, do not wear at the celebration of the Divine service and sacraments, a comely surplice, and observeth all other rites and orders prescribed in the Book of Common Prayer, and the Queen's Majesty's Injunctions, and in the Book of Advertisements?" Archbishop Grindal, in his Gloucester Articles of 1576, ordered the clergy "not to oppose the Queen's injunctions, nor the ordinations, nor articles made by some of the Queen's Commissioners" (naming those who subscribed the advertisements), "January 25th, in the seventh year of the Queen's reign." (The date is that of the Queen's letter mentioned in the advertisements, not that of the promulgation of the book itself.) This alone seems to have been thought by Strype (1 Life of Parker, 319), an historian sometimes cited for a contrary purpose, sufficient proof that the Queen must in the end have authorised the publication of the advertisements. Archbishop Whitgift, in his celebrated Articles of 1584 (1 Card. Doc. Ann., 413), enjoined "that all preachers and others in ecclesiastical orders do at all times wear and use such kind of apparel as is provided unto them in the Book of Advertisements and Her Majesty's Injunctions, *anno primo*." Bishop Thornborough, of Bristol, in 1603, inquired "whether at any time, and during the whole celebration of Divine service and ministration of the sacraments, in every your churches, your parson, vicar, or curate doth wear a surplice, according to the terms and statutes of this realm of England in that behalf provided; and how often default hath been made herein and by whom?" In another article as to perambulations he inquires whether the clergy say "the prayers and suffrages appointed" for that ceremony, "according to the late Queen's Majesty's Injunctions in that behalf provided, and according to the Book of Advertisements?" The Book of Advertisements was referred to as of legal authority in several of the canons of 1571; showing, though these canons were not confirmed by the Crown, nor, apparently, ever put in force, the sense and understanding at that time, while the matter was still recent, of the bishops and clergy of the whole Church of England represented in the convocations of both provinces. The 24th and 25th canons of 1603-4 repeated, with express reference to the advertisements, as already containing the rule to be followed ("according to the advertisements published anno 7 Eliz." *Juxta Admonitiones in Septimo Elizabethae promulgatas*) the substance of the directions contained in the advertisements, as to the use of surplices, &c., in cathedral and collegiate churches;

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and the 58th Canon, which relates to the use of surplices at the administration of the Holy Communion in parish churches, followed, with scarcely any variation, the exact words of the advertisements on the same subject. The convocations which passed those canons thought them consistent with others (the 14th, 16th, and 58th), which enjoined the strictest possible conformity with the orders, rites, and ceremonies prescribed by the Book of Common Prayer, without addition, omission, or alteration; a view quite sound and correct, if the advertisements were a legal exercise of the statutory power given to the Crown by 1 Eliz. c. 2, s. 25; but, on the contrary supposition, erroneous, and untenable. The Canons of 1603-4 received the Royal Assent; so that on that occasion there was the most formal, solemn, and public concurrence possible, of the Crown and the Convocation of both provinces, in that understanding of the law, which had been acted upon for nearly fifty years by all the executive authorities of the church. The Canons of 1640 (also confirmed by the Crown), which mention "Queen Elizabeth's injunctions and advertisements," carry on the public evidence of the same understanding down to the time of the Great Rebellion; and the divines consulted by the Lords' Committee of 1641 (Card. Conf., 273) alleged that the High Church party "pretended, for their innovations, the injunctions and advertisements of Queen Elizabeth," denying, indeed, that either the injunctions or the advertisements were in force, "but by way of commentary and imposition;" but not disputing that the advertisements had such authority as Queen Elizabeth by law could give them. To this it may be added that Hooker, the greatest ecclesiastical writer between 1566 and the protectorate, describes the advertisements as "agreed upon by the bishops, and confirmed by the Queen's Majesty." (3 Hooker's Works, by Keble, 6th edit., p. 587.) Cosein (although, in a passage which will afterwards be referred to, he appears to have at one time supposed that the conditions of the statute had not been duly complied with), speaks of them (5 Works, p. 90) as made under the Queen's reserved authority and Wren (Parentalia, p. 75) as "Advertisements; authorised by law (1 Eliz. c. 2, sect. penult.*)" From all these facts, the conclusion drawn by this committee in *Hebbert v. Purchas*, that the advertisements of Queen Elizabeth on this subject had the force of law under 1 Elizabeth c. 2, s. 25, appears to their Lordships to be not only warranted, but irresistible. Nor is the weight of these facts diminished by the circumstance (which was, in the opinion of their Lordships, established by the appellant's counsel), that the extensive destruction of albs, vestments, and copes, mentioned in Mr. Peacock's book, and spoken of in the judgment of *Hebbert v. Purchas* as if it had been later than the promulgation of the advertisements, really preceded that event. The same causes which had led to the destruction, irregularly and without law, of a particular kind of ornaments, as to which the law, in its then provisional state, was at variance with the sentiment of the moderate, as well as of the extreme, section of the clergy of the Reformed Church, would naturally suggest the expediency of taking such order, upon the first convenient opportunity, as would give legal sanction to the disuse of those ornaments. Reading, then, as their Lordships consider they are bound to do, the order as to

vestures in the book of advertisements, into the 95th section of the 1 Eliz. c. 2, and omitting (for the sake of brevity) all reference to hoods, it will appear that that section, from the year 1566 to 1662, had the same operation in law as if it had been expressed in these words: "Provided always that such ornaments of the church and of the ministers thereof shall be retained and be in use as were in this Church of England by authority of Parliament in the second year of King Edward VI., except that the surplice shall be used by the ministers of the church at all times of their public ministrations, and the alb, vestment, or tunicle shall not be used, nor shall a cope be used except at the administration of the Holy Communion in cathedral and collegiate churches." It is clear that, during the whole of this period, except during the interregnum of the Civil War and the Protectorate, when the episcopal government of the church and the use of the liturgy were interrupted, this state of the law was generally understood, acted upon, and enforced by authority. It is also clear that throughout this long period the Ornaments Rubric, as originally printed in the Prayer Book of Queen Elizabeth, was allowed to remain unaltered. This, then, being the state of the law up to and in 1662, and the Ornaments Rubric, up to and at that time, not being in any sense a complete and independent enactment, but being merely a reference to an external law, namely, the statute of 1 Elizabeth, cap. 2, the question has now to be asked, was it the intention and was it the effect of the alteration in the Ornaments Rubric in 1662, to repeal the 25th section of the statute of Elizabeth, and all that had been done under it, and to set up a new and self-contained law on the subject of ornaments? The history of the revision of the Prayer Book is strongly opposed to such a conclusion. The Puritans, in their 18th General Exception at the Savoy Conference, stated various objections of principle to ceremonies in the church, especially as to three matters: (1), the surplice; (2), the sign of the cross in baptism; and (3) kneeling at the Holy Communion. Following up their general "exceptions" with objections in detail to particular parts of the Book of Common Prayer, they said, commenting on the Ornaments Rubric, as it stood before the revision of 1662: "Forasmuch as this rubric seemeth to bring back the cope, albs, &c., and other vestments forbidden by the Common Prayer Book, 5th and 6th Edw. VI., and for our reasons alleged against ceremonies under our 18th General Exception, we desire it may be wholly left out." Baxter (History of Life and Times, cap. 8, p. 155) seems to treat the objection as having been founded on the words in the rubric "at the time of the communion." "They excepted," he says, "against that part of the rubric which, speaking of the sacraments to be used in the church, left room to bring back the cope, albe, and other vestments." The words, "seemeth to bring back," assumed that those vestures of the first Book of King Edward were not practically in use under that rubric. The words did not suggest—and they would have been erroneous if they had suggested—more than that the rubric had the appearance of giving them some legal authority. The real substance of the objection was in the reference to the 18th General Exception, and in the request that the whole rubric might be omitted, with the object, manifestly, of getting rid of the surplice. The bishops do not

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appear to have considered the suggestion about "seeming to bring back," &c., worthy of particular notice. It would have been easy to answer it by showing that, under the statute to which that rubric referred, the surplice had been legally substituted for the alb, &c. But knowing that the surplice itself was the only thing really in controversy, they contented themselves with saying: "For the reasons given in our answer" (in which they had defended ceremonies generally, and the surplice particularly, but had said nothing about copes, albs, or vestments) "to the 18th General Exception to which you refer us, we think it fit that the rubric continue as it is." Although the bishops would not yield on this point, it could not have been their intention, when they "thought it fit that the rubric should continue as it was," to abolish the use of the surplice, and restore the ancient vestures, in any office in which, as the law then stood, the surplice was the vesture proper to be used. No one who holds in respect the memory of the Ecclesiastical Legislature of that day (whose revision of the Prayer Book was accepted by Parliament, almost *sub silentio*) could impute to them a deliberate intention covertly to alter the substance of the law as to the vestures of the clergy (which they had in the conference declared their intention to leave unchanged), by changes apparently verbal and trivial, in a rubric possessing down to that time no legislative authority, and on which they themselves, as will be seen in the sequel, never meant to act, and never did act, in any such sense. The declarations of the Legislature which bear upon this question are, (1), the recitals in the preamble of the Act of 1662, and in the second section of that Act; and (2) the preface to the Prayer Book. The preamble of the Act of 1662 recites that the commission on which the annexed book was founded had been ordered "for settling the peace of the church, and for allaying the present distempers, which the indisposition of the time had contracted." The restoration of vestures which had not been in use for nearly a hundred years, and had become associated, not in the popular mind only, with the idea of superstition, cannot well be supposed to have been contemplated by the Legislature as a change conducive to the peace of the church, or to agreement within its pale, even when that pale might have been contracted by the secession of those from whom conformity was not to be looked for. And if it had been intended not merely to continue an existing and well-known state of things, but to revive usages long obsolete, and to prohibit all things previously in legal use, which were not prescribed by the first book of King Edward, it can hardly have been expected that the desired certainty of rule, and agreement in practice, would have been attained by a vague reference to a Prayer Book not generally accessible. Of the "preface" to the book of 1662 it is to be observed (1) that it disallows, as without warrant in law, the practical interruption, during the Rebellion and the Protectorate, of the use of the Liturgy, "though enjoined by the laws of the land, and those laws never yet repealed;" (2) that none of the general reasons thereby assigned for the revision, and for the alterations then made, are such as to make it at all probable that for any of those reasons the old vestures would be restored; and (3) that a comparison of the new language with the old is thereby expressly invited, for the

purpose of arriving at a just view of the reasons for particular changes: "If any man, who shall desire a more particular account of the several alterations in any part of the Liturgy, shall take the pains to compare the present book with the former, we doubt not but the reason for the change may easily appear." Entering then upon the comparison so invited, the first material observation is that, on the one hand, the statute 1 Eliz., c. 2, is reprinted at the beginning of the book as an unrepealed and effective law, and, indeed, is transcribed in the manuscript book approved and signed by the two convocations; and, on the other hand, the Ornaments Rubric of 1662 occupies the same place, and *prima facie* retains the same general office and character which it had in the former book, in which, as has been already said, it was a note of reference to an external law, namely, that contained in the 25th section of the statute, still printed at the beginning of the book. Their Lordships cannot look upon this rubric as being otherwise than what it was before, a memorandum or note of reference to that law. Except for its new Parliamentary authority (which is a matter scarcely entering into the comparison of the old with the new language), it would certainly be so. It is true that the former express reference to the Act of Elizabeth at the end of the rubric is omitted. But, on the other hand, the Act itself is exhibited as a law still in force, and the effect and the obvious purpose of all the changes in the wording of the rubric (with a single exception) is to make it, as far as it goes, a mere extract from, and a simple repetition of the words of, that Act. The important words of the Act, "until other order shall be therein taken," &c., are not now for the first time left out; the former rubric had also stopped short of them when it could not possibly control their legal effect. If the manuscript alterations in the handwriting of Sancroft acting as Cosin's secretary (much dwelt upon by the appellant's counsel), could for this purpose be accepted as evidence, they would prove, as a matter of fact, that the change was made because (in the language of the manuscript) "these are the words of the Act itself." Their Lordships do not think that such evidence is admissible; but the same reason is legitimately to be inferred from the comparison suggested by the preface to the Prayer Book. It is easy to understand why the words of the Act should be as closely as possible adhered to, if those words, as found in that Act, were still the law authoritatively governing the matter. The words "shall be retained and be in use" were not in the former rubric, but they were in the statute. If intended as a mere extract from the statute, or to continue and carry forward in 1662 the use of those things which were then actually, or in contemplation of law, in use under that statute, they are apt and appropriate; but if it was meant to bring back an old and long-disused state of things, by making the Rubric of 1662, for that purpose, a new point of departure, which repealing the 25th section of 1 Eliz. c. 2, and all that had been done under it, the substitution of this particular language for the words of the former rubric, "the minister shall use," &c., and the recurrence to the exact phraseology of the enactment about to be superseded, would seem to be the most inappropriate way conceivable of accomplishing that object. The only other altera-

tion (which is also the single deviation in the Rubric of 1662, as far as it goes, from the language of the 25th section of 1 Eliz. c. 2) is this. In that section the words were, "such ornaments of the church and of the ministers thereof shall be retained and be in use as was in this church," &c. The rubric in use before 1662 was that of 1559, as reprinted in the book of 1603-4, which said: "The minister, at the time of the communion, and at all other times in his ministration, shall use such ornaments in the church as were in use," &c. In the Rubric of 1662 they are, "such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained and be in use as were in this church," &c.; the words, "at all times of their ministration," being interpolated into the context, of which the rest is extracted from the Act of Elizabeth. What is the reason for this change, discoverable (according to the rule of the preface to the Prayer Book) from a comparison of the new language with the old? The old language (i.e., that of the former rubric) seemed to imply a distinction which really existed when it was used in 1559, between the ornaments of the minister at the time of the communion and his ornaments at other times in his ministration, and the objection at the Savoy Conference as understood by Baxter (than whom no one was better acquainted with all that passed) seems to have been to an apparent recognition or admission of this distinction. That distinction, in all parish and non-collegiate churches, had been abolished by the advertisements and the practice under them. The new words (though not incapable of being read distributively, if and so far as such a distinction might still continue in law), ceased to imply, or to seem to imply, any such distinction. If the words of the statute had been in this place simply followed, there would have been less force in the alteration; but these words, "at all times of their ministration," are put in as if to give emphasis to the change, and to direct attention to the fact that, in the then state of the law, the use of the same vestures by the minister, at all times of his ministration, was the ordinary and the general rule. Such a change of language here would have been most extraordinary if it had been intended to recur in all the churches of the kingdom to those distinctions to which the advertisements had put an end, but which the terms of the former rubric seemed to recognise. On the other hand, it was a natural change of language, if the object was to remove some part, at least, of the ground for the Puritan objection, that the former rubric "seemed to bring back" the abolished vestures. This explanation of the change is, in fact, the only one which is in harmony with or which could justify the note or list of alterations in the book now deposited in the Library of the House of Lords, "out of which was fairly written (Lords' Journal, April 10, 1662) the Book of Common Prayer subscribed on the 20th Dec. 1661, by the Convocations of Canterbury and York, and which book, so subscribed, was by those Convocations "exhibited and presented" to the King, and sent by the King to the House of Lords on the 25th Feb. 1661-2. This original book, from which the transcript was thus made, contains the actual record of all alterations and additions made by the Convocations, clearly written in manuscript into a printed Prayer Book of 1636, and at the beginning a tabular list of the

material alterations. It was delivered by the House of Lords to the House of Commons as the authority for the book "fairly written" which was to be referred to in the Act (Lords' Journal, April 10, 1662); and it is impossible to doubt that the tabular list of alterations contained in it was inserted for the purpose of enabling the changes which Parliament was asked to sanction to be well understood. This tabular list sets out in parallel columns all the material changes which had been made from the old form, among which no mention of the rubric in question occurs, and there is then a note added in these words: "These words are all ye materiall alterations, ye rest are only verbal, or ye changing of some rubricks for ye better performing of ye service, or ye new moulding some of ye collects." To repeal in 1662 the 25th section of the statute of 1 Eliz., and the order taken under its authority, would have required either a clear and distinct repealing enactment, or an enactment inconsistent and irreconcilable with the former law. It was admitted in the argument, and indeed could not be denied, that the statute of Elizabeth was not repealed in terms; and it is in fact, as has been already observed, set forth as the first enactment in the new Prayer Book. The statute is also beyond question one of those "good laws and statutes for the uniformity of prayer and administration of the Sacrament," which by the 24th section of the Act of 1662 are declared to "stand in full force and strength, to all intents and purposes whatsoever for the establishing and confirming" of the new book, and which are thereby directed to be "applied, practised, and put in use for the punishing of all offences contrary to the said laws, with relation to the book aforesaid, and no other." In order to judge whether there is anything inconsistent and irreconcilable between the Ornaments Rubric in the new Prayer Book and the 25th section of the older statute, that section must be read as if the order taken under the section had been inserted in it. And, as so read, their Lordships see nothing inconsistent between the rubric and the section. The rubric served, as it had long previously served, as a note to remind the Church that the general standard of ornaments, both of the church and the ministers, was to be that established by the authority of Parliament in 1549; but that this standard was set up under a law still unrepealed, which engrafted on the standard a qualification that, as to the vestures of parish ministers, the surplice, and not the alb, vestment, or tunicle, should be used. No doubt can be entertained that for nearly two centuries succeeding 1662 the public and official acts of the bishops and clergy of the Church, and of all other persons, were inconsistent with the supposition that the Rubric of 1662 had made any change in the law. During the twenty-five years immediately succeeding the legislation of 1662, we have a series of visitation articles (those of fifteen bishops and one archbishop, of thirteen dioceses, printed either at length or by collation with Bishop Morley's form, in the appendix to the second report of the Ritual Commissioners, pp. 609, 611, 615, 632, 639, 642, 645, 649, 653-4), which prove conclusively that those whose official duty it was to see the law observed, and of whose strictness in the performance of that duty the same articles supply abundant evidence, understood the law still to be

that the surplice was always to be used by the clergy officiating in the administration of the Holy Communion. This list does not include any articles of the year 1662 except those of Bishops Hacket, of Lichfield, and Henchman, of Salisbury, who both expressly refer to the Act of Uniformity of that year. Upon the point in question Bishop Hacket inquires in 1662 thus: "Have you a decent surplice, one or more, for your parson, vicar, curate, or lecturer to wear in the time of all public ministrations? Hath he read the Book of Common Prayer as it is enjoined by the late Act of Uniformity for public prayer, administration of the Sacrament, &c., on some Sunday before the 24th Aug. last past, and did and doth he wear the surplice while he performed that office and other offices mentioned in that Common Prayer Book?" (*Ibid.* p. 609.) Bishop Henchman (*Ibid.* p. 611) inquires: "Doth your minister, reading Divine Service, and administering the Sacraments, and other rites of the Church, wear the surplice according to the canons?" Subsequently, in 1663, 1664, 1666, 1671, 1672, 1674, 1676, 1677, 1679, 1683, and 1686, articles to the same effect, in different forms, but all equally cogent, were administered by the other prelates, whose visitations have been referred to. Bishop Morley's form, adopted by nine other prelates in those years, and used by himself in 1674 (as he and nine others had also used it in 1662, when the form of the revised Rubric had been settled by the two Convocations, but before it became law), is this: Art. 5 (concerning churches, &c.), "Have you a comely, large surplice for the minister to wear at all times of his public ministration in the Church?" Art. 7 (concerning ministers): "Doth your minister, at the reading or celebrating any Divine Office in your church or chapel, wear the surplice, together with such other scholastical habit, as is suitable to his degree?" (*Ibid.* p. 615.) Bishop Henchman, in 1664 (then translated to London), and Bishop Pearson, of Chester, in 1674, used this form: Art. 7 (concerning churches, &c.): The same as Bishop Morley's. Art. 4 (concerning ministers): "Doth your minister, in the morning and evening service, in the administration of the Sacraments, and in performing other religious offices appointed by the Church of England, use the respective forms in the Book of Common Prayer, together with all those rites and ceremonies which are enjoined in this Church; and doth he make use of the surplice when he reads Divine Service or administers the Sacraments?" (*Ibid.*, pp. 632-642.) Bishops Morley and Henchman were two of the three prelates (Archbishop Sheldon being the third), who are stated by Baxter (*Life and Times*, 171-2), to have "managed all things" at the Savoy Conference. Archbishop Sheldon, in his circular letter to the official of his diocese in 1670 (2 Card. Doc. An. 276-9), directs them to require that all parsons, vicars, and curates, "in the time of their officiating, ever make use of and wear their priestly habit, the surplice and hood." Archbishop Sancroft, in 1686, also used Bishop Morley's form under the head "Concerning churches;" and under that "Concerning the clergy," his 7th article runs thus: "Doth your parson, vicar, or curate read Divine Service on all Sunday, and publicly administer the Holy Sacraments of Baptism and the Eucharist, and perform all other ministerial offices and duties, in such manner and form as is directed

by the Book of Common Prayer lately established, and the Act of Uniformity therewith published... without addition, diminution, or alteration? And doth he in those his ministrations wear the surplice, with a hood or tippet befitting his degree?" (*Ibid.*, p. 654). It was not disputed at the Bar that the subsequent practice in parish and non-collegiate churches till about 1840 or later was uniformly consistent with this view of the law. As public declarations of what was understood to be the state of the law shortly after the completion of the Revision in 1662, their Lordships may refer, in the first place, to the statement of Bishop Sparrow. Sparrow was Bishop of Exeter in 1684. He had been one of the Commissioners at the Savoy Conference. In 1665 he published his "Rationale" of the Book of Common Prayer, which then contained nothing as to the Ornaments Rubric or the ornaments of the minister. In 1684, after the revision, he published a new edition, and thus (p. 377) states the law as then understood. "The minister in time of his ministration shall use such ornaments as were in use in the 2nd Edward VI., Rubric 2, viz., a surplice in the ordinary ministration of the Holy Communion in cathedral and collegiate churches—Queen Elizabeth's Articles, set forth in the seventh year of her reign." Their Lordships may further refer to the alterations proposed by the commissioners of 1689 appointed to revise the Prayer Book, with a view to the relief of Dissenters (H. of Com. Papers, vol. 36, 1854). The Rubric proposed by them to be substituted for the Ornaments Rubric may be taken to be a statement of what, at that time, was understood to be the state of the law: "Whereas the surplice is appointed to be used by all ministers in performing Divine offices, it is hereby declared that it is continued only as being an antient and decent habit. But if any minister shall declare to his bishop that he cannot satisfy his conscience in the use of the surplice, in that case the bishop shall dispense with his not using it," &c. And the "Bill of Comprehension" introduced into Parliament by the king's authority about the same time contained a clause (M.S. in Burnet Papers, Cardw. Conf. p. 457), framed on the same principle. It is abundantly clear that, if any person had imagined that the Prayer Book of 1662 introduced a change on this subject, there were very many who would gladly have acted on it. No instance has been given of any person having acted on it. On the other hand, every one continued to act according to the old law, although, if the argument of the appellant is correct, every one in so doing was acting illegally. The practice,—consistent with the old law, inconsistent with the argument of the appellant,—has been uniform, open, continuous, and under authoritative sanction. What, then, in a question of this nature, is the weight in law of such contemporaneous and continual usage? Their Lordships may take the answer to the question from the words, either of Lord Campbell, in *Gorham v. Bishop of Exeter* (15 Q. B., 73, 74); or of Chief Baron Pollock in *Pochin v. Duncombe* (1 H. & N. 856); or of Dr. Lushington in *Westerton v. Liddell* (Moore, separate Report, 79). Lord Campbell, referring to a statute of 25 Hen. 8, c. 19, said: "Were the language of the statute obscure, instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous

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and long-continued usage. There would be no safety for property or liberty, if it could be successfully contended that all lawyers and statesmen have been mistaken for centuries as to the true meaning of an old Act of Parliament." Chief Baron Pollock, with reference to the maxim, "*Contemporanea expositio fortissima est in lege*," said: "The rule amounts to no more than this, that if the Act be susceptible of the interpretation which has thus been put upon it by long usage, the court will not disturb that construction." Dr. Lushington said: "Usage, for a long series of years, in ecclesiastical customs especially, is entitled to the greatest respect; it has every presumption in its favour; but it cannot contravene or prevail against positive law; though, where doubt exists, it might turn the balance." A Church Rubric, taking the form of directions to be acted on by large numbers of persons from week to week, and from day to day, is a subject above all others for exposition by contemporaneous and continual usage, and the principles laid down in the cases to which their Lordships have referred, fortified as they easily might be by many other authorities, seem to their Lordships to be decisive of the present question. What their Lordships have already said is sufficient to show that, in their opinion, according to the ordinary principles of legal construction and interpretation, the Ornaments Rubric of 1662, on the subject of the vestures of ministers, cannot, any more than the Rubric on the same subject which preceded it, be looked at otherwise than in connection with the Statute of 1 Eliz. c. 2. They may, however, also point out a singular incongruity which might arise from looking at it unconnected with the statute. The Rubric states that such ornaments of the ministers, at all times of their ministration, shall be retained and be in use as were in the Church by authority of Parliament in 1549, that is, under the First Prayer Book of Edward VI. But under the Book of 1549, the Rubric as to the vestures in the Communion Service is confined to that office, and the general Rubric at the end of the Book is confined to the saying, or singing, of Matins and Evensong, baptizing, and burying. There does not, therefore, appear in the Book of 1549 to be any imperative direction as to the use of the surplice or any other vesture in the marriage service, in the churching of women, or by ministers assisting the bishop in the office of Confirmation, in the Communion Service, or in the saying of the Litany, which in that book was not connected with Matins or Evensong. These omissions, however, were filled up by the advertisements issued under the statute which provided that every minister saying any public prayers, or ministering the Sacraments, or other rites of the Church, should wear a comely surplice. If, therefore, the Act and the advertisements are read in connection with the Rubric, the use in the latter of the words "at all times of their ministration" may be justified: whereas those words would be inaccurate if applied merely to the Prayer Book of 1549. The learned counsel for the appellant, in the course of their argument, placed considerable reliance on passages in certain books published during the eighteenth, and in the present centuries by writers who, however learned, were not entitled to speak with any legal authority, and some of whom appear to have expressed opinions adverse to the legality of the usage as to the vestures of clergy-

men, which they admit prevailed up to and at the time at which they wrote. It would, in the opinions of their Lordships, be contrary to well-settled principles of law to admit private opinions to control the legal interpretations of public documents, or the legal inferences from public acts or usage; but it may be not without advantage to point out the circumstances under which the opinion of these writers appear to have been expressed. One of the books referred to by the appellant's counsel was Dr. Thomas Bennett's Paraphrase, with Annotations upon the Book of Common Prayer. The second edition of this book was published in 1709, and the earlier edition (the date of which their Lordships have not observed) must have been still nearer the year 1662. Both editions were published before Cosin's Notes on the Prayer Book were printed, and their Lordship's will, in the first place, refer to those notes, and to the writers who followed. Three sets of Notes on the Prayer Book, as it stood before 1662, by Cosin, were published by Nicholl's in 1710, the first set being supposed to have been written by Cosin some time before, and the two others at different times after, 1630, but all before the revision of 1662. In the first Notes (Cosin's Works, v. 5, p. 42) he had originally suggested that the clergy, as the law then stood, were "all still bound to wear albs and vestments, howsoever it was neglected;" and that the 14th and 58th Canons of 1603-4 were inconsistent with each other. But perceiving, some time afterwards (at what time afterwards is uncertain) that he had, in making that note, overlooked the terms of the statute (1 Eliz., c. 2, s. 25), he added: "But the Act of Parliament, I see, refers to the canon, and until such time as other order shall be taken." In another passage of the same set of notes (*Ibid.*, p. 90), he had distinctly recognised the authority of those articles of the advertisements which relate to this matter, as a due exercise of the powers given to the Crown by that statute, with reference to a point which might depend on sect. 26 rather than on sect. 25. "For cathedral churches," he there says, "it was ordained by the advertisements in Queen Elizabeth's time (that authority being reserved, notwithstanding this book, by Act of Parliament), that there should be an epistoller and gospeller, besides the priest, &c." And, in the execution of his official duty as Archdeacon of the East Riding of York, in 1627, he administered to the churchwardens then under his jurisdiction very stringent articles (not adopted without change from forms previously in use, but revised and altered under his own hand), in which the use of the surplice by the parochial clergy, when administering the Sacraments, was treated as legally necessary, and never to be omitted. (See his Correspondence, published by the Surtees Society, v. 1, p. 106; and Preface; also Works, v. 2, p. 9). In his later notes, and also in his suggested corrections of the Prayer Book, he repeated the view which had been expressed in the uncorrected form of his first note, giving, however, no reason for that opinion, except such as may be inferred from a passage at p. 233 of v. 5 of his works, where, after quoting the words of 1 Eliz., c. 2, s. 25, he says, "which other order, so qualified as is here appointed to be, was never yet made." From this it may be concluded that Cosin's opinion at that time was founded either on some technical view of the informality of the advertise-

ments, or on some conclusions as to matters of fact, with respect to which, as they involved no question of peculiar ecclesiastical learning, his authority was certainly not greater than that of any other man. After the Restoration, Cosin was made Bishop of Durham; and in his Visitation Articles of 1662, already mentioned (which may be assumed, according to the appellant's argument, to have been anterior to St. Bartholomew's Day in that year), he still considered it to be his duty to treat the use of the surplice in the administration of both Sacraments as matter of legal obligation on all the parochial clergy. The result appears to be that the opinions recorded in the private notes of this divine, at different periods of his life, are not consistent with each other; while those of them which are adverse to the validity of the advertisements are inconsistent with his official acts done in the exercise of a legal jurisdiction, and in the discharge of his public duty, both before and afterwards. The private notes of Cosin, however, originally written before 1662, and made known to the public half a century or more after they were written, appear to have been adopted without much examination by writers who followed. Bishop Gibson, in the "Codex" published in 1713, apparently echoing Cosin's words, says: "Which other order (at least in the method prescribed by this Act) was never yet made; and, therefore, legally, the ornaments of ministers, in performing Divine Service, are the same now as they were in 2 Edw. 6." Burn, in his ecclesiastical law, follows Gibson, as Gibson had followed Cosin. Dr. Cardwell, the last author cited, erroneously supposed that there was a judicial decision which had established that an instrument under the great seal was necessary for a due execution of the Parliamentary power, and, for that reason only, he concluded that the book of advertisements had not the force of law. (Cardwell, Confer., p. 38, note). Their Lordships will now refer to the opinion expressed by the other author, Bennett, already mentioned, whose work was published before Cosin's notes were made public. He states (Paraphrases with Annotations upon the Book of Common Prayer, 2nd edit. pp. 4, 5) the Rubrics of 1549, 1559, and 1662, and then proceeds thus: "From hence it seems to follow that the present Rubric, and that of Queen Elizabeth, which are in effect the very same, do restore those ornaments which were abolished by King Edward 6's second book, and which, indeed, have been disused ever since that time. But it must be considered that in the latter part of the Act of Uniformity, 1 Eliz., there is this clause, "until other order," &c.; this clause explains Queen Elizabeth's Rubric, and, consequently, the present one, which is, in reality, the same. So that those ornaments of the church and its ministry which were required in the second year of King Edward were to be retained till the Queen (and, consequently, any of her successors), with the advice before specified, should take other order. Now, such other order was accordingly taken by the Queen in the year 1564, which was the seventh of her reign. For she did then, with the advice of her Ecclesiastical Commissioners, particularly the then Metropolitan, Dr. Matthew Parker, publish certain advertisements, wherein are the following directions: " [He then quotes the advertisements, and afterwards states the canons.]

"From hence it is plain that the parish priests (and I take no notice of the case of others) are obliged to use no other ornaments but surplices and hoods. For these are authentic limitations of the Rubric, which seems to require all such ornaments as were in use in the second year of King Edward's reign. Besides, since from the beginning of Queen Elizabeth's reign down to our own times, the disuse of them has most notoriously been allowed; therefore, though it were not strictly reconcilable with the letter of the Rubric, yet we cannot be supposed to be under any obligation to restore the use of them, and, indeed, if that practice which our governors do openly and constantly permit and approve be not admitted for a good interpretation of laws, whether ecclesiastical or civil, I fear it will be impossible to clear our hands of many repugnances of different kinds besides this under debate." It only remains to consider the bearing on this part of the present case of the former decisions of the judicial committee in *Liddell v. Westerton* and *Martin v. Mackonochie*. As to *Liddell v. Westerton*, everything said and done in that case to which the Rubric of 1662 was material, had reference exclusively to ornaments of the church. The court had "nothing to do with the ornaments of the minister or anything appertaining thereto."—(Moore's separate Rep. p. 31). The questions whether the power of the Crown, under the 1 Eliz. c. 2, s. 25, had ever been duly exercised, and (if so) with what effect; whether the Rubric of 1662 was to be read with that section, as a law still in force, or not; what would be the effect of so reading it, and whether any aid towards the solution of those questions might be derivable from usage, either before or after 1662, and what such usage had been, were none of them before Dr. Lushington, or the Court of Arches, or the Judicial Committee. It was not suggested that anything had ever been done under the 1st Eliz., c. 2, sect. 25, as to any "Ornaments of the Church." Under these circumstances it was sufficient, as well as most convenient, to refer to the rubric, and to that alone; the effect of which was, as to that matter, simply coincident and identical with that of the section in the Act of Elizabeth, assuming it to be then in force. It is perfectly consistent that the rubric should speak with the authority of the statute, so far as the language and effect of both are identical, and yet should not supersede or control the operation of that part of the statute which it does not in terms repeat. It is true that Dr. Lushington did, in more than one passage of his judgment, signify his assent to what he described as the "irresistible argument that the last Statute of Uniformity, by referring to the First Book of Common Prayer of Edward VI., excluded not only the Second Book but everything else effected in the interval between 1549 and 1662, whether by Act of Parliament or by canon, which could or might have altered what existed in 1549; and, consequently, that nothing done from 1549 to 1662, however lawful during that period, had in itself force or binding authority after the statute of 1662 came into operation." Everything which fell from that very learned judge is entitled to most respectful consideration; but he had not been (as their Lordships now have been) upon the path of inquiry which was really necessary to support or to disprove that proposition. Nothing

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to the same effect is to be found in the judgment of the Judicial Committee, which overruled that part of Dr. Lushington's judgment in which these *dicta* occur, reversing his decision and that of the Court of Arches as to the crosses not connected with the Communion Table; and also rejecting as erroneous his view of the meaning of the words "ornaments of the church" as used in the rubric; which view had nevertheless been held in both the courts below to be clear and indisputable. There is, however, in the judgment of the Judicial Committee, delivered by Mr. Pemberton Leigh, the following passage, which has been much relied on by the appellant:—"It will be observed that this rubric (that of 1559) does not adopt precisely the language of the statute, but expresses the same thing in other words. The Statute says: 'such ornaments of the church, and of the ministers thereof, shall be retained and be in use;' the rubric 'that the minister shall use such ornaments in the church.' The Rubric to the Prayer Book of Jan. 1, 1604, adopts the language of the Rubric of Elizabeth. The Rubric to the present Prayer Book adopts the language of the statute of Elizabeth. But they all obviously mean the same thing; that the same dresses, and the same utensils, or articles which were used under the First Prayer Book of Edward VI., may still be used. None of them, therefore, can have any reference to articles not used in the services, but set up in churches as ornaments in the sense of decorations." This passage has been the subject, as it appears to their Lordships, of remarkable misconception. It was sufficient for the purpose of the question as to crosses then before the Judicial Committee, to consider only the meaning of the exact words of the rubric itself, standing alone, and the words corresponding to them which were found in the statute of Elizabeth and the Rubric of 1559; and to do this with a view only to the interpretation of the two particular phrases, "ornaments of the church," and "by authority of Parliament in the second year of the reign of King Edward VI." For that purpose of verbal exposition the statement in this passage of the judgment (with the exception of a somewhat inaccurate expression as to the Rubric of 1604) was unexceptionally correct. The words of the Rubric of 1662, standing alone, and the corresponding words in the statute of Elizabeth and the Rubric of 1559 and 1604, do mean what is there stated, neither more nor less. In the Act of Elizabeth there are other and further words, the effect of which, if still in force, is in the present case very important; but in that part of the judgment of *Liddell v. Westerton* any examination of the effect of those words, or of the questions arising out of them with reference to any ornaments of the ministers of the church, would have been absolutely irrelevant. Judges weigh their words with reference to the questions which they have to consider, and not with reference to questions which are not before them. If what was then said could properly be applied to a purpose not then in contemplation, the statement that the words of the 25th section of the Act of Elizabeth, the Rubric of 1559 and 1604, and the Rubric of 1662, "all obviously mean the same thing," might more reasonably be alleged in proof that the Judicial Committee thought the words "according to the Act of Parliament set forth in the beginning of this book," or the words

"until other order taken therein," &c., were still implied at the end of the Rubric of 1662, then the succeeding words can be relied on to show that they held all the vestures of the clergy prescribed by the first Book of King Edward to be lawful at all the three epochs referred to—1559, 1604, and 1662. With respect to the decision of the Judicial Committee in *Martin v. Mackonochie*, little need be said. There, too, it was sufficient to consider the effect of the mere words of the Rubric of 1662, repeating (as it did) in 1662 the language of the Act of the first year of Elizabeth, on a point unaffected by anything done in the meantime. The points determined in *Liddell v. Westerton* are succinctly stated, approved, and followed. There is no reference to the particular passage in the judgment of *Liddell v. Westerton* on which the appellant's counsel rely; though, if there had been, their Lordships would have been of opinion, for the reasons already stated, that the present question would be in no way affected by it. Their Lordships, for these reasons, which, out of respect for the elaborate arguments so earnestly addressed to them, and not from any hesitation as to the decision at which they should arrive, they have expressed at a length greater than is usual, are of opinion that the decision of the learned judge of the Arches Court as to the vestments worn by the appellant, following that of this committee in *Hebbert v. Purchas*, is correct, and ought to be affirmed. Their Lordships will now proceed to consider the charge against the appellant with reference to his position during the Prayer of Consecration. The allegation upon that head is that the appellant, when officiating in the service of the Holy Communion, unlawfully stood, while saying the Prayer of Consecration in the said service, at the middle of the west side of the communion table, such communion table then standing against the east wall, with its shorter sides towards the north and south, in such wise that during the whole time of his saying the said prayer he was between the people and the communion table with his back to the people, so that the people could not see him break the bread or take the cup in his hand. The rule by which the position of the minister during the celebration of the Holy Communion is to be determined, must be found in the rubrical directions of the communion office in the Prayer Book, there being, as to this matter, nothing in any statute to control or supplement those directions. In examining these directions, their Lordships propose to put aside the argument, very much pressed upon them, that the proper and only proper position for the communion table is in the body of the church, or in the middle of the chancel, and that it is in a wrong position when placed, at the time of the Communion Service, along the east wall. They think this argument has no sufficient foundation. No charge is made that in the church of the appellant the communion table stood where it ought not to have stood, and, in the opinion of their Lordships, no such charge could have been sustained. The rubric, indeed, contemplates that the table may be removed at the time of the Holy Communion; but it does not, in terms, require it to be removed. Morning and evening prayer are, according to one of the early rubrics of the Prayer Book, to be used in the accustomed place of the church, chapel, or chancel. In churches, where it is customary to use both the chancel and body of

the church, or the chancel alone, for morning and evening prayer, the direction that the table shall stand "where morning and evening prayer are appointed to be said," is satisfied without moving it. That direction cannot be supposed to mean that the position of the table is to be determined by that of the minister's reading desk or stall only, the service being "used" and "said" by the congregation as to the part in it assigned to them, as well as by the minister. The practice as to moving or not moving the table has varied at different times. It was generally, if not always, moved, in the earlier part of the post-Reformation period. When the revision of 1662 took place, and when the present rubric before the prayer of consecration was for the first time introduced, it had come to be the case that the table was very seldom removed. The instances in which it has been removed may be supposed from that time to have become still more rare; and there are now few churches in the kingdom in which, without a structural rearrangement, the table could be conveniently removed into the body of the church. The utmost that can be said is, that the rubrics are to be construed so as to meet either hypothesis. Their Lordships have further to observe that the rubrics assume that, before the prayer of consecration is reached, those who intend to communicate will have drawn near to the communion table, wherever it may be placed, so as to concentrate the communicants near it or round it, and thus enable them to witness the ministration more easily than if they had remained in their places throughout the church. It is proper also to point out that the term "east" or "eastward" nowhere occurs in the rubrics. From the mention that is made of the north side, it seems to be supposed that in all churches that expression would represent a uniform position, and there is no doubt that from the almost universal eastward position of churches in England this would be the case; but the north is the only point of the compass which is actually referred to. During several portions of the communion office the minister is directed, either expressly or by reference or implication, to stand at the north side of the table. Where this is the case their Lordships have no hesitation in saying that whether the table is placed altar-wise along the east wall, or standing detached in the chancel or church, it is the duty of the minister to stand at the side of the table which, supposing the church to be built in the ordinary eastward position, would be next the north, whether that side be a longer or shorter side of the table. No doubt in a certain context the word "side" might be so used as to be shown by that context to be contradistinguished from the top, or bottom, or end of a subject of quadrilateral or any other figure. But for this purpose a determining context is necessary. In the absence of such a context it is accurate, both in scientific and in ordinary language, to say that a quadrilateral table has four sides. In the rubrics not only is there no context to exclude the application of that term to the shorter as well as the longer sides; but the effect of the context is, as it appears to their Lordships, just the reverse. The direction is absolute, and has reference to one of the points of the compass, which are fixed by nature; the figure and the position of the table are not fixed either by nature or by law; and the purpose of

the direction is to regulate, not one part or another of the table, but the position of the minister with reference thereto. Under these circumstances, it seems extravagant to put on the word "side" a sense more limited than its strict and primary one, for the purpose of suggesting difficulties in acting upon the rule, which for nearly two centuries were never felt in practice, and which would not arise if the strict and primary sense were adhered to. If it were necessary that there should be extracted from the rubrics a rule governing the position of the minister throughout the whole communion office, where no contrary direction is given or necessarily implied, the rule could not, in their Lordships' opinion, be any other than that laid down in *Hebbert v. Purchas*, and they entertain no doubt that the position which would be required by that rule—a position, namely, in which the minister would stand at the north side of the table, looking to the south—is not only lawful, but is that which would, under ordinary circumstances, enable the minister, with the greatest certainty and convenience, to fulfil the requirements of all the rubrics. The case, however, with which their Lordships have to deal is one which may assume the character of a penal charge. It might be a penal charge against the present appellant that he has stood, during the prayer of consecration, on the west side of the table; and on the other hand, on a construction of the rubric the opposite of that contended for by the respondents, a penal charge might be maintained against a priest who stood at the north side. It is therefore necessary to be well assured, both that there is a direction free from ambiguity that the priest should stand, during this particular prayer, either at the north or at the west side, and also that no other test is supplied by the Rubric in question which would be a sufficient and intelligible rule for the position, at that part of the service, of the priest. Their Lordships have therefore to consider the precise wording of the Rubric preceding the Prayer of Consecration taken in connection with the prayer itself. It is to be observed that the revision in 1662 introduced for the first time the breaking of the bread as one of the manual acts to be done during the Prayer of Consecration, and that, although some of the other manual acts, namely, the taking the bread and the cup into the priest's hands, had been mentioned in the Rubric of the First Prayer Book of Edward VI., they had not been contained in the Second Prayer Book of that Sovereign, or in the Prayer Books of Elizabeth or James I. The Rubric "That he may with the more readiness and decency break the bread before the people," &c., was also new; and it is not impossible that one of the reasons for its introduction may have been to meet one of the demands or suggestions of the Puritan party, who had proposed a form of service in which the priest was to be ordered to break the bread "in the sight of the people" (4 Hall. Reliq. Liturg.) Their Lordships are of opinion that the words "before the people," coupled with the direction as to the manual acts, are meant to be equivalent to "in the sight of the people." They have no doubt that the Rubric requires the manual acts to be so done, that, in a reasonable and practical sense, the communicants, especially if they are conveniently placed for receiving of the Holy Sacrament, as is presupposed in the office, may be witnesses of,

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that is, may see them. What is ordered to be done before the people, when it is the subject of the sense, not of hearing, but of sight, cannot be done before them unless those of them who are properly placed for that purpose can see it. It was contended that "before the people" meant nothing more than "in the church;" to guard against an anterior and secret consecration of the elements. But if the words "before the people" were absent, the manual acts, and the rest of the service, could not be performed elsewhere than in the church, and in that sense *coram populo*, nor could the sacrament be distributed except in the place and at the time of its consecration: and this argument would, therefore, reduce to silence the words "before the people," which are an emphatic part of the declaration of the purpose for which the preparatory acts are to be done. That declaration applies not to the services as a whole, nor to the consecration of the elements as a whole, but to the manual acts, separately and specifically. There is, therefore, in the opinion of their Lordships, a rule sufficiently intelligible to be derived from the directions which are contained in the Rubric as to the acts which are to be performed. The minister is to order the elements "standing before the table:" words which, whether the table stands "altarwise" along the east wall, or in the body of the church or chancel, would be fully satisfied by his standing on the north side and looking towards the south; but which also, in the opinion of their Lordships, as the tables are now usually, and in their opinion lawfully, placed, authorise him to do those acts standing on the west side and looking towards the east. Beyond this and after this there is no specific direction that, during this prayer, he is to stand on the west side, or that he is to stand on the north side. He must, in the opinion of their Lordships, stand so that he may, in good faith, enable the communicants present, or the bulk of them, being properly placed, to see, if they wish it, the breaking of the bread, and the performance of the other manual acts mentioned. He must not interpose his body so as intentionally to defeat the object of the Rubric and to prevent this result. It may be difficult in particular cases to say exactly whether this rule has been complied with; but where there is good faith the difficulty ought not to be a serious one; and it is, in the opinion of their Lordships, clear that a protection was in this respect intended to be thrown around the body of the communicants, which ought to be secured to them by an observance of the plain intent of the Rubric. In applying these principles to the present case, their Lordships find that some difficulty has arisen from the circumstances under which the evidence was taken. The charge against the appellant was a twofold one; both that he had stood at the middle of the west side with his back to the people, and that the people could not see him break the bread or take the cup in his hand. The witness Nicholson undoubtedly states that, at the service of which he speaks, while sitting in the nave, he could not see the appellant perform the manual acts; and the witness Bevan gives evidence to the same effect. But with regard to Nicholson, he explains, as their Lordships understand his evidence, that, whether persons could see what the appellant was doing would depend on whether they were sitting immediately behind him or were sitting on one

side or the other; and with regard to Bevan, he states that, what would have prevented a man who sat at the side from seeing what the appellant did, was, that he had on a chasuble, "which is a sort of cloak which spreads his body out." When the appellant himself was examined, he does not appear to have been asked any question on the subject; and the inference which their Lordships draw from the whole examination is, that inasmuch as at that time it was understood to be the law, founded on the decision in *Helbert v. Purchas*, that the standing on the west side of the table was, of itself and without more, unlawful, neither party thought it important to carry the evidence with any precision beyond this point, the respondents thinking they had established their case, and the appellant not being prepared to dispute the fact of the position in which he stood. Their Lordships are not prepared to hold that a penal charge is established against the appellant merely by the proof that he stood while saying the Prayer of Consecration at the west side of the Communion Table, without further evidence that the people could not, in the sense in which their Lordships have used the words, see him break the bread or take the cup into his hand, and they will therefore recommend that an alteration should be made in the decree in this respect. Their Lordships, before leaving this part of the case, think it right to observe that they do not consider the judgment in the case of *Martin v. Mackonochie* to have any material bearing on the question now before them. The decision in that case was that the priest must stand during the Prayer of Consecration, and not kneel during a part of it. The correctness of that decision has not been, and, as their Lordships think, cannot be, questioned. Nothing is more clear throughout the Rubrics of the Communion office than that when the priest is intended to kneel, an express provision is made on the subject. The conclusion, however, in *Martin v. Mackonochie*, is expressed, perhaps, more broadly than was necessary for the decision. What was obviously meant was that the posture of standing was to be continued throughout the whole of the prayer. Nothing was or could be decided as to the place in which the priest was to stand, for that question was not raised, and was not in any manner argued, in the case. Their Lordships will now proceed to the charge as to wafer or wafer-bread. The charge as to this is "that the appellant used in the Communion Service and administration wafer-bread or wafers, to wit, bread or flour made in the form of circular wafers instead of bread such as is usual to be eaten." And this is traversed by the appellant. It appears that the allegation is in the same form as that used in the *Purchas* case; but in that case the defendant did not appear, and no criticism seems to have taken place as to the form of the allegation or its sufficiency. It is probable that the allegation was meant to raise the question as to the legality of the wafer, as distinguished from bread of the kind "usual to be eaten," and there are certainly some indications that the appellant and his counsel so understood, and meant to meet, the charge. A different view has, however, been taken by the counsel for the appellant on this appeal, and they have maintained that there is no averment that the wafer, as distinguished from bread ordinarily eaten, was used. They contend that the charge goes to the shape, and not to the composition, of the sub-

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stance. Their Lordships are of opinion that this objection must prevail. The charge, in their opinion, is consistent with the possibility of it having been the fact that bread "such as is usual to be eaten," but circular, and having such a degree of thinness as might justify its being termed wafers, was what was used. And if this is what was used, their Lordships do not think it could be pronounced illegal. As, however, the question of the construction of the rubric has been raised on this appeal, as it was in the *Purchas* case, their Lordships think it right to express their opinion upon it, at the same time that they give the appellant the benefit of the ambiguity which exists in the form of the charge. It is to be observed that the rubric does not in any part of it use the term "wafer." The words are "bread"—"bread such as is usual to be eaten," and "the best and purest wheat bread that conveniently may be gotten." Their Lordships have no doubt that a wafer, in the sense in which the word is usually employed, that is, as denoting a composition of flour and water rolled very thin and unleavened, is not "bread such as is usual to be eaten," or "the best and purest wheat bread that conveniently may be gotten." The only question on the construction of the rubric is that raised upon the words "it shall suffice." There is no doubt that in many cases these words, standing alone, and unexplained by a context, would be quite consistent with something different from, larger or smaller, more or less numerous, more or less costly, than what is mentioned, being supplied. Here, however, the sentence commences with the introduction: "To take away all occasion of dissension and superstition, which any person hath or might have concerning the bread, it shall suffice," &c. These words seem to their Lordships to make it necessary that that which is to take away the occasion of dissension and superstition should be something definite, exact, and different from what had caused the dissension and superstition. If not, the occasion of dissension remains, and the superstition may recur. "To suffice," it must be as here described. What is substantially different will not "suffice." The rubric, which orders that the bread and wine shall be provided by the curate and churchwardens at the charges of the parish, seems to contemplate ordinary bread as the only material to be used, and the 20th canon is still more precise in the same direction. The former rubric (of 1552, 1559, and 1604) had said, "It shall suffice that the bread be such as is usually to be eaten at the table with other meats, but the best and purest wheat bread that conveniently may be gotten." Queen Elizabeth's injunction of 1559 on the same subject (in its form mandatory, and acted upon for many years afterwards), was issued when this rubric had the force of law, and must be understood in a sense consistent with, and not contradictory to it. That injunction distinguishes between (1 Card. Doc. Ann. 202) "the sacramental bread" and "the usual bread and water, heretofore named singing cakes, which served for the use of the private mass;" directing the former to be "made and formed plain, without any figure thereupon, and of the same fineness and fashion round" as the latter, but "to be somewhat bigger in compass and thickness." The form, and not the substance, is here regulated. To order the use of the substance properly called "wafer," which was

not "bread such as is usual to be eaten at the table" would have been directly contradictory to the rubric; and this cannot be supposed to have been intended. There was evidently "dissension" on this subject, and some diversity of practice, in the reign of Elizabeth. It appears from passages in the fourth book of the "Ecclesiastical Polity" (1 Hooker's Works by Keble, 6th edition, pp. 449-451,) published in 1594, that Hooker considered the use, either of leavened or of unleavened bread, to be at that time lawful. But the point was one as to which controversy then existed, and had given occasion to strife. In 1580, Chaderton, bishop of Chester, acting as commissioner in Lancashire, under the Crown, applied to the Privy Council for instructions as to "two special points worthy of reformation;" one of which was "for the Lord's Supper, with wafers, or with common bread?" The Lords of the Council replied (26th July, 1580) that they thought both points ought to be referred to the consideration of Parliament; adding, "In the meantime, for the appeasing of such division and bitterness as doth and may arise of the use of both these kinds of bread, we think it meet, that in such parishes as do use the common bread, and in others that embrace the wafer, they be severally continued as they are at this present. Until which time, also, your Lordship is to be careful, according to your good discretion, to persuade and procure a quietness amongst such as shall strive for the public maintaining either of the one or the other." (Peck's *Desiderata Curiosa*, p. 91). In a later letter, the Bishop recurred to the same question, and was thus answered (21st Aug. 1580), by Lord Burghley and Sir Francis Walsingham: "Concerning the last point of your letter, contained in a postscript, whereby appeareth that some are troubled about the substance of the communion bread, it were good to teach them that are weak in conscience, in esteeming of the wafer bread, not to make difference. But, if their weakness continue, it were not amiss, in our opinions, charitable to tolerate them, as children with milk. Which we refer to your Lordship's better consideration." (*Ibid.*, p. 94). In 1584, Bishop Overton, of Lichfield, issued an injunction to the clergy of his diocese: "That the ordinance of the Book of Common Prayer be from henceforth observed in this, that the bread delivered to the communicants be such as is usual to be eaten at the table with other meats, yet of the purest and finest wheat; and no other bread to be used by the minister, nor to be provided for by the churchwardens and parishioners, than such finest common bread." (Appendix to 2nd Report of Rit. Comm., p. 430.) The 20th Canon of 1603-4, already mentioned, seems to have proceeded on the same view of the law; and, after the passing of that canon, the usual form of inquiry in the Visitation Articles of Bishops and Archdeacons (e.g., Archbishop Bancroft in 1605, Bishop Babington, of Worcester, in 1607; and Bishop Andrewes in 1619), was whether the churchwardens always supplied, for the Holy Communion, "fine white bread." The same form of inquiry continued to be generally used after the rubric had been altered, upon the Revision of 1662, so as to express its purpose to be, "to take away all occasion of dissension," as well as of "superstition" (which alone had been previously mentioned). The same motive had been expressed in the rubric of King

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Edward's first Prayer Book, "for avoiding all matters and occasion of dissension" ("superstition" not being then added); when the opposite course was taken, of requiring unleavened bread, of a certain form and fashion, to be everywhere and always used. The practice of using fine wheat bread such as is usual to be eaten, and not cake or wafer, appears to have been universal throughout the Church of England from the alteration of the rubric in 1662, till 1840, or later. Their Lordships think that if it had been averred and proved that the wafer, properly so called, had been used by the appellant, it would have been illegal, but as the averment and proof is insufficient, they will advise an alteration of the decree in this respect. There remains to be considered the charge as to the crucifix. As to this the allegation is, that the appellant unlawfully set up and placed upon the top of the screen separating the chancel from the body or nave of the church, a crucifix and twenty-four metal candlesticks, with candles which were lighted on either side of the crucifix. This charge was accompanied by two other charges, in respect of which the appellant has been admonished to abstain from the acts complained of, and to this part of the monition he has submitted. One of these charges was for having formed and accompanied a procession from the chancel, down the north aisle and up the nave back to the chancel again, on the occasion of public service, those taking part in the procession at one time falling upon their knees, and remaining kneeling for some time. The other charge was the setting up, attached to the walls of the church, representations of figures, in coloured relief of plastic material, purporting to represent scenes of our Lord's passion, and forming what are commonly called stations of the cross and passion, such as are often used in Roman Catholic churches. The learned judge, whose decision is under appeal, thus describes the screen and crucifix: "There is a screen of open ironwork some 9ft. high stretching across the church at the entrance to the chancel; the middle portion of this screen rises to a peak, and is surmounted by a crucifix or figure of our Saviour on the Cross in full relief and about 18in. long—this is the crucifix complained of. The screen of course, from its position, directly faces the congregation, and the sculptured or moulded figure of our Lord is turned towards them. There is, further, a row of candles at distances of nearly a foot apart all along the top of the screen, which is continued up the central and rising portion of it, the last candles coming close up to the crucifix on either side, so that when the candles are lighted for the evening service, I should presume that the crucifix would stand in a full light." For the erection of this screen at the entrance of the chancel, in the form in which it is now found there, and surmounted by the crucifix in question, their Lordships think it clear that no faculty has been obtained. There is, indeed, a faculty, dated the 23rd of Aug. 1870, authorising the building of "a dwarf wall with screen thereon of light ironwork between the chancel and the nave;" and this faculty appears to have been granted with reference to a ground plan annexed to the petition for the faculty; which ground plan specifies the place where this screen of light ironwork was to be erected. But no further information was given to the ordinary of the character of the structure, much less of the crucifix by which

it was to be surmounted. Technically, therefore, it must be held that, in the absence of a proper faculty, the crucifix was unlawfully set up and retained. If, however, their Lordships were of opinion that the case was one in which, under all the circumstances, the ordinary, on the application for a faculty, ought to grant, or might properly grant, a faculty, they might probably have thought it right, before pronouncing any judgment, to have given an opportunity to the appellant to apply for a faculty. Their Lordships, however, are of opinion that, under the circumstances of this case, the ordinary ought not to grant a faculty for the crucifix. The learned judge refers to two cases, decided by this tribunal, which have a material bearing upon the present question. The first of these was the case of *Liddell v. Westerton* (Moore's Special Report). In this case, as the learned judge states, the court had to pronounce upon the legality of a cross set up in the appellant's church. And it was decided that, although before the reformation the symbol of the cross had no doubt been put to superstitious uses, "yet that crosses, when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, may still lawfully be erected as architectural decorations," and that the wooden cross erected in that particular case "was to be considered a mere architectural ornament." The court determined nothing directly as to the legality of a crucifix, but was at great pains throughout the judgment to point out that crosses were to be distinguished from crucifixes, saying that "there was a wide difference between the cross and images of saints, and even, though in a less degree, between a cross and a crucifix," the former of which, they said, had been "used as a symbol of Christianity two or three centuries before either crucifixes or images were introduced." The other case is that of *Philpott v. Boyd* (L. Rep. 6 P. C. 435). As to this case, the learned judge states that this tribunal, in justifying the erection of the Exeter rood, adhered entirely and very distinctly to the position taken up in the previous case, and pronounced that erection lawful, though it included many sculptured images, on the express ground "that it had been set up for the purpose of decoration only," declaring that it was "not in danger of being abused," and that "it was not suggested that any superstitious reverence has been, or is likely to be, paid to any of the figures upon it." The learned judge then proceeds to consider whether it would be right to conclude that the crucifix in the present case was set up for the purposes of decoration only; whether it is in danger of being abused, and whether it could be suggested that superstitious reverence had been, or was likely to be, paid to it. The learned judge states that the crucifix, as formerly set up in our churches, had a special history of its own. He refers to the rood ordinarily found before the reformation in the parish churches of this country, which was, in fact, a crucifix with images at the base, erected on a structure called the rood loft, traversing the church at the entrance to the chancel, and occupying a position not otherwise than analogous to that which the iron screen does in the present case. He refers to the evidence as to the preservation of the crucifixes or roods during the reign of Queen Mary, and of their destruction, as monuments of idolatry and supersti-

tion, in the reign of Elizabeth. He takes notice of a letter of Bishop Sandys in 1561 in the Zurich Letters, first series, p. 73, in which he states: "We had not long since a controversy respecting images. The Queen's Majesty considered it not contrary to the Word of God, nay, rather for the advantage of the Church, that the image of Christ crucified, together with Mary and John, should be placed, as heretofore, in some conspicuous part of the church, where they might more readily be seen by the people. Some of us thought far otherwise, and more especially as all images of every kind were at our last visitation not only taken down, but also burnt, and that too, by public authority, and because the ignorant and superstitious multitude are in the habit of paying adoration to this idol above all others." The learned judge arrives at the conclusion that the crucifix so placed formed an ordinary feature in the parish churches before the Reformation, and that it cannot be doubted that it did so, not as a mere architectural ornament, but as an object of reverence and adoration. He further points out that the worship of it was enjoined in the Sarum Missal, in which the order of service for Palm Sunday ends with the adoration of the rood by the celebrant and choir before passing into the chancel. And to this reference might be added one to the order for the Communion according to the Hereford use, in which there is a prayer with this introduction, "Postea sacerdos adorans crucifixum dicat." Proceeding then on these considerations, and dealing with a Church in which was found not merely an illuminated crucifix, but also those stations of the cross and other acts in the conduct of the services, the illegality of which the appellant does not challenge in his appeal, the judge continues thus:—"It is no doubt easy to say, what proof is there of danger of idolatry now? What facts are there to point to a probability of 'abuse'? But when the Court is dealing with a well-known sacred object—an object enjoined and put up by authority in all churches of England before the Reformation, in a particular part of the church and for the particular purpose of 'adoration'—when the Court finds that the same object, both in the church and out of it, is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that, now, after a lapse of 300 years, it is suddenly proposed to set up again this same object in the same part of the church as an architectural ornament only, it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in 'decoration' may end in 'idolatry.' If this apprehension is a just and reasonable one, then there exists that likelihood and danger of 'superstitious reverence' which the Privy Council in *Philpotts v. Boyd* pronounced to be fatal to the lawfulness of all images and figures set up in a church." In these observations of the learned judge their Lordships concur; and they select them as the grounds of his decision which commend themselves to their judgment. They are prepared, under the circumstances of this case, to affirm the decision directing the removal of the crucifix, while at the same time they desire to say that they think it important to maintain, as to representations of sacred persons and objects in a church, the liberty established in *Philpotts v. Boyd* subject to the power and duty of the ordinary so to exercise his judicial discretion in granting or refusing faculties, as to guard against things likely

to be abused for purposes of superstition. On the whole, therefore, their Lordships will humbly recommend Her Majesty to affirm the decree of the Court of Arches, except as regards the position of the minister and the use of wafer-bread or wafers; and as to these excepted matters they will humbly advise Her Majesty that inasmuch as it is not established to their satisfaction that the appellant, while saying the Prayer of Consecration, so stood that the people could not see him break the bread or take the cup into his hand, as alleged in the representation; and, inasmuch as it is not alleged or proved that what was used by him in the administration of the Holy Communion was other than bread such as is usual to be eaten, the decree of the Court of Arches should be in these respects reversed. And they will further humbly advise her Majesty that in respect of the charges as to which the decree is reversed, the costs in the Court of Arches should be paid by the respondents to the appellant; and further that there should be no costs of this Appeal.

Solicitors for the appellants, *Brooks, Jenkins, and Co.*

Solicitors for the respondents, *Moore and Curry.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, May 7, 1877.

RUMSEY v. NICHOLL. (a)

Pleading—Ejectment from rectory house and glebe—Demurrer.

A statement of claim alleged that in 1864 the plaintiff was presented, instituted, and inducted to the rectory and living of L., and in Jan. 1867 he obtained leave from the patron to exchange livings with some clergyman to be approved by the patron; that the patron approved of one P., incumbent of the living of O. (with whom the plaintiff was negotiating), and promised to do all things necessary to carry out the proposed exchange with P.; and to carry out the exchange the plaintiff executed a deed of resignation of his living of L., and delivered it to the registrar of the Bishop of the Diocese; that before delivering the deed the plaintiff, with the knowledge and assent of the patron, had obtained the permission of the bishop to exchange livings with P., and that at the time of delivering the deed the plaintiff explained fully to the registrar his object and intention in executing and delivering it, and the registrar, on behalf of the bishop, accepted it for that purpose only; and that at the time of the execution and delivery the bishop, the registrar, and the patron well knew that the deed was executed and delivered by the plaintiff in reliance on and in consideration of the promise made by the patron, and with full intention on the part of the plaintiff that if the exchange should not be carried out the deed of resignation was to be void to all intents, &c.

The statement also alleged that the patron did not fulfil his promise, &c., or do what was necessary

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

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to carry out the exchange of livings, &c., but falsely claimed the right to present, and did present the defendant to the plaintiff's living of L., and that the defendant, with full knowledge of all the premises, accepted the presentation and ejected the plaintiff, and has since kept possession of the glebe lands, rectory, and living of L., and received the profits thereof, &c.

The plaintiff claimed possession of the rectory, glebe, and meane profits during the defendant's possession.

The defendant demurred.

Held (affirming, but on different grounds, the judgment of Denman, J. in the Common Pleas Division), that the statement of claim was bad, as it did not sufficiently allege that the registrar accepted the plaintiff's deed of resignation subject to the condition that the deed was to be void if the exchange of livings was not effected.

In an action of ejectment the plaintiff's statement of claim was as follows:

1. In the year 1864 the plaintiff was presented, instituted, and inducted to the rectory and living of Llandough, in the county of Glamorgan, and entered into possession of the rectory house, glebe lands, and profits of the said rectory and living, and continued therein until dispossessed as hereinafter mentioned.

2. In or about the month of January 1867, the plaintiff requested permission from C. R. Mansel Talbot, the patron of the said living of Llandough aforesaid, to exchange livings with some clergymen to be approved by the said patron.

3. The said patron granted the permission requested as aforesaid, and the plaintiff thereupon entered into negotiations with one Robert Pinckney, who was then the incumbent of the living of Chilfrome, in the county of Dorset, and the plaintiff subsequently submitted the name of Pinckney to the patron in terms of the arrangements aforesaid. The said patron, after making personal inquiries and satisfying himself by the said inquiries of the suitability of Pinckney, approved of the proposed exchange of livings and promised that he would do all things necessary on his part to enable the plaintiff and Pinckney to carry out an exchange of their living as aforesaid.

4. Relying on the said promise, and for the purpose of carrying out the said exchange, the plaintiff executed a deed of resignation of the living of Llandough, and delivered the same into the hands of the registrar of the Bishop of Llandaff. Before executing and delivering the said deed of resignation, the plaintiff had, with the sanction and to the knowledge of C. R. Mansel Talbot, the patron aforesaid, requested and obtained from the bishop permission to exchange livings with Pinckney; and at the time of executing and delivering the deed, the plaintiff explained fully and explicitly to the registrar aforesaid his intention and the object which he had in view in executing and delivering the said deed, and the registrar on behalf of the bishop aforesaid accepted the said deed to hold for that purpose only. And at the time of executing and delivering the said deed, and before and after such execution and delivery, the said bishop, and the said registrar, and the said patron, knew well that the deed was executed and delivered as aforesaid, by the plaintiff in reliance on and in consideration of the promise made by the patron in paragraph 3 mentioned, and with full intention on

the part of the plaintiff that if the said exchange as aforesaid should happen not to be carried out, the said deed of resignation was to be held and become null and void to all intents and purposes whatsoever, and the plaintiff should have full liberty to remain in, or, if need were, re-enter on the possession and enjoyment of his living aforesaid.

5. Notwithstanding the premises the said C. R. Mansel Talbot, the patron aforesaid, would not and did not fulfil his part of the agreement in paragraph 3 mentioned, and did not and would not present Pinckney, or do what was necessary on his part to carry out and effectuate the exchange of livings proposed between the plaintiff and Pinckney, but falsely claiming and pretending to have obtained an absolute legal right to dispose of the plaintiff's said living by the resignation executed and delivered as aforesaid, and in violation of his promise and agreement aforesaid, and not regarding the plaintiff's remonstrance claimed right to present, and did upon such false claim present his nephew, the defendant, to the plaintiff's said living at Llandough.

6. The defendant, in full knowledge of all the premises, and despite the remonstrances of the plaintiff, accepted the said presentation, and pretending right therefrom, broke and entered the rectory house and glebe lands and living of Llandough aforesaid, and expelled the plaintiff from his possession thereof, and took and received to his own use all the issues and profits, and the beneficial use and occupation of the said rectory house, glebe lands, and rectory and living of Llandough aforesaid, and has continued ever since to keep the plaintiff ejected as aforesaid; whereby the plaintiff during all that time has lost and been deprived of the beneficial use and occupation of the said rectory house, glebe lands, and rectory, and living as aforesaid, and of all the issues and profits thereof. And, though the defendant has been repeatedly desired and required to vacate and yield up possession of the rectory house, glebe land, rectory, and living aforesaid, and the issues and profits thereof, he still continues to keep possession of the said rectory house, glebe lands, rectory, and living aforesaid, and to keep the plaintiff ejected therefrom, and to convert to his own use the issues and profits thereof, to the plaintiff's great loss and injury. The plaintiff claims possession of the rectory house and glebe lands aforesaid, and 4000*l.* for meane profits from November, 1867, until such possession shall be given.

Demurrer on the ground that the statement of claim shows that the plaintiff is not entitled to the living, and that the defendant is.

The demurrer was argued before Denman, J. in the Common Pleas Division, and judgment was given for the defendant with costs.

The case in the Common Pleas Division is reported *ante*, Vol. X., p. 524; 36 L. T. Rep. N. S. 252.

The plaintiff appealed.

McClymont, for plaintiff.—The deed of registration was delivered as an escrow, and the statement of claim sufficiently alleges that it was. Until an exchange is effected by the presentation, institution, and induction of both parties to it, the whole proceeding is void. Here the deed is void, and the defendant a wrongdoer in entering upon the plaintiff's rectory and living. He cited

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Downes v. Craig (Judgment of Parker, B.), 9 M. & W. 166;

Blackstone, vol. 1, p. 471;

Gibson's Codex, p. 821;

Shepherd's Touchstone, p. 57;

Watson's Clergyman's Law, p. 28;

Holt and Glover v. Bishop of Coventry and Litchfield, Hob. 152; Owen, 12; 1 Phillimore's Ec. Law (ed. 1873), p. 504.

W. G. Harrison, Q.C. and Moulton, for the defendant.—This is an attempt to attach a parol condition to a deed. The allegations in the statement of claim do not support a delivery of the deed as an escrow. They only state the intention of the plaintiff at the time of the delivery. Ejectment cannot be brought in respect of a "living;" if the statement means that the plaintiff is in possession of the spiritualities, and therefore entitled to have possession of the rectory house, glebe and profits, it has not stated it. A rector cannot be dispossessed of his living except by the spiritual court.

McClymont replied.

COCKBURN, C.J.—I am of opinion that judgment must be given in favour of the demurrer. I own to having had considerable doubt in the course of the discussion whether the 4th paragraph of the statement of claim does not contain allegations sufficient to show that the bishop, or his registrar, accepted the deed of resignation subject to the condition that it was to be of no effect, if the exchange of livings was not carried out. But on the whole I agree with the rest of the court in thinking that the 4th paragraph is insufficient to show that. The deed of resignation may either be absolute or conditional. Here it is in terms absolute, and I think the plaintiff cannot be heard to say now that, although by the terms of the instrument his resignation was absolute, he intended it only to take effect upon certain conditions being fulfilled. It has occurred to my mind that something more than a mere resignation is requisite in order to constitute a valid resignation. There must be also an acceptance of the resignation by the bishop. Now I think that if the bishop insisted on accepting the resignation absolutely according to the terms of the deed, the plaintiff cannot afterwards rely on the condition, and if he were to have accepted it subject to such a condition expressed in the deed, as the plaintiff now insists upon, the object being an exchange of livings, and the condition being assumed, the deed would be void. The statement of claim asserts that at the time of executing the deed the plaintiff explained fully and explicitly to the registrar his object and intention in executing and delivering the deed, and the registrar accepted the deed to hold for that purpose only, and the bishop, and the registrar, and the patron knew of the plaintiff's object and intention in delivering the deed. Now, if the bishop had accepted the deed on these terms, and had explained that he accepted subject to the condition that the deed was to be void if the exchange was not perfected, I think it then would have been a conditional acceptance of the resignation, notwithstanding the deed in terms was absolute; but when the statement of claim is looked at, it amounts to no more than this, that, whereas the plaintiff did explain to the registrar that the resignation was intended to be subject to the exchange being affected, and the registrar did accept the deed, it is not sufficiently stated that the

deed was accepted on the terms that it was to be void on the condition not being fulfilled. I think that is a most material part of what ought to have been stated, and unless it is explicitly stated, the statement of claim is bad, and our judgment must be for the defendant.

BRAMWELL, L.J.—I am of the same opinion. I concur in the doubts expressed by the Lord Chief Justice. I think the statement of claim would have been good if words had been interpolated to the effect that the deed was delivered as an escrow, or that the bishop agreed to accept the resignation only on the event of an exchange being effected, but I think that is not the meaning of the words as they stand. I never thought to regret the days of special demurrers, but a special demurrer in this case would have saved the necessity of long arguments.

BRETT, L.J.—There is no allegation in this statement of claim that the deed was delivered as an escrow, or that the deed of resignation was accepted subject to the condition. Assuming, what I think is extremely doubtful, that evidence as against these defendants might be given in support of both these assertions, I am very strongly of opinion that the 4th paragraph of the statement of claim does not sufficiently allege that the deed was offered to or accepted by the registrar, subject to any such condition as has been suggested. It seems to me that it not only fails in that respect, but it is drawn in a form which shows that whoever drew it doubted whether he could prove his case to that extent. The 4th paragraph states what took place at the time of the delivery of the deed to the registrar, and merely states that the plaintiff then made a statement that his intention was that if the exchange was not carried out, the deed of resignation was to be void. It is obvious that his intention is, in delivering the deed, that it might be the first step towards effecting an exchange of livings. Then the statement goes on to state something in the mind of the plaintiff, and made known to the registrar, but it carefully abstains from stating what the intention or desire in the mind of the registrar was, or that he accepted the deed subject to the condition. It is well known that the mode, and the only mode, of effecting an exchange with conditions now, is that an absolute deed of resignation should be delivered. I am of opinion that our judgment should be for the defendant.

Judgment for the defendant.

Solicitors for plaintiff, *Lee and Pemberton.*

Solicitors for defendant, *Maples, Teesdale and Co.*

Friday, May 4, 1877.

(Before JAMES, BAGGALLAY and BRETT, L.JJ.)

COOK v. WARD. (a)

Local drainage board—Powers delegated to committee—Land Drainage Act 1861 (24 & 25 Vict. c. 133), Sch. part ii., clause 6.

Plaintiff owned lands in a separate drainage district, constituted under a provisional order made in pursuance of the Land Drainage Act 1861. The drainage board of the district, of whom defendant was one, duly appointed, under part ii., clause 6, of the Act, a committee, consisting of defendant and two others, to exercise the powers

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

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conferred by the Act. An excessive rainfall occurred, and the committee agreed among themselves that each one of them should watch over a separate allotted position of a long dyke running through the district, and in case of emergency should exercise, with respect to that portion, the powers delegated by the board to the committee. Defendant accordingly cut through some gateways leading through some closes of the plaintiff, in order to prevent the plaintiff's land and that of other persons from being flooded. The defendant, in so doing, acted reasonably and properly, and the committee approved of his acts.

In an action by the plaintiff to recover damages for injury to his lands in consequence of the defendant's so cutting the gateways, it was

Held, affirming the decision of the Common Pleas Division (Lord Coleridge, C.J. and Lindley, J.), that the plaintiff was entitled to maintain his action, as the powers delegated to the committee by the board could not be sub-delegated by the committee to the defendant, and he was therefore not justified by the statute in acting independently.

APPEAL from the Common Pleas Division.

Statement of claim:

1. The plaintiff was possessed of two closes of land situate in that portion of Deeping St. Nicholas, in the county of Lincoln, known as the Counter Drain Washes, and bounded by lands of B. Everard towards the east, by the Counter Drain towards the south, and by lands of B. Parr's devisees towards the west, and of a ditch and of two gateways or passages forming the entrance from the road on the bank of the river Glen over said ditch into the said respective closes, and of certain other lands near to the said ditch, all situate in the parish of Deeping St. Nicholas, in the county of Lincoln.

2. The water passing along the said ditch lawfully passed and was carried by means of culverts or tunnels under the said gateways or passages forming such entrance as aforesaid.

3. At divers times in July 1875, the defendant wrongfully broke and entered the said closes and the said ditch and passages and gateways respectively, and broke down and dug up and destroyed the said passages and gateways, and the said culverts and tunnels under the same respectively, and dug holes in the said closes and passages, and gateways respectively, and removed large quantities of earth and soil therefrom, and damaged and destroyed the same.

4. By means of the premises, large quantities of water were wrongfully caused and permitted to flow and did flow from off certain lands of the defendant, and other lands through and along the said ditch into and along the said closes and the said other lands of the plaintiff, and remained thereon for a long time, and damaged the crops and seeds of the plaintiff then growing thereon, and the plaintiff was deprived of means of access for himself and his cattle to and from the said closes and the said road, and lost the use of the said closes and other lands, and was otherwise damaged. The plaintiff claimed 220*l.* damages, and such further or other relief, by injunction or otherwise, as the nature of the case might require.

The material parts of the statement of defence were as follow:

5. The Counter Drain Washes is a drainage

District, duly constituted under the Land Drainage Act 1861, and the Land Drainage Supplemental Act 1873.

6. Before the happening of the alleged grievances, or any of them, the defendant had been duly appointed a member of the Drainage Board of the said district.

7. Such of the acts in the statement of claim complained of as were done by or under the authority of the defendant, were so done by him in his capacity of member of the board, and under and by virtue of the authority of the board and of a committee thereof duly constituted, and were within the powers conferred upon the defendant as and being a member of such drainage board and upon the said drainage board, and the said committee thereof, by the Land Drainage Act 1861, and the Land Drainage Supplemental Act 1873, and the defendant has not done anything in excess of such powers, nor did he in doing the said acts cause to the plaintiff any unnecessary damage.

8. Immediately before the happening of the events in the statement of claim complained of, a large quantity of rain had fallen, and a certain dyke called the Soah Dyke was full of water, and there was not sufficient outfall for the water therein; thereupon the defendant, as such member of the drainage board as aforesaid, and acting under the authority of the said board and of a committee thereof duly constituted, caused certain culverts or tunnels which had been previously constructed by the said drainage board in order to carry off the water from the said Soah Dyke to be cut, and otherwise cleaned out and enlarged the said tunnels. Averment, that the acts in this paragraph mentioned were the alleged grievances in the statement of claim complained of, and that the said acts were done by the defendant in such capacity and under such authority as in the last preceding paragraph mentioned, and were deemed by the defendant to be, and were in fact, reasonable and proper to be done in order to carry off the floodwater which had accumulated within the said drainage district. Issue taken.

The plaintiff's land was situated in a district which, by a provisional order of the Inclosure Commissioners, made on the 6th Feb. 1873, in pursuance of the Land Drainage Act 1861 (24 & 25 Vict. c. 133), was constituted a separate drainage district by the name of The Deeping Fen Separate Drainage District. The provisional order was confirmed by the Land Drainage Act 1873 (36 Vict. c. 24), and by the order it was provided that the drainage board of the district should consist of nine members, one of them being the defendant.

The Land Drainage Act 1861, provides, in Part II., for the formation of drainage districts. By sect. 66, "The superintendence of matters relating to drainage within a drainage district shall be vested in a board hereinafter called a drainage board, and such board shall be a body corporate," &c. By sect. 67, the drainage board are to exercise all powers by that or any other Act of Parliament, law, or custom, vested in or exercisable by commissioners of sewers within their jurisdiction, &c. By sect. 70, "Subject to any provisions to the contrary that may be made by the provisional order constituting the district, the mode of electing members of drainage boards, and the proceedings of drainage boards shall be con-

ducted in manner directed by the schedule annexed hereto."

Part II. of the schedule deals with the proceedings of drainage boards. By clause 6, "The board may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers delegated conform to any regulations that may be imposed upon them by the board."

By clause 8, "A committee may meet and adjourn as they think proper. Questions at any meeting shall be determined by a majority of votes of the members present, and in case of an equal division of votes the chairman shall have a second or casting vote."

The Deeping Fen Drainage Board duly held a meeting on the 27th April 1875, when the following resolution was passed:—"Resolved, that Mr. R. Ward, Mr. S. Andrews, and Mr. Charles Plowright be appointed a committee to act in any case of emergency, with all the powers conferred by the provisional order 15th May 1873, on such committee." Acting under that resolution, the three members of the committee agreed among themselves that, with respect to the South Dyke, a drain about five miles long, which received the soakage and the overflow of the river Glen, and which passed in front of lands of the plaintiff and of other persons, a separate part of the dyke should be allotted to each of them, over which he was to watch, and, in case of emergency, to execute the power delegated to the committee by the board. The defendant, in execution of the power so delegated to him by his fellow committeemen, cut through some gateways leading to the plaintiff's closes, in order to let off the water which had accumulated in the dyke through the excessive rainfall, the culverts under the gateways being too small to allow the water to pass away quickly enough. This course was necessary in order to prevent the flooding of the plaintiff's or the other persons' lands, and it was approved by the committee.

At the trial before Mellor, J., and a special jury at the last Lincoln Spring Assizes, the learned judge left the following questions to the jury:—

1. Was the damage done to the plaintiff's land occasioned by the excessive rainfall, combined with the soakage and overflow of the Glen and Counter Drain and the shutting of the staunch at the outfall of the tunnel? Answer, Yes.

2. Was any damage done to the plaintiff's land by the act of cutting the gateways, which could be estimated as the result of that act? No.

3. Was the cutting of the gateways a reasonable and proper act under the circumstances, and was it done with ordinary and reasonable care? Yes.

4. Did the defendant act in the reasonable belief that he was doing that which was for the best under the provisions of the Land Drainage Act and the powers conferred on the committee? Yes.

5. Was the act of cutting the gateways authorised by the two other members of the committee? Yes.

MELLOR, J. thereupon entered a verdict for the defendant, but directed the jury to assess the damages sustained by the plaintiff contingently. The jury assessed the damages at 1s., and leave was reserved to the plaintiff to move to enter a verdict, and judgment for 1s. without costs, if the

court should be of opinion that the defendant was not justified under the Act.

Graham, for the plaintiff, moved accordingly, and on cause being shown, the Common Pleas Division ordered judgment to be entered for the plaintiff, pursuant to leave reserved, on the ground that, neither by the provisional order, the Act, nor the resolution appointing the committee, had they any power to act otherwise than jointly and in concert.

The defendant appealed.

Mellor, Q.C. and Busard, Q.C. for defendant.—If the board had delegated their powers to any one member of the board, he would have been authorised to exercise those powers. From the nature of the case, the committee, to be of any service, could not be together in one place. They were bound to be in different places as the emergency arose. They accordingly must settle in concert a principle of action, and leave the details to be carried out by each singly. The Act contemplates this course, and the defendant was authorised by it, to act as he did.

Lawrance, Q.C. and Graham, for the plaintiff were not called on to argue.

JAMES, L.J.—I do not see any reason to differ from the judgment of the Common Pleas Division. It is difficult to controvert the principle upon which Lord Coleridge decided, that where powers are delegated to a body, they cannot sub-delegate them. It is said for the defendant that the principle upon which each member was to act was settled by the committee in concert, and that they left it to each member to look after the details only, but it is difficult to see what the principle was. If all three had agreed that the gateways must be cut and the other two had ordered the defendant to cut them, he might have been justified, but it does not appear that the question of the gateway ever entered into the mind of the committee at all. That being so, I think we must say that the defendant was not acting under the orders of the committee, and was not justified by the Act.

BAGGALLAY, L.J. concurred.

BRETT, L.J.—I am sorry that I must agree that our judgment must be for the plaintiff. The defendant could only justify his acts by showing that he was acting under the orders of the committee, and this he has not done.

Judgment for plaintiff. Judgment affirmed.

Solicitors for the plaintiff, Wright, Banner, and Wright, for Bonner and Oalkthrop, Spalding.

Solicitors for the defendant, Varley and Toynbee, for Toynbee, Larkin, and Toynbee, Lincoln.

(Before the LORD CHANCELLOR (Cairns), COCKBURN, C.J., and BRAMWELL, L.J.)

June 25 and 26, 1877.

THOMPSON AND COMPANY v. THE SUNDERLAND GAS COMPANY. (a)

Gasworks Clauses Act 1847 (10 Vict. c. 15), ss. 6, 7 — Power to lay down pipes—Cellar formed by arch under street—Building.

By the Gasworks Clauses Act 1847, sect. 6, gas companies may open and break up the soil and pavement of streets, and lay down pipes; provided, by sect. 7, that they shall not lay down

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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pipes into, through, or against any building without the owner's and occupier's consent.

Defendants laid down their pipes so as to break into plaintiffs' cellar, which was formed by an underground arch which supported the street.

Held, reversing the judgment of Lopes, J., that the cellar was a building within sect. 7, and therefore defendants were not acting within their powers, and plaintiff could recover for the damage done.

APPEAL by the plaintiffs from the judgment of Lopes, J.

The defendants were laying down gas pipes in a street under the powers of an Act of Parliament incorporating the Gasworks Clauses Act 1847 (10 Vict. c. 15)(a), and in the course of their works they broke into and damaged a cellar belonging to the plaintiffs. The street was supported on brick arches, and the plaintiffs' cellar, which was used for keeping stores in, was under one of these arches, and was formed by the arch.

The damage sued for, which was done to the plaintiffs by the defendants' breaking through the arch, was assessed by the jury at 25*l.*; the jury found that the defendants had not been guilty of negligence. The learned judge directed judgment for the defendants, and the plaintiffs appealed.

McClymont for the plaintiffs.—The defendants were not acting within the powers conferred upon them by the Gasworks Clauses Act 1847 (10 Vict. c. 15), s. 6, in breaking the arch, and were therefore trespassers, and the plaintiffs are entitled to recover for the damage which has been done. This archway was a building, the property of the plaintiffs, and therefore the defendants were absolutely prohibited by sect. 7 from interfering with it without the plaintiffs' consent. He cited

Goodson v. Richardson, 30 L. T. Rep. N. S. 142; L. Rep. 9 Ch. 221;

Re Badger, 8 E. & B. 728.

Herschell, Q.C. and *Shield* for the defendants.—This was not a building within the meaning of sect. 7, but was only an arch on which the street was supported, and therefore the defendants

(a) By the Gasworks Clauses Act 1847 (10 Vict. c. 15), s. 3, the word "street" shall include any street, court, or alley, highway, lane, road, thoroughfare, or public passage or place within the limits of the special Act.

Sect. 6. The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works, and from time to time repair, alter, or remove the same, and also make any sewers that may be necessary for carrying off the washings and waste liquids which may arise in the making of the gas, and for the purposes aforesaid may remove and use all earth and materials in and under such streets and bridges, and they may in such streets erect any pillars, lamps, and other works, and also all other acts which the undertakers shall from time to time deem necessary for supplying gas to the inhabitants of the district included within the said limits, doing as little damage as may be in the execution of the powers whereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers.

Sect. 7. Provided always that nothing herein shall authorise or empower the undertakers to lay down or place any pipe or other works into, through, or against any building, or in any land not dedicated to public use, without the consent of the owners and occupiers thereof . . ."

were justified under sect. 6. Sect. 7 refers only to buildings above the soil of the street, and not to underground arches such as this.

(Other questions were discussed in the course of the argument, but it is unnecessary to refer to them, as the court did not give judgment on them.)

The LORD CHANCELLOR.—This case raises a simple question on the construction of the Gasworks Clauses Act 1847 (10 Vict. c. 15), and there is no other question in the case. The company were exercising, as they thought, the powers conferred upon them by the Act, when they did what is complained of, and the jury have found that there was no negligence; if they had parliamentary power therefore to do what they have done, there is an end of the case, and they are right; if not the plaintiffs are entitled to damages, and the amount is 25*l.* The gas company laid down pipes under the road, and the road was supported by brick arches; the company opened the soil of the road and came down on the arches. They broke in and did damage to an arch belonging to the plaintiffs to the amount of 25*l.* Sect. 6 of the Gasworks Clauses Act, gives power as to streets and bridges, and no doubt very large powers are conferred on the undertakers by that section, when it provides that they "may remove and use all earth and materials in and under such streets and bridges." The assumption of the Legislature seems to have been that the company might take a street (as defined in the interpretation clause of the Act (sect. 3), or a bridge, as something dedicated to the public, and having nothing under it which may not be taken, and the Gas Company might be trusted to go down under the streets and bridges and execute their works as they think fit. If the matter stood here, and the company came upon an archway under a street, and broke it up or removed it, on the construction of sect. 6, possibly a question might arise whether an archway came under the words, "all earth and materials in and under such streets and bridges." It is not necessary to decide this question, but my own opinion is, that if it depended on sect. 6 alone, the company would have an absolute right to lay down their pipes under streets or bridges whenever they thought fit. But sect. 7 puts the matter beyond all doubt, for it provides that the company shall not lay pipes "into, through, or against any building." Assuming that an arch is a building within the meaning of sect. 7, Mr. Shield says that a building in that section means a building above and not under the soil of the road. Sect. 6 empowers the gas company to do their works in and under streets and bridges, and sect. 7 is added by way of proviso to prevent their interfering with buildings, and on what principle is it not to include a building which is under the road? It seems to me that it must include such a building. Both reason and common sense agree with that construction, for this legislation would have been very wrong and unjust if Parliament had given power to the Gas Company to lay down their mains and pipes in a building simply because it was under the road. We know that there are many houses in London which have cellars and other extensive premises attached to them extending under the street, and it cannot have been intended that such premises as these should be interfered with in this way. Then, was it a

building within the meaning of sect. 7, which the company interfered with in this case? The arches stood under the street, and their history is not clear; it may be that they were erected to support the road, or they may have been made for the owner of the land to use as cellars, or for some similar purpose. Certainly they were supporting the road, and they had been used by the landowners, for they were occupied as store cellars. They were not a natural formation, but were artificial, and they were useful to the owners of the land for purposes for which buildings are commonly used. I am at a loss to conceive why they should be considered not to be buildings; in my opinion they are buildings clearly within the meaning of the 7th section. The result is, that the defendants have not Parliamentary powers to interfere with the buildings which they have interfered with, and having exceeded their powers, they have become trespassers, and are liable in damages to the plaintiffs. The decision of the learned judge must therefore be reversed, and judgment entered for the plaintiff for 25l.

COCKBURN, C.J.—I agree in the result, but not exactly on the same grounds, for on the construction of sect. 6, I think that the defendants were acting beyond their powers, which appear to me to be limited by that section to laying down pipes within the soil. I cannot think that, the power being thus limited to the right of laying down pipes within the soil, anything which is not the soil can come within the power. It may be a question to what depth the soil of the street will extend, but I think that the power to lay down pipes under the street is co-extensive and commensurate with what is the soil of the street. I agree with the Lord Chancellor as to the meaning of sect. 7, and I reject the contention of Mr. Shield that it applies to buildings which are above ground only. For the reasons which have been given by the Lord Chancellor, I think it cannot be so limited. Houses which are built partly below the surface of the street, are buildings under ground, and I think the Legislature meant to compel the companies to divert the course of their pipes so as to avoid all buildings either under or on the street. If the arches were constructed solely to support the street, it might be a question whether they would be buildings within the meaning of the 7th section or not, but here, having been apparently used as long as the street was there by the owners of the land, and having been used as subsidiary to the occupation of the adjoining houses, they are buildings distinguishable from a mere construction for the purpose of supporting the road. There ought to be judgment for the plaintiff for 25l.

BRAMWELL, L.J.—I am of the same opinion. I think this is a building within the meaning of sect. 7. It cannot be denied that if the surface of the road were taken away and the arch left standing, it would be a building and a building only. Mr. Shield's construction is impossible, because he argues that sect. 7 is meant to apply to buildings above ground only, but sect. 6 only gives authority to place pipes under ground. The two sections, therefore, according to the construction contended for, would mean that the company might lay down pipes under ground, provided that they should not be authorised to lay them down in buildings above ground; but that cannot be the meaning. As to the other

point I agree with the Lord Chief Justice. It seems to me that the company have power to acquire an easement or right of occupancy, and this is to be acquired gratuitously. It is evident, therefore, that beneficial occupation is not to be interfered with. The soil of a road, generally speaking, is of no use to the owner of the land, and therefore the Legislature intended that this comparatively worthless ownership should be disregarded. Mr. Herschell says that it might be the subject of compensation, but I think that cannot be. Compensation is not given for a right, but for the exercise of the right. I think the judgment ought to be reversed, and judgment entered for the plaintiff for 25l.

Judgment reversed.

Solicitor for plaintiff, *John Tucker.*

Solicitors for defendants, *Johnson and Weatherall.*

SITTINGS AT LINCOLN'S INN.

Thursday, April 26, 1877.

(Before JESSEL, M.R., JAMES, and BAGGALLAY, L.JJ.)
FLOWER v. THE LOCAL BOARD OF LOW LEYTON. (a)
Public Health Act 1875 (38 & 39 Vict. c. 55), s. 264
—Action against local board—Notice—Nuisance—Damages.

The object of the 264th section of the Public Health Act 1875, which provides that a writ or process shall not be sued out against any local authority for anything done or intended to be done under the provisions of the Act until the expiration of one calendar month after notice, is to give the local authority an opportunity of making compensation for damages which they may have wrongfully occasioned, without the expenses of an action, but that provision does not apply to an action in the Chancery Division for the purpose of obtaining an injunction to restrain a nuisance. Decision of Malins V.C., reversed, the Court of Appeal taking a different view of the object of the action.

THIS was an appeal from a decision of Malins, V.C. The hearing in the court below is reported Vol. X., p. 511, where the facts of the case are sufficiently stated.

The Vice-Chancellor being of opinion that the real object of the action was to obtain damages, held that notice was requisite, under the 264th section of the Public Health Act 1875.

From this decision the plaintiff appealed.

J. Pearson, Q.C. Cracknall, and Shebbeare, for the appellant.—Our main object is to obtain an injunction to restrain the nuisance, though we also pray for damages for the injury already sustained by us. It has been held that the 264th section of the Act does not apply to a Chancery suit for an injunction, to which an action in the Chancery Division is now equivalent:

The Attorney-General v. The Hackney Local Board, 33 L. T. Rep. N. S. 244; L. Rep. 20 Eq. 626;

Baker v. Corporation of Wisbeach, L. Rep. W. N. 1877, p. 56.

[They were stopped by the court.]

H. A. Giffard (with him *Glasse, Q.C.*), for the respondents.—This is really an action for damages, as is clear from the form of the prayer, and the 264th section of the Act evidently applies to such

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an action. The prayer for an injunction is merely subsidiary. The whole statement of claim is a money demand. The *Attorney-General v. The Hackney Local Board* (*ubi sup.*) does not govern this case. There the decision proceeded upon the ground that if the plaintiff had waited for a month the wrong of which he complained might be irreparable.

No reply was called for.

JAMES, M.R.—I think it is impossible to hold that the 264th section of the Public Health Act 1875, applies to what is really equivalent to a bill in the Court of Chancery for an injunction to restrain a serious or irreparable injury requiring the intervention of that court. I think the plain object of the section, which was, moreover, explained in the case of *The Attorney-General v. The Hackney Local Board* (*ubi sup.*), was to give an opportunity to the local authority to make compensation for damages which they might have wrongfully occasioned, without necessitating all the expense of an action. The object was to enable the local authority, if it chose, to satisfy its liability by payment or tender of the amount claimed. But I do not think that the section was intended to apply to cases of nuisance, as if, for instance, the local authority was improperly pulling down a house or stopping up a sewer. Otherwise, the section would amount to a licence to every local board to do any injury it pleased, without the injured party being able to interfere till the expiration of a month, when the damage might have become quite irreparable. It is not contended by the defendants that that is the meaning of the provision in question; they only say that the present action, though brought in the Chancery Division, is really an old common law action for damages, and therefore comes within the 264th section of the Act. Although the Court of Chancery has ceased to exist, and a statement of claim has taken the place of a bill of complaint, still the judges of the High Court have all the jurisdiction and all the powers which the Court of Chancery formerly had, and can grant injunctions in the same way as that court used to do, and the only question we have to determine is whether this is merely an action for damages or an action in which the court should grant an injunction. Now, on the statement of claim I am satisfied that the acts complained of do create an intolerable nuisance, and that the main object of the action is to restrain the continuance of that nuisance, although the prayer also asks for damages for the past injury. I am, therefore, of opinion that the plaintiffs' demurrer to the statement of defence ought to be allowed.

JAMES, L.J.—I take the same view of the case.

BAGGALLAY, L.J. concurred.

Appeal accordingly allowed, with costs.

Solicitors for the appellant, *Houghtons and Byfield*.

Solicitors for the respondents, *Robert T. Wragg*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Friday, June 15, 1877.

METROPOLITAN BOARD OF WORKS v. NEW RIVER COMPANY. (a)

Water for domestic purposes—Public purposes—Fixed rates—Agreement—Watering roads—10 Vict. c. 17, s. 37—15 & 16 Vict. c. clx. ss. 35, 38, and 41.

By the New River Company's Act 1852, sect. 35, the company must supply houses within their limits with sufficient water for domestic purposes at certain fixed rates.

By sect. 38, domestic purposes are not to include engines or railway purposes, or baths, cattle, or fountains, or flushing sewers or drains, or any trade or business requiring an extra supply of water.

By sect. 41, the company shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are thereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter, and charge for the same at certain limited rates, according to the quarterly consumption.

By sect. 37 of the Waterworks' Clauses Act 1847 (incorporated in the said Act of 1852), the undertakers shall provide a sufficient supply of water for cleansing sewers and drains, for cleansing and watering streets, and for other public purposes, at rates and upon conditions to be agreed to by the undertakers or to be settled by justices or by an inspector.

The plaintiffs demanded from the defendants a supply of water by meter, under the said 41st section, for watering the roads and gardens on the Victoria Embankment, such supply being required only during one-third of the year and the driest weather:

Held, that the defendants were not bound to afford this supply at the limited rates fixed by sect. 41; but that they were entitled to claim rates for such supply, to be fixed by agreement or settlement, under sect. 37 of the Waterworks' Clauses Act 1847.

THIS was a special case stated by order upon the application of the plaintiffs without any pleadings.

1. This is an action brought to try the right of the plaintiffs, the Metropolitan Board of Works, to have afforded to them by the defendants a supply of water by meter, under the provisions of the 41st section of the New River Company's Act 1852 (15 & 16 Vict. c. clx.), for watering the roads and gardens upon the Victoria Embankment; the defendants deny their obligation to supply water for such purposes under that section.

2. The defendants are a company originally constituted under a charter granted in the reign of King James the First in 1620, by the name of "The Governor and Company of the New River brought from Chadwell and Amwell, to London, for bringing water from certain springs at Chadwell and Amwell, in the county of Hertford, into the city of London, for the supply of water."

3. The defendants were not restricted by the charter to any price or terms for the supply of

their water, but were authorised by the charter to lay down their pipes and acquire property.

4. The defendants continued to act solely under their charter down to the year 1852, in which year the said New River Company's Act 1852, was passed.

5. In that year also was passed the Metropolis Water Act 1852 (15 & 16 Vict. c. 85), since amended by the Metropolis Water Act 1871 (34 & 35 Vict. c. 113).

6. By the 35th section of the New River Company's Act 1852, it is enacted as follows:

35. That the company shall, at the request of the owner or occupier of any house or part of a house in any street within their limits in which any pipe of the company shall be laid, or of any person who, under the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for domestic purposes at the rates hereinafter specified; (that is to say) for water supplied to any dwelling house; where the annual value of the dwelling house shall not exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 4*l.*; where such annual value shall exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 3*l.* If there be a water closet or water closets, or fixed bath or baths, or any high service in such dwelling house or place, then in addition to the rates above specified, the following rates shall be payable; (that is to say) where the annual value of such house shall exceed 30*l.*, but shall not exceed 50*l.*, a rate not exceeding 4*s.* per annum for each single water closet, fixed bath, or high service, and a further sum of 2*s.* for each additional water closet, fixed bath, or high service; where such annual value shall exceed 50*l.* but shall not exceed 100*l.*, a rate not exceeding 6*s.* per annum for each single water closet, fixed bath, or high service; and a further sum of 3*s.* for each additional water closet, fixed bath, or high service; where such annual value shall exceed 100*l.*, but shall not exceed 200*l.*, a rate not exceeding 8*s.* for each single water closet, fixed bath, or high service, and a further sum of 4*s.* for each additional water closet, fixed bath, or high service; where such annual value shall exceed 200*l.*, but shall not exceed 300*l.*, a rate not exceeding 10*s.* for each single water closet, fixed bath, or high service, and a further sum of 5*s.* for each additional water closet, fixed bath, or high service; and where such annual value shall exceed 300*l.*, a rate not exceeding 12*s.* for each single water closet, fixed bath, or high service, and a further sum of 6*s.* for each additional water closet, fixed bath, or high service.

7. By the 38th section of the said last-mentioned Act of 1852 it is provided:

That a supply of water for domestic purposes shall not include a supply of water for steam engines or railway purposes, or for warming or ventilating purposes, or for working any machine or apparatus, or for baths, horses, cattle, or for washing carriages, or for gardens, fountains, or ornamental purposes, or for flushing sewers or drains, or any trade or manufacture or business requiring any extra supply of water.

8. By the 41st section of the said last-mentioned Act it is provided:

That the company shall, at the request of any consumer of water, for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited, or at their own instance afford a supply of water by means of a meter or other instrument or mode for measuring and ascertaining the quantity of water so supplied, and may charge for such supply, not exceeding the following rates, per 1000 gallons; (that is to say) when the quarterly consumption of water shall not exceed 50,000 gallons, 7*d.* When exceeding 50,000 gallons and not exceeding 100,000 gallons, 7*d.*; when exceeding 100,000 gallons, and not exceeding 200,000 gallons, 6*d.*; when exceeding 200,000 gallons, 6*d.*; and a further rate not exceeding 25*l.* per cent., in respect of water so supplied at an elevation of more than sixty feet above Trinity high water mark.

9. By the 3rd section of the said last-mentioned

Act the Water Works Clauses Act 1847 (with the exception of certain sections not material to this case) is incorporated.

10. By the 37th section of the said Water Works Clauses Act it is enacted as follows:

In all the pipes to which any fire-plug shall be fixed the undertakers shall provide and keep constantly laid on, unless prevented by frost, unusual drought, or other unavoidable accident, or during necessary repairs, a sufficient supply of water for the following purposes; (that is to say) for cleansing the sewers and drains, for cleansing and watering the streets, and for supplying any public pumps, baths, or wash houses that may be established for the free use of the inhabitants, or paid for out of any poor rates or borough rates levied within the limits of the special Act; and such supply shall be provided at such rates, in such quantities, and upon such terms and conditions as may be agreed upon by the town commissioners and the undertakers or in case of disagreement, as shall be settled in England or Ireland by two justices, and in Scotland by the sheriff, until in either case an inspector shall have been appointed, and after the appointment of such inspector, by the inspector so appointed.

11. A supply of water for watering streets is only required on certain occasions and at certain seasons, so that upon an average of years a supply for this purpose has taken by the authorities for little more than 120 days out of the 365.

12. These days almost entirely fall within the dry weather of the summer season, when the demand for domestic supply is at the highest point.

13. To supply water for the purpose of street watering, the defendants are compelled specially to provide additional permanent works and apparatus, and of greater dimensions than would be required for domestic or other purposes for which a continuous supply of water is required for the roads.

14. The defendants now supply a third of the whole of London.

15. The Victoria Embankment is within the limits of supply of the defendants, and the plaintiffs are charged with the duty of watering the roads thereon.

16. Until the present year, the plaintiffs have always received the supply of water from the New River Company under special agreements similar to that of which the following is a copy:—

No. 22. (Meter.)

Memorandum of agreement made this day of August, 1870, between the Metropolitan Board of Works of the first part, and the Governor and Company of the New River, brought from Chadwell and Amwell to London, hereinafter called the Company of the other part. Whereas by the New River Company's Act 1852, the company are authorised to supply any person or body within their limits with water, to be used within such limits for other than domestic purposes, at such rate, and upon such terms and conditions as shall be agreed upon between the company and the person or body requiring such supply. Now these presents witness, that in consideration that the company will supply the said Board of Works with water for watering the Thames Embankment according to the annexed schedule of general conditions from the day of to the day of next; the said parties hereto of the first part, agree to pay to the company after the rate of 1*s.* for each 1000 gallons for the water so to be supplied for the purpose aforesaid; the quantity of water to be ascertained by a meter to be attached to each of the watering posts, and also to abide by and perform the said general conditions in all other respects; which said schedule shall form part of this memorandum.

As witness to our hands.

(Signed)

JOHN POLLARD, Clerk of the Board.

Certified B. D. KIRKHAM, Inspector.

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METROPOLITAN BOARD OF WORKS v. NEW RIVER COMPANY.

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SCHEDULE.

General conditions on which the company will supply water by meter for watering the streets, commencing at Lady Day and ending at Michaelmas, for supplying water by meter during the season, the charge will be at the rate of 1s. per 1000 gallons.

If the quantity of water used during the season exceeds one million of gallons, a discount of $\frac{1}{2}$ per cent. for every complete million will be allowed up to 30 million gallons.

The watering is to be done by a cart supplied by the contractor with a proper metallic tube to the satisfaction of the company.

Iron stand posts are to be erected, and leather hose to be provided by the contractor or by the inhabitants of the district to be watered at their expense, and at all times to be kept in proper repair by them.

The company will not be responsible if such posts and hose are not so provided, but will, if desired, inform the contractors where these articles may be obtained.

The required meters will be furnished, fixed, and kept in repair by the company at a charge of 2l. 2s. each for the period of the contract, and will be removed by the company at the expiration of the contract.

All posts not supplied with a meter will be kept locked. The water posts in the different localities are to be used only at the undermentioned times.

Situation of Post.	Morning before the hour of	Afternoon after the hour of
Seven posts fixed in the Victoria Embankment.	Any time.	

17. Under the agreement the plaintiffs would have to pay for water for the roads at the rate of 1s. per 1000 gallons, less a trifling discount, but under the 41st section they would have to pay 6d. per 1000 gallons.

18. The plaintiffs have required the defendants to supply them with water for watering the roads on the Victoria Embankment according to the provisions of the said 41st section; but the defendants have refused to supply water under that section for the said purpose, and deny their obligation to do so.

19. They contend that the 41st section only applies to cases of regular quarterly consumption, and not to the case of street watering, the requirements for which purpose are not only not regular, but for which purpose during two-thirds of the year no supply whatever is taken. That the standard of charges fixed by such section does not apply to any case where the irregularity of demand is such, that for two-thirds of the year there is no quarterly supply whatever; that the quarterly supply means continuous supply quarter by quarter throughout the year; that the 41st section only applies to the matters excepted in the 38th section, and does not apply to the watering of streets; that the supply of water for street purposes is regulated by the provisions of the 37th section of the Waterworks Clauses Act 1847, hereinbefore cited.

20. The questions for the opinion of the court are:—Whether the defendants are bound to supply the plaintiffs with water for the purpose of watering the said roads by meter in accordance with the provisions of the 41st section of the New River Company's Act 1852, and to charge for such supply according to the rates specified in the said section; if the court shall be of opinion that the defendants are so bound, judgment is to be entered for the plaintiffs with costs; but if the court shall be of opinion that they are not so bound, judgment is to be entered for the defendants with costs. And the court is in that case humbly solicited to direct upon what prin-

ciple the defendants are entitled to charge for such supply of water as aforesaid.

Brown, Q.C. (with him *Biron*) argued for the plaintiffs.—There are no rates or charges provided or limited in any section of the New River Company's Act 1852 before the 41st for the purpose of watering streets. This, therefore, being another purpose than those for which provision was made, must be subject to the 41st section of that Act. The powers given to the defendants by their Act of 1852 create a monopoly, and if there be any doubt in the construction of these powers, the public, whom the plaintiffs represent, ought to have the benefit of it.

The *Solicitor-General* (Sir H. Giffard, Q.C.), *Thesiger*, Q.C., and *Hardy* appeared for the defendants, but were not heard.

MELLOR, J.—I do not think we can give Mr. Brown's clients the benefit to which he has urged their claims. We are satisfied that the Act of 1852 was intended to enforce a supply of water for domestic purposes, and other purposes of the kind, at a fixed rate, but subject to the provisions for different purposes of the Waterworks Clauses Act 1847. The first section which applies to these matters is the 35th, by which domestic purposes, strictly so called, are provided for. The 38th section points out what are not to be considered domestic purposes, and for these exceptions sect. 41 provides. The 38th section applies only to purposes of a private nature, although not strictly domestic, and they were, I think, intended to be distinguished from the public purposes for which the Waterworks Clauses Act, incorporated into the private Act, expressly provides.

LUSH, J.—I think this is a plain case. The 3rd section of the New River Company's Act 1852, incorporates the Waterworks Clauses Act 1847, with exceptions not here applicable. The first section of the Act of 1847 enacts that it shall extend to waterworks which incorporate it into their private Act, "and all the clauses of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorised thereby, so far as the same shall be applicable to such undertaking." There is nothing expressly varying or excepting sect. 37 of the general Act in the private Act 1852; and that section may well stand without doing violence to any words in the New River Company's Act. Sect. 41 of the Act of 1852 relates only to purposes of the same kind as those previously provided for, although not to those expressly mentioned. Looking back, we find sect. 35 treats of domestic or private purposes only; and sect. 38 treats of private purposes too, although they are not to be included under the head of domestic purposes for which sect. 35 provides. The only words which appear in sect. 38 which are to be found also in the 37th section of the Waterworks Clauses Act are Sewers or Drains; the context in each case shows that they are not intended to be the same things; in the Act of 1852 the sewers and drains are those of individuals; in the Act of 1847 they are public. This distinction is still more clear with respect to the other purposes treated in the two statutes. The defendants are not bound to supply the plaintiffs for this purpose at all under their own Act of Parliament; and if it comes under sect. 37 of the Act of 1847,

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they may make what charge they please, subject to the appeal there provided.

Judgment for defendants.

Solicitor for plaintiffs, *W. Wyke Smith*.
Solicitors for defendants, *Baxter and Co.*

June 16 and 20, 1877.

WILLING (app.) v. ST. PANCRAS ASSESSMENT COMMITTEE (resps.) (a)

Poor rate—Hoardings for advertisements—Rateability of advertising agent.

A large hoarding, the property of the owner of the premises, was placed upright on the ground in front of a wall surrounding the garden of an empty house, which had been occupied for years only by a caretaker. The hoarding was bolted to the wall and propped up by struts in the garden ground; it was used for advertisements by the appellant, who had entered into an agreement with the owner to rent it for this purpose at an annual payment, and to give up possession at twenty-four hours' notice. The premises were assessed to the poor rate in the name of the owner, but were stated in the list to be unoccupied.

At other premises, besides a similar hoarding, boards were placed on the ground leaning against the walls of the garden, the house in which had been pulled down, and rebuilding had been commenced, but had been stopped by the bankruptcy of the builder. Here the hoarding and boards were the property of the appellant, had been erected by him, and were used by him for advertisements, a similar rent being paid to the owner, as in the former case. So also no occupier appeared in the assessment list, and it was proved that by the practice of the parish land upon which buildings were in course of erection was not rated. The appellant was rated in respect of both these premises:

Held, upon a case reserved by the General Assessment Sessions, that the appellant's use of these boards was not under the circumstances of either case such an actual exclusive and permanent occupation as to justify his being rated for the premises, and that the assessment was wrong.

The following was a case stated by the General Assessment Sessions holden under the Valuation (Metropolis) Act 1869, on an appeal by James Willing, against the Supplemental Valuation List of the parish of St. Pancras, made under the provisions of the said Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. lxxvii.), in which the appellant's name was inserted as the occupier of several advertising stations, and as such assessed to the relief of the poor.

1. The appellant appealed in one appeal against the whole of his assessment in the parish.

2. The Court of Assessment Sessions decided that the appeal should be allowed in all cases, except 291a, as numbered in the Assessment List, as to which they ordered that the assessment should stand. But they made this order subject to a case for the opinion of the Court of Queen's Bench in respect to their decision upon 221a and 291a, before mentioned. The respondents moved for a *certiorari*, and brought up the order of sessions.

3. The general ground of the decision of the Assessment Sessions was that the appellant was

not the occupier of a rateable hereditament so as to justify the respondents in inserting his name as they did as the occupier of rateable hereditaments, as appearing by the list.

4. The appellant carries on the trade of an advertising agent, and in pursuance of such trade he affixes his bills and posters to existing walls, fences, and hoardings, and in some cases he merely rests his advertising boards on the ground, leaning them against walls or fences, steadying them by cord or nails or other attachments, if necessary; in some cases writing the advertisements on the surface of the wall, and in others erecting hoarding expressly for the purpose of advertisements; and for the right to do this he pays rent or money to the owners of the fences, walls, hoardings, or lands on which his advertisements are placed or written. The value of an advertising station to the appellant depends upon its situation and the opportunities it possesses for displaying the appellant's bills and posters to the public. The following facts are stated as bearing on the two cases as to which a case was granted.

As to No. 221a.

5. Pulvis Cottage is the name of an old dilapidated suburban villa (No. 221a in the Supplemental Valuation List), not in the occupation of Mr. Willing, and only inhabited by a person for the purpose of taking care of the premises, and has been so since 1865, although continuously advertised to be let or sold. In front of the house there is a dwarf wall, with a pier at each end, and with a break in the centre, in which the upper gate of the premises is placed. Above the dwarf wall are iron railings. Behind the wall and railings stands a row of trees; in front of the wall and railings a hoarding or framework of wood was fixed in July 1874 by the appellant, expressly for the purpose of advertisements. This hoarding rests on the ground outside the wall, and it is about 15ft. high and 50ft. long, so that it darkens the house inside and otherwise interferes with the occupation of the premises for living purposes. The fastenings are necessary to prevent the hoarding from being blown over and from being removed. The hoarding is fixed in its place partly by being bolted to the wall and tied to the railings with wire fastenings, and partly by pieces of wood from the top of the hoarding nailed in some places to the trees inside, and in some places struts run to the garden ground behind.

6. Pulvis Cottage was assessed in the Valuation List of the parish in 1870, and this assessment still remains there, not having been removed from it. It is therein stated to be unoccupied, and no name of an owner is given.

7. The villa stands on a considerable portion of ground, having a garden back and front, but its front is brought up to within a short distance of the wall above mentioned. Between the front and the wall stands the row of clipped lime trees above mentioned. The owner had placed the house for letting in the hands of his solicitors, Messrs. Palmer, Eland, and Nettleship, of 4, Trafalgar-square, whose name appears in the correspondence copied below. They had let the house at one time to a Mr. Tyreman, whose name also appears in the correspondence, who intended to pull it down and build on the site; but he was unable to carry out the agreement, and he gave it up, and the premises remained in Messrs. Palmer's hands for letting.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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8. They placed in the house a caretaker, to take charge of the house and give information, who resided there with her family, and who had the control of the outer gate of the front garden (above mentioned) next the road, and of the front door of the house. The outer gate was kept closed, and communication kept with the house by means of a bell, the handle of which was outside the outer wall of the front garden. The appellant had no key or right of access to the premises, or any other right inside this outer wall. The advertisements were changed or attended to by the appellant's agents from outside the walls. The hoarding was originally put up when Mr. Tyreman was in occupation; there was no evidence as to what passed between Mr. Tyreman and the appellant, but the following letters were put in evidence:

368, Gray's Inn-road, near King's Cross Station,
Metropolitan Railway, London, July 30, 1874.
Re Pulvis Cottage.

Dear Sirs,—We are willing to rent the above of you on the same terms as we gave Mr. Tyreman, viz., 20*l.* per annum. The last rent paid to 1st July.

We shall be prepared to give up possession at any time on receipt of twenty-four hours' notice.—Yours truly,
WILLING & Co. (per W. J. S.)

Messrs. Palmer, Eland, & Co., 4, Trafalgar-square, W.C.

4, Trafalgar-square, W.C., 31st July, 1874.
Pulvis Cottage.

Gentlemen,—We think the rent for the liberty to affix boards should be at least 30*l.* a year from 1st July; in other respects the terms mentioned in your letter of yesterday are quite satisfactory.—Yours truly,
PALMER, ELAND, & NETTLESHIP.

Messrs. Willing & Co., Advertising Contractors,
St. Martin's-lane, W.C.

4, Trafalgar-square, W.C., 15th Aug. 1874.
Pulvis Cottage.

Gentlemen,—Referring to our interview with you, we beg to say our clients will accept a rent of 25*l.* a year for liberty to affix your advertising boards, such rent to run from 1st July last, and the letting in other respects to be subject to the terms mentioned in our letter of the 31st ult.—Yours obediently,

PALMER, ELAND & NETTLESHIP.

Messrs. Willing & Co., St. Martin's-lane.

To the boards or hoardings above described was fixed, among other advertisements, the board advertising the house for letting or sale. This board was the property of Messrs. Palmer and Co., or the owner. As to these premises, the court removed the name of the appellant from the Valuation List.

As to No. 291*a*.

9. Upon the ground upon which the hoarding hereinafter mentioned stood at the time of the Supplemental List being made out there stood, in 1870, when the Valuation List was made out, a house and shop, and which were assessed in that valuation list. In the assessment Richard Wood appeared as the name of the occupier, and T. K. Armitage as the name of the owner. The house and shop stood back from the road in a small garden, and in front towards the road there was a low wall bounding the premises. Since 1870 the owner determined to let the site for building, and the house and shop were let for building to a person who shortly after became bankrupt, having first pulled down the house and shop and commenced to dig the foundations of the new buildings. Upon the premises being pulled down the assessment was taken out of the valuation list, and re-

mained so struck out until the appellant's name was inserted as occupier.

10. During the time during which this person held the premises the appellant obtained permission from him to use the house for advertising purposes to the extent hereafter mentioned, but under what precise circumstances there was no direct evidence. It was in evidence, however, that this person was succeeded by a person named West, by whose permission the appellant still continued to use the premises as hereinafter mentioned. A receipt was put in evidence, which was as follows:

1, Powis-place, Haverstock Hill, Oct. 10, 1874.

Received of Messrs. Willing and Co. the sum of 3*l.* 15*s.*, one quarter's rent for use of hoarding for advertising purposes, due Michaelmas day last.

£3 15*s.*

ARTHUR WEST.

11. The appellant placed advertising boards outside the walls upon the ground in the street leaning against the outside face of the wall which ran in front of the premises as before-mentioned. These boards were placed along the whole length of the wall except at a gap which had been pulled down by the builders to admit the carts used for conveying the building materials to the houses, and otherwise used in the course of the building. Inside the wall between the wall and the site of the old buildings and between the wall and the new buildings which were in course of erection at the time when the supplemental list was made out, and at the time of the appeal the appellant let into the earth some ordinary scaffold poles to which at such a height as to be seen from the street above the board above-mentioned was fastened a horizontal framework upon which the advertisements were exhibited. To further support this hoarding struts were carried back at an angle resting on the ground behind. These hoardings were originally erected by and remained the property of the appellant.

12. During all the time during which these advertisements were thus exhibited, West carried on his building operations on the land, and the houses were nearly at their full height when the appeal was heard.

13. It is not the practice of the parish authorities to put any assessment upon land on which buildings are being erected, and new buildings are not assessed in the ordinary way until they are occupied, when they are brought into rating. As to these premises the court affirmed the valuation list.

14. The appellant admits the amount of the assessment to be correct provided he is liable to be assessed at all; but he contends with reference to the order of sessions that confirms the valuation list as to the advertising station at Powis-place, No. 291*a*, that he is not an occupier or at any rate not exclusively the occupier of a rateable hereditament, so as to make him rateable; that West, if any person, is the occupier; that the true legal inference from the facts above stated is that all he had was, at the most, what is described in one of the cases as an easement of occupation or a mere licence to erect the hoarding and display his advertisements in the mode above described; and that the appellant's name as such should be removed from the valuation list, and the order of the sessions dismissing his appeal should be quashed.

The respondents contend as to the order of the sessions removing the name of the appellant from

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the valuation list on the ground that he is not the occupier of a rateable hereditament at the advertising station in front of Pulvis Cottage, 221a. That the appellant is such an occupier, and that the order of the sessions, in so far that it confirms the appeal, should be quashed.

The questions for the opinion of the court are: First, whether looking to all the facts and circumstances above stated the court of assessment sessions were right in removing the appellant's name from the valuation list in respect of the premises No. 221a.; secondly, whether the said court of assessment sessions were right in retaining the name of the appellant in the valuation list, in respect of the premises No. 291a.

The order of sessions is to be varied or confirmed in accordance with the judgment of the court.

F. M. White, Q.C. and Paine argued for the appellant;

Poland and Castle for the rating authorities.—The arguments on each side sufficiently appear from the judgments of the court.

MELLOR, J.—I consider we must look at the facts for the determination of each question of this kind. As was said by the judges in the case of *Smith v. St. Michael, Cambridge* (3 E. & B. 383, 390), "We think that we must look not so much at the words as the substance of the agreement." The best test to apply to these facts is that of Lord Hatherley in *Cory v. Bristow* (L. Rep. 2 App. Cas. 262, 275), "As Lord Campbell expresses it in one of the cases last cited (*Forrest v. Overseers of Greenwich* (8 E. & B. at p. 900) as regards the nature of the occupation the question is whether it be a permanent and profitable occupation of land within the parish which seeks to assess the person in respect of such occupation. As regards the interest of the person who is so to be rated, it must be an interest in himself exclusively." It seems to me that there is no distinction between the two cases which the court below has decided differently. Pulvis Cottage is held not to be rateable in the appellant's name. It is a house in the hands of a caretaker, but advertised to be let. In fact, it may be said to be unoccupied by any person but the owner until some one may rent it. The arrangement between the owner and the appellant was this: the appellant said, Allow me to put up a hoarding upon which I may affix advertisements, my payment to be so much a year, possession to be surrendered by me at twenty-four hours' notice. The owner agreed. Now the first letter contained the word rent, and referred to payment per annum; but looking at the whole arrangement in the light which Hill and Blackburn, J.J. applied to *Smith v. St. Michael, Cambridge*, I think we ought not to be bound by those words. Was there ever an intention on the owner's part to deprive himself of occupation of the premises? Looking at all the circumstances the case seems to me entirely distinguishable from *Cory v. Bristow*. No exclusive occupation was permanently vested in the appellant. I do not see that the other case differs materially. The owner was building houses close to the hoarding. It is clear he only intended to allow the advertisements during the time he was building. The compensation agreed was in similar terms and for the same purpose. It was, I think, a mere licence in the nature of an easement. Blackburn, J.

said, in a case with respect to the rateability of moorings in the Thames which were used by the appellant to moor his hulk as a floating coal depot, under an agreement with the conservators, who were owners of the soil and the moorings, "There is no doubt that the conservators might retain the possession in themselves so as to be the occupiers, and for a sum of money, or gratuitously if they pleased, grant to another person the privilege or easement of attaching his barges to these moorings; in which case the conservators would themselves still continue to be the occupiers; and unless there be something in their Act to relieve them from being rated, they would be rateable; the value of their occupation being measured by the amount paid to them for their licence." (*Watkins v. Overseers of Milton-next-Gravesend*, L. Rep. 3 Q. B. 350, 355). That case is somewhat different from the present, but the appellant's occupation does not seem to me to be more than the privilege or easement which is there described. It may increase the rateable value upon the owner, for the practice of the parish cannot regulate the law, nor alter the character of an occupation. Lord O'Hagan said of rateability in *Cory v. Bristow* (p. 279), "The occupation to which it is attached must be an actual, an exclusive, and a profitable occupation." There are other cases on this subject, but there is no ground for saying they conflict when we properly understand the principles laid down by the House of Lords. After carefully considering those principles we conclude that there is no occupation here by way of demise which can be said to be actual or exclusive. The right which the appellant enjoyed was a mere permissive licence in the nature of an easement; the owner did not part with possession; on the contrary, he seems to have fully intended to resume possession himself. These advertising boards cannot, in my opinion, be the subject of rating, unless they are in the hands of the real owner of the soil; about that we are not asked, and although I cannot help thinking it may be so, my brother Lush is doubtful, and we need say nothing about it. We are clear that the appellant Willing is not rateable in either of the cases reserved.

LUSH, J.—As the only question necessary to be determined is, whether Willing, the advertising agent, is rateable, I have not addressed my mind to the question, whether these boards ought to increase the rateable value of the land upon the owner. I say nothing on that point. As to the other I have written my views. [Reads following judgment.]—The question we have to decide is, whether the appellant was an occupier of land within the meaning of the statute of Elizabeth. It is not easy to give an accurate and exhaustive definition of the word "occupier." Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against any one who invades it, but so long as he leaves it vacant, he is not rateable for it as an occupier. It, however, he furnishes it and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year. On the other hand a person who, without having any title, takes actual

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possession of a house or piece of land, whether by leave of the owner or against his will, is the occupier of it. Another element, however, besides actual possession of the land is necessary to constitute the kind of occupation which the Act contemplates, and that is permanence. An itinerant showman who erects a temporary structure for his performances may be in exclusive actual possession, and may with strict grammatical propriety be said to occupy the ground on which his structure is placed, but it is clear that he is not such an occupier as the statute intends. As the poor rate is not made day by day, or week by week, but for months in advance, it would be absurd to hold that a person who comes into a parish with intention to remain there a few days, or a week only, incurs a liability to maintain the poor for the next six months. Thus a transient temporary holding of land is not enough to make the holding rateable. It must be an occupation which has in it the character of permanency; a holding as a settler and not as a wayfarer. These I take to be the essential elements of what is called a beneficial or rateable occupation, and to these tests we must resort, in cases like the present, which seem to be on the border land, and to present at first sight considerable difficulty. Where the subject of occupation is not a surface area, which is the idea primarily suggested by the phrase "occupier of land," but only a small portion of the soil, so much of it as contains a post, a pipe, or a rail, the element of permanence or its absence is shown by the way in which the post, &c., is connected with the soil. I do not agree with Mr. Castle, that the word permanence is used in this class of cases in the sense of being continuous as to its use, but in the sense of being permanently attached to the soil as a fixture. It would be an abuse of language to say that the owner of a post lying upon the ground is thereby occupier of the ground upon which the post rests, however long it may be there; but if the post is inserted into the ground, or otherwise so attached to it that it cannot be severed from the land without breaking up the soil, it has become one with the soil, and the owner of the post is thereby the occupier of the soil to which it is annexed. This element pervades the cases of water mains, gas mains, telegraph posts, tramways, mooring posts, and other like cases, in all of which, where the rateable quality has been affirmed, the ruling idea is, that by the mode of attachment the chattel has been merged in the soil; so that, by means of that which has been imbedded in or fixed to the land, the owner of it occupied the land itself. Tried by this test which explains and reconciles the cases cited in the argument, the appellant is not occupier of any land by means of the hoarding in the first case, or the poles in the other. It is impossible to hold that any land was demised to Mr. Willing in either. What he paid for was merely a licence to use the premises as he did. The distinction which the justices have made between the two cases cannot be maintained. In neither case has anything been so annexed to the soil as to become a fixture. In the second case, which is the stronger of the two, the poles are merely let into the ground in holes dug for the purpose; but they are not in any way attached to the soil, and may be removed without disturbing it. They are as much chattels as if they lay upon the ground instead of standing on it. For

these reasons I am of opinion that the order of sessions in the first case must be affirmed, and in the second quashed.

Judgment for the appellant.

Solicitor for appellant, *S. Edwards.*

Solicitors for respondents, *Ounlife and Beaumont.*

May 30, June 21, 25, 26, and 29, 1877.

SERJEANT v. DALE. (a)

Prohibition—Arches Court—Interest of bishop—Patron—Delay in application—37 & 38 Vict. c. 85, ss. 8, 9, 12, 16.

The respondent, the rector of two united parishes in the City of London, was represented by three parishioners to the Bishop of London under the Public Worship Regulation Act 1874, s. 8, for breach of the provisions of that section. Proceedings were duly taken under sect. 9 against the respondent, who neither appeared nor answered throughout, and the respondent was adjudged guilty and condemned in costs. Afterwards an inhibition from the Arches Court issued against the respondent, in consequence of which he was prevented from ministering in his church; and the livings were subsequently sequestrated for the stipend of the curate appointed by the bishop, and notice to tax the costs was served upon the respondent.

After the adjudication, but before the inhibition and sequestration, the respondent discovered, as the fact was, that the patronage of the Dean and Chapter of St. Paul's who had instituted him, the presentation at that time alternately belonging to them and to the Archbishop of Canterbury, had been since transferred by order in Council to the Bishop of London; so that the right to present to the joint living would fall to the archbishop on the next vacancy and to the bishop on the vacancy after.

About ten months after the adjudication, and about six months after the respondent's discovery concerning the patronage, the respondent applied to the court for a prohibition from further proceedings to the Arches Court on the ground of no jurisdiction.

Held, that the Bishop of London was patron of the respondent's benefice within the meaning of sect. 16 of the Act, and was thereby disqualified from acting in relation to the representation under sect. 9.

Held, also, that the initiatory proceedings essential to give jurisdiction to the Court of Arches were, under the circumstances, contrary to the statute, and void; and that the court had no jurisdiction to hear or adjudicate on the representation.

Held, also that the respondent was entitled to have the rule for prohibition made absolute.

On the 30th May 1877, a rule nisi was obtained on behalf of the Rev. Thomas Pelham Dale, clerk, calling upon the Right Hon. James Plaistead Baron Penzance, the official principal of the Arches Court of Canterbury, upon notice to be given to him or his registrar; and John Clifford Serjeant, Robert George Morley, and James Horwood, complainants in a cause or matter in the said court, entitled *Serjeant and others v. Dale*, upon notice to be given to them or their solicitors; James Horwood as sequestrator of the United Benefices of St. Vedast with St. Michael-le-Querne, upon

(a) Reported by M. W. McKILLAR, Esq., Barrister-at-Law.

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notice to be given to him or his solicitor; to show cause why a writ of prohibition should not issue to the Arches Court of Canterbury to prohibit the said court from further proceedings in relation to the said cause or matter, or in relation to the said sequestration, the said cause or matter being one over which there was no jurisdiction.

The following is the material part of the affidavit of the Rev. Thomas Pelham Dale, the respondent in the ecclesiastical suit, and the applicant for the rule:

1. I am rector and incumbent of the united parishes of St. Vedast, otherwise Foster, and St. Michael-le-Querne, in the City and Diocese of London, having been instituted and inducted thereto in the year 1847.

2. The parish of St. Vedast, otherwise Foster, was originally a peculiar of the Archbishop of Canterbury. From about the year 1421, the patronage thereof has been in the Archbishop of Canterbury for the time being. The patronage of St. Michael-le-Querne had, at the time of my institution, long been and was till the year 1866, as I believe, in the Dean and Chapter of St. Paul's Cathedral.

3. Many years before my institution, the two benefices were united, and thereupon the alternate rights of presentation to the united benefice became vested in the patrons of the two benefices, that is to say the Archbishop of Canterbury for the time being, and the Dean and Chapter of St. Paul's. I was instituted on the presentation of the Dean and Chapter of St. Paul's.

4. On or about the 24th April 1876, I received in a registered letter several documents, viz.: one purporting to be a copy of a representation under the Public Worship Regulation Act 1874, under the hands of John Clifford Serjeant, Robert George Morley, and James Horwood, three of the churchwardens of the parishes of St. Vedast and St. Michael-le-Querne; another being a copy of a statutory declaration by the same persons; another headed "The Diocesan Registry of London," and purporting to be a requisition from the Lord Bishop of London requiring me to state, within twenty-one days from the date thereof, whether I was willing to submit to his Lordship's direction therein without appeal. This last document was, however, unsigned and was only dated "April 1876." Another document was a form of consent to submit to the bishop's directions for me to sign and return. Another document was a form of acknowledgment of the receipt of the said copy representation and copy statutory declaration for me to sign and return. With these documents was a letter purporting to be signed by John Shephard, registrar, and dated from the Bishop of London's registry the 24th April 1876, which referred to these documents.

5. On or about the 3rd May 1876, I was served with another copy of the said representation with the said copy statutory declaration annexed thereto, and stamped on the back with the stamp of the "Bishop of London's Registry."

6. I received, on or about the 30th May 1876, a notice purporting to come from the deputy registrar of the Arches Court of Canterbury, stating that His Grace the Archbishop of Canterbury had signed a requisition to the judge of the said court to hear and determine the matter of the said representation, and appointing a time and place to

consider what security for costs should be given by the complainants in the said representation.

7. On or about the 14th June 1876, I received a notice that the judge of the Arches Court had appointed the 18th July ensuing, at eleven o'clock in the forenoon, in the public library at Lambeth Palace, to hear and determine the matter of the said representation.

8. Lambeth Palace is, I believe, in the county of Surrey, and in the diocese of Canterbury, and is not within the diocese of London.

9. I did not appear either in person or by counsel, at the hearing. I have never entered, or caused, or allowed to be entered any appearance for me in the registry of the Arches Court. On the 12th of July 1876, having at that time a belief that the proceedings against me were irregular by reason of the notice before referred to being unsigned and not sufficiently dated, though not at that time aware of any other ground of irregularity, I served a notice stating in general terms that the proceedings against me were irregular, and that I should hold the complainants liable for any damage that might result therefrom, upon Messrs. Moore and Currey the solicitors and proctors for the complainants.

10. On the 18th July 1876, as I am informed and believe, the said representation was heard; and previous thereto a conversation took place in open court between the learned judge and the complainants' counsel concerning the notice received by the complainants that the proceedings were irregular. The result was, that the learned judge declined to express any opinion concerning informalities in the preliminary proceedings, but offered an adjournment to correct them if necessary.

11. On or about the 2nd Aug. 1876, I was served with a document purporting to be a monition from the judge of the Arches Court pronounced in pursuance of the hearing already referred to, and reciting that the judge had pronounced at the said hearing that the complainants had sufficiently proved the practices, acts, matters, and things alleged in their representation, and that I had offended against the statutes, laws, constitutions, and canons of the Church of England in respect of the matters therein set forth, and further reciting that the said judge had admonished me to abstain for the future from such practices, acts, matters, and things, and had condemned me in costs; and proceeding to admonish me accordingly.

12. I applied for and obtained a copy of the special case required by the statute to be stated by the judge of the Arches Court, and of the judgment pronounced by the learned judge. I gave notice of appeal in Aug. 1876, against the judgment, but have not further proceeded therein.

13. On or about the 27th of Oct. 1876, I was served with a summons to show cause why an inhibition should not issue to enforce obedience to the said monition; and about the same time I was served with copies of three affidavits, one by the said John Clifford Serjeant, one by the said Robert George Morley, in support of the said summons, and a further affidavit of the said John Clifford Serjeant.

14. On or about the 12th Nov. 1876, I was served with a document purporting to be an inhibition from the Arches Court.

15. In consequence of the said inhibition, I

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have been prevented from conducting Divine Service or ministering in my church and the Rev. Charles T. Ackland, a priest licensed thereto, as I have been informed and believe, by the Bishop of London, has since officiated therein.

16. At some time about the end of Oct. or beginning of Nov. 1876, but when I cannot exactly say from memory, I first had reason to suspect, but had no certain knowledge, that the alternate turn or right of patronage in the united benefice of which I am rector, to which the Dean and Chapter of St. Paul's had been entitled, had been in the year 1866 transferred from such Dean and Chapter and vested in the Bishop of London and his successors; and that the Bishop of London for the time being had thereby become, as I am advised, entitled to the advowson in the former benefice of St. Michael le Querne, formerly held by the said Dean and Chapter, and to the alternative turn or right of patronage in the united benefice. The occasion of my obtaining the information which led me to investigate the matter was in the sitting of a commission preparatory to the union of my said united benefice with the benefice of St. Matthew, Friday-street. I attended the sitting as being interested therein, and then for the first time heard it stated that the fact of the transfer of patronage had taken place. I thereupon made inquiries and learnt, as the fact is, that this transfer had been effected by an Order of Her Majesty in Council, dated the 18th Nov. 1866, and published in the *London Gazette* on the 13th Nov. 1876. I am informed and believe that the said *Gazette* is out of print.

17. Shortly after Sunday, the 25th March 1877, I learnt, as the fact was, that a sequestration of my united benefice for the purpose of raising the quarter's stipend of the said Rev. Charles T. Ackland had been affixed to the door of my church on that day; and shortly afterwards, the 28th March 1877, Mr. James Ellis (who had acted for me as the collector of my tithes for twelve or fourteen years) called upon me and stated that he had paid 28*l.* 13*s.* 6*d.* for the stipend of the said Rev. Charles T. Ackland and the costs of the sequestration to the said James Horwood, one of the complainants, who had, I believe, been appointed sequestrator of my benefice, demanding payment from him of the said sum. I immediately dismissed him from the office of collector on the ground that I had given him previous specific directions not to pay any sum out of my tithes to any person whatsoever, and I confirmed his dismissal by a letter.

18. I believe that in the month of June there will be a further sequestration issued and further demands made by the said James Horwood as sequestrator.

19. On or about the 12th April 1877, I received a bill of costs purporting to be the costs incurred by the complainants in the matter of the said representation, with a notice that the 17th April had been appointed for the taxation of the said costs. I believe that I shall shortly be required to pay the said costs, and that the payment of them will be forced by process out of the Court of Arches.

June 21, 25, and 26.—The Solicitor-General (Sir H. Giffard, Q.C.), and Jeune, showed cause for the complainants.—The two objections to the jurisdiction are (1) that the judge heard the matter of the representation at Lambeth which, although in the province containing the respondent's parish, is

not in the diocese, nor in London or Westminster, as required for the place of hearing by the Archbishop. [The arguments on this point were not considered, and need not therefore be reported.] (2.) That the Bishop of London who acted in the matters arising in relation to the representation was the patron of the benefice within the 16th section. The ordinary meaning of the word "patron" is the person who has the immediate right to appoint upon a vacancy; here the Bishop has only the second turn. In *Reynoldson v. Blake* (1 *Ld. Raym.* 192), the court, after citing some year books proceeded to say, at page 197, "which last books prove that though in case of united churches there is but one advowson in right, yet every patron has the whole advowson to his turn." This judgment is cited with approval in *Robinson v. Marquis of Bristol* (11 C.B. 208, 251). This limited meaning of the word was adopted by the court in *Edwards v. Bishop of Exeter* (5 Bing. N.C. 652), where a question arose as to the right of presentation when a Protestant and a Papist were co-patrons of an advowson. By 3 Jac. 1, c. 5, ss. 18 & 19, a Popish recusant convict, afterwards interpreted to mean any Roman Catholic, was disabled from presenting to any living; and the Universities were to have such presentation, "when it shall happen to be void during such time as the patron thereof shall be and remain a recusant convict as aforesaid." The court considered full force and effect was given to this transferring or vesting clause, if it extended no further than to that case where the patron, if a sole patron, or all the patrons were Roman Catholic. The Ecclesiastical Dilapidations Act 1871 (34 & 35 Vict. c. 43), defined the word "patron" in section 3 as "the person or persons or corporation, who in case such benefice were vacant, would be entitled to present thereto;" and the Legislature seems to have considered it necessary to expressly extend that ordinary meaning for the purpose of including cases of joint or alternate presentation. But even if the Bishop of London be a patron within the meaning of this 16th sect., it is now too late for a writ of prohibition. There is no error on the face of these proceedings, and there was a remedy upon this ground of objection to the proceedings by way of appeal. The respondent, even after his admitted knowledge of the existence of this objection, allowed the inhibition and sequestration to go without appeal; and came to this court six months after his discovery to set aside proceedings in which sentence was given ten months before. "It is agreed by all," said Brett, J. in delivering the judgment of the court in *Worthington v. Jeffries* (L. Rep. 10 C.P. 379, 380), "that upon an application to any of the Superior Courts for a prohibition the court has a discretion in some cases to refuse to prohibit." In *Blacquiere v. Hawkins* (1 Doug. 378), it was laid down that a prohibition does not lie after sentence, unless the want of jurisdiction appear on the face of the proceedings. This rule was followed in *Gould v. Gapper* (5 East 345), although it was there held to be sufficient if the objection could be collected from the whole of the proceedings below; also in

Ex parte Cowan, 3 B. & Ald. 123;
Ricketts v. Bodenham, 4 A. & E. 433;
Chickham v. Dickson, 12 Mod. 132;
Pool v. Gardner, 12 Mod. 207;
Marsden v. Wardle 3 E. & B. 695.

In the last case, however, the recognised rule

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concerning Ecclesiastical causes was held inapplicable to cases in the County Courts. In none of these cases was the point of knowledge of the objection raised, and the only authority for making it of importance is the dictum, by way of exception to the above recognised rule, of Willes, J. in *Mayor of London v. Cox* (L. Rep. 2 E. & I. App. 239, 283), where he says with reference to a defect not apparent upon the record, "considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the court would decline to interpose, except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant." Here by his own showing the applicant need not have delayed so long, and moreover his remedy still exists by appeal.

Charles, Q.C. and Phillimore supported the rule, the court requesting them to limit their arguments to the point raised concerning the period of the application, with regard to the circumstance that there was no appearance of the objection on the face of the proceedings. The principal laid down by Rogers in his *Ecclesiastical Law*, p. 748 (title Prohibition): "If the spiritual court has not jurisdiction over the subject matter of the suit, it is never too late to apply for a writ of prohibition, nor is it necessary that the defect of jurisdiction should appear on the pleadings, if it can be collected from the whole of the proceedings, for if it be brought to the knowledge of the temporal court by suggestion that the spiritual court has passed sentence in a case altogether out of their jurisdiction, it is the duty of the temporal court to restrain and stay the encroachment," is supported by various authorities:

Gould v. Gapper, 5 East, 345;

Ex parte Williams, 4 B. & C. 318;

In the matter of the Dean of York, 2 Q. B. 1.

The only limitation of the general right is where the applicant, with knowledge of the objection, has acquiesced in the jurisdiction of the inferior court. It has been held in some cases that he cannot, upon his failure to succeed under such circumstances, turn upon the tribunal he has accepted, and obtain a prohibition after sentence, if the objection does not appear on the proceedings,

Full v. Hutchins, Cowper 422;

Newman and Uz. v. Moore, Freeman 298;

Lord Camden v. Horne, 4 L. T. Rep. 382;

Hart v. Marsh, 5 A. & E. 591.

This is not a point which could be raised upon appeal, for by sect. 12 of the Public Worship Regulation Act 1874, no fresh evidence is admissible. That interest in a judge is ground for prohibition appears from

Dimes v. Grand Junction Canal, 3 H. of L. Cas. 759;

Brookes v. Lord Rivers, Hardress, 508;

Company of Mercers and Ironmongers of Chester v. Bowker, 1 Strange 639.

Here the applicant is the party aggrieved, and he is therefore entitled to relief *ex debito justitiæ*: if he suffers from the usurpation of jurisdiction of another court. There is a distinction in that case from an application by a stranger, wherein the court may exercise discretion (*Re Forster v. Forster and Berridge*, 4 B. & S. 187, 199); but even that distinction was doubted in *Worthington v. Jeffries* (L. Rep. 10 C. P. 379, 384), and it was held that "if the superior court is clear in fact and in law, that the inferior court is acting in excess of its jurisdiction or without jurisdiction, it cannot rightly

refuse to enforce public order in the administration of the law by refusing either to issue a writ of prohibition, or put the plaintiff in prohibition to declare in prohibition." This also is the conclusion of Willes, J., upon the authorities in *Mayor of London v. Cox* (L. Rep. 2 E. & I. App. 239, 278).

June 29.—LUSH, J., delivered the judgment of the court (Mallor and Lush, J.J.).—We have received the greatest assistance from the learned counsel on both sides; and the full examination and discussion which the authorities bearing upon the main question underwent during the argument—viz., the question whether the applicant is too late in applying for a prohibition—have enabled us to come to a satisfactory conclusion upon a point which, upon a cursory view of the cases, appears to be left in some obscurity. We have called this the main question because we have never entertained any serious doubt that the action of the Court of Arches was from the first invalid, and that had its jurisdiction been questioned at an earlier stage a prohibition must have been awarded. The statute 37 & 38 Vict. c. 85, confers upon the judge created by the 7th section a new and special jurisdiction, and that jurisdiction is not enlarged by the judge having become official Principal, and the proceedings being in the Arches Court of Canterbury. The jurisdiction which he exercises under this Act is still a special jurisdiction, conferred and limited by statute, and if the conditions precedent to its exercise do not exist, the whole proceeding in the court is *coram non judice*. The course of proceeding is prescribed by the Act, sects. 8 and 9. A representation is to be made to the bishop, who is in the first instance to determine whether the proceedings ought or ought not to be taken against the incumbent complained of. If he thinks they ought not the matter rests there, if he thinks they ought, the parties have the option of submitting to his final decision upon the matter of the complaint. If they decline to do so, then, and then only, are the functions of the judge called into exercise. The court is not set in motion by the parties, but by the bishop after he has "considered the whole circumstances of the case," and he has come to the conclusion that further proceedings ought to be taken. His act in invoking the jurisdiction of the court is emphatically a judicial act. This consideration gives force and substance to the 16th section. By the Common law a judge who has an interest in the result of a suit is disqualified from acting, except in cases of necessity, where no other judge has jurisdiction. The 16th section contemplates and provides for this contingency by giving jurisdiction in such case to the archbishop, and requiring him to act in the place of the bishop so disqualified. Whether the party could have waived the objection by consenting to the bishop acting, as a party can waive the common law objection of interest in the judge, we need not determine. It is certain that Mr. Dale did not know the fact that the patronage of the living had been transferred from the Dean and Chapter to the Bishop until after sentence had been given against him and monition issued. We cannot yield to the argument which was much pressed by Mr. Jenne that because the Bishop of London has not the next presentation, he is not a patron of the benefice within the meaning of the statute. That

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which accelerates the turn of one of two patrons who present alternately, accelerates the turn of the other. The law does not measure the amount of interest which a judge possesses. If he has any legal interest in the decision of the question one way, he is disqualified, no matter how small the interest may be. The law in laying down this strict rule has regard, not so much, perhaps, to the motives which might be supposed to bias the judge, as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice, which is essential to social order and security. This is the principle which underlies this branch of the 16th section, and we cannot doubt that the word "patron" was meant to include as well a bishop who has the second turn, as one who has the next presentation, each being interested in avoiding the benefice. We are anxious not to be misunderstood in using this language. No right-minded person does or can for a moment entertain the thought that the Right Rev. Prelate, who was called upon to act in this case, was or could be influenced by any consideration of personal interest in the proceeding. The probability is, the fact was not present to his mind. Such an idea was emphatically (though unnecessarily) repudiated in the course of the argument. The applicant stands upon his legal right, and calls upon us to give effect to it, and we feel constrained to hold that the initiatory proceedings which are made essential to give jurisdiction to the Court of Arches were, by reason of the bishop being patron of the benefice, contrary to the statute and void, and that the Court had no jurisdiction to enter upon the inquiry. Is the applicant, then, too late to apply for a remedy which the common law gives him, and which he undoubtedly would have been entitled to had he made the application before sentence? None of the authorities brought before us, when analysed and examined, appear to us to support the proposition; and seeing that the sentence is still in operation, and that if not stayed, it will, or may, end in deprivation, we can see no reason for limiting the right to a prohibition to that stage of the cause. The applicant has neither acquiesced in the jurisdiction assumed by the court, nor done anything to estop himself from complaining of it. He did not even know of the fact which creates the disqualification until after sentence had been given. We should require strong and explicit authority to justify us in assenting to a proposition so repugnant to common sense and justice, as that a person should be shut out from the benefit of an objection because he did not make it before he became aware of the existence of the facts which raise it. We can find none. We need not go through the cases: They are classified and explained in the elaborate opinion of the judgment delivered by the late Mr. Justice Willes in the House of Lords in *The Mayor of London v. Cox and others* (L. Rep. 2 E. & I. App. 239) and so much of that opinion as bears upon the present question justifies us in the view we have taken. This being our opinion upon the first ground of objection, it is unnecessary to decide the second ground, viz., whether the place of trial being neither in the diocese nor in London or Westminster, the proceedings are

on that account void. We need say no more than that we consider it to be an objection deserving of serious consideration. We should, before the Judicature Acts, have required the applicant to declare in prohibition in order that our judgment might be reviewed in a Court of Appeal. But that proceeding is now unnecessary, as an appeal lies against this judgment, with the same advantage to all parties, and without the delay and expense of pleadings. We therefore make the rule absolute for a prohibition.

Judgment for the respondent.

Solicitors for complainants, *Moore and Currey*.
Solicitors for respondent, *Brooks, Jenkins and Co.*

COMMON PLEAS DIVISION.

Friday, April 20, 1877.

EVANS v. MOSTYN AND OTHERS. (a)

APPEAL FROM INFERIOR COURT.

Metalliferous Mines Regulation Act 1872 (35 & 36 Vict. c. 77), sects. 13 and 41—Fencing of abandoned mine—Liability of lessor.

By sect. 13 of the Metalliferous Mines Regulation Act 1872, the owner and every person interested in the minerals of a mine shall cause the top of the shaft of such mine when abandoned to be securely fenced, provided that as between the owner and a person interested in the minerals the former shall be liable.

By sect. 41 the term "owner" is defined to be the immediate proprietor, lessee, or occupier, and not a person receiving rent, or a mere proprietor subject to a working lease, or a mere owner of the surface.

The lords of Mold were freeholders of a mine, an old unused shaft of which was unfenced, and they had certain rights over the surface. They leased the mine to a company, reserving a lien on the minerals gotten for their rent and dues, with powers of distress and re-entry. The company went into liquidation.

Held, that the lords were "persons interested" in the minerals of the mine within the meaning of the Act, and therefore liable to fence.

CASE stated by two Justices of the Peace for the county of Flint, under 20 & 21 Vict. c. 43.

On the 23rd Dec. 1875 an information was preferred by the appellant, who is Her Majesty's Inspector of Mines for the county of Flint, against the respondents, under the Metalliferous Mines Regulation Act 1872 (b), charging them

(a) Reported by S. HARR, Esq., Barrister-at-Law.

(b) Sect. 13.—Where any mine to which this Act applies is abandoned, or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred, the owner thereof, and every other person interested in the minerals of the mine, shall cause the top of the shaft, and any side entrance from the surface, to be and to be kept, securely fenced for the prevention of accidents.

Provided that

(1.) Subject to any contract to the contrary, the owner of the mine shall, as between him and any other person interested in the minerals of the mine, be liable to carry into effect this section, and to pay any costs incurred by any other person interested in the minerals of the mine in carrying this section into effect.

(2.) Where such abandonment or discontinuance has occurred in the case of a mine before the passing of this Act, this section shall apply only to such shaft or side entrance of the mine as is situated

with leaving a certain shaft in the parish of Mold unfenced, and in a dangerous state and condition. The information was dismissed.

The respondents, as the lords of Mold, are the owners in fee of the mines and minerals under the place where the shaft is sunk; and they have also surface rights for the purpose of working, getting, and carrying away such minerals. The shaft, and the minerals under it, were demised to the Mold Mines Company (Limited) for a term of twenty-one years from the 29th Sept. 1864. The demise contained a power of re-entry and distress for rent and dues, and reserved to the lessors a lien upon the minerals gotten. The shaft has not been in actual use for more than twenty years. The company are in liquidation, and are not working the mines; but the respondents have not re-entered under the power reserved to them in the said lease. The appellant, in May 1875, gave the respondents notice in writing to fence the shaft, as being specially dangerous, which they neglected to do, alleging that it was the duty of the lessees to do so. The shaft was about five to eight yards from a wall adjoining a turnpike road.

The *Attorney-General* (Sir John Holker), *Gorst*, Q.C., and *Bowen* (the *Solicitor-General* Sir H. Giffard with them), for the appellant.—The inspector of mines may call upon either the lessee or lessor to fence. Surely the lessor is interested in the minerals. He may make shafts, adits, &c., to work the adjoining mines.

McIntyre, Q.C. and *Coxon*, for the respondents.—The lessors have no interest in the minerals, but only easements over the mine. The interest in the minerals which is to make an owner liable under sect. 41 must be immediate and direct, and not a mere rent or royalty. If it was intended to make lessors liable, why were they not mentioned? They are mentioned in other cases. If a reversionary interest is enough, then an interest in remainder is enough also. The lessor is much more likely to be absent from the neighbourhood than the lessee. [LINDLEY, J.—Then do you think that a *cestui que trust* and trustee may both be liable? or that the *cestui que trust* only satisfies the words "persons interested."] It is not necessary in all cases to have several persons interested. The lessee only is enough.

Gorst, Q.C. in reply.—The lessors have, by the lease, a lien on the minerals; therefore, they have an interest in them. They have also a power to distrain the minerals, and a power to re-enter for breach of covenant. Sect. 13 applies only to abandoned mines. That may be the reason why

within fifty yards of any highway, road, footpath, or place of public resort, or in open or uninclosed land, or not being situate as aforesaid, is required by an inspector, in writing, to be fenced, on the ground that it is specially dangerous.

- (3) If any person failed to act in conformity with this section he shall be guilty of an offence against this Act, &c.

Sect. 41.—In this Act, unless the context otherwise requires

. . . . The term "owner," when used in relation to any mine, means any person or body corporate who is the immediate proprietor, or lessee, or occupier of any mine, or of any part thereof; and does not include a person, or body corporate who merely receives a royalty, rent, or fine from the mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mines, &c.

an obligation is imposed on the lessor; for the lessees could not be got at.

GROVE, J.—This case is not free from difficulty. On the whole, I am of opinion that upon the true construction of the Act the respondents are liable to fence the mine, and may be subject to a penalty for having previously neglected to do so. Our decision turns upon sects. 13 and 41. (His Lordship read those sections.) The question is, Are the lessors "persons interested?" It is curious that the lessor is not called an owner. Generally he would be so, as distinguished from the occupier. It is curious also that he is not mentioned. But who else could be meant? "Persons interested" must mean some persons. At first the word "interested" seemed to me to mean persons having a present interest. In this case the lessors have, in some events, an interest in the minerals included in the lease. A lien on minerals is an interest in them; so is a power to distrain them, and a right of re-entry. These are direct interests in the minerals, and also present ones. I have arrived at this decision after some doubt; but I think it not an unreasonable construction to hold that the working lessee is liable in the first instance, and then the persons having such an interest as the landlords here have.

LINDLEY, J.—I am of the same opinion. The real question is whether the lessors are persons interested in the mine within the meaning of sect. 13 of the Act. If that section stood alone I should think our decision clearly ought to be for the appellant. But sect. 41 has raised a doubt in my mind. These lessors are not owners under that. However, the lease gives power of distress and entry, and a lien on the minerals. To whom else could the words imply? The respondents do not show any persons who answer the description better than themselves. So we are driven by stress of circumstances to think they must be intended.

Case remitted to magistrates. No costs.

The Solicitor to the Treasury.

Solicitor for the respondents, J. T. Simpson.

Friday, June 15, 1877.

(Before Lord COLERIDGE, C.J. and GROVE, J.)

BARBER v CALLOW.(a)

20 & 21 Vict. c. 43—32 & 33 Vict. c. 14, s. 27—
Customs and Inland Revenue Act 1875, s. 11—
Letting carriages on hire—Sale by instalments—
Possession.

A., a coachbuilder, entered into an agreement with B., to let two Clarence cabs to B., on hire, at thirty shillings a week, with a provision that if B. paid the thirty shillings weekly, at stipulated times, for seventy-five weeks consecutively, the cabs should become the property of B., upon a further payment of 5l. If B. should omit to make any such weekly payment at the stipulated time, A. might re-possess himself of the cabs. B. made default in the weekly payments, and A. re-entered into possession of the cabs. An information, charging A. with keeping a certain carriage, for the keeping of which a licence was required by 32 & 33 Vict. c. 14, s. 27, without having a proper licence, was

(a) Reported by CAMERON CHURCHILL, Esq., Barrister-at-Law.

preferred by C. In support of the information the 11th section of the Customs and Inland Revenues Act 1875, which declares that the person who lets a carriage shall be deemed for the purpose of the Act of 32 & 33 Vict. c. 14, to be the person keeping the carriage, was relied on.

A. contended that the carriage had been sold, subject to a proviso as to the non-payment of the instalments. The police magistrate dismissed the information.

Upon an appeal, it was held that the judgment of the police magistrate must be affirmed.

Held also, that the true construction of the agreement was that A. had not let the carriage for hire for a period less than a year, and that it was not a letting at all, but a sale by seventy-five weekly instalments.

THIS was a case stated by the Metropolitan Police Magistrate, sitting at the Police Court, Worship-street, in the county of Middlesex, within the Metropolitan Police District, under the statute of 20 & 21 Vict., c. 43, on the application in writing of the appellant (who was dissatisfied with the determination of the magistrate upon a question of law which arose before him [as hereinafter stated], on the 22nd Feb. 1877), the appellant having duly entered into recognisance to prosecute the appeal.

The facts of the case were as follows :

1. An information was preferred by the appellant, an officer of excise, against the respondent, under the 27th section of the statute of the 32 & 33 Vict. c. 14, in the terms and to the effect following: "That after the passing of a certain Act of Parliament made and passed in the session holden in the 32nd and 33rd years of the reign of Her Majesty, chapter 14, one John Callow did, within six calendar months, before the day of exhibiting the said information, to wit, on the 12th Oct. 1876, and within the limits of the Chief Office of Inland Revenue, in London, to wit, at the parish of Shore-ditch, in the county and district aforesaid, keep a certain carriage, for the keeping of which a license was required by the said Act, without having a proper license under the said Act, contrary to the form of the said Act; whereby, and by force of the said Act, the said John Callow had forfeited the sum of 20*l*."

2. The following facts were admitted before the police magistrate by both parties on the hearing of the complaint: That the appellant was an officer of excise. That the said information was commenced and prosecuted by order of the Commissioners of Inland Revenue. That the respondent, who is a coachbuilder, carrying on business in Islington, had not, on the said 12th Oct. 1876, a license under the said Act authorising him to keep a carriage. That on that day two carriages were in the possession of, and used by one John Rutter, under an agreement dated the 15th June 1876, and made between the said respondent of the one part, who on the day and year last mentioned was the owner of the said carriages, and the said John Rutter of the other part. A copy of the agreement is annexed to and deemed to be part of this case. That in consequence of the non-compliance with the terms of the said agreement by the said John Rutter, the said respondent did subsequently to the said 12th Oct. 1876, and before the expiration of the year, seize and take into his possession the said carriages and sold and disposed of them in the usual way of his trade.

3. On the part of the appellant it was contended that under the said agreement the letting for hire of the said carriages was for a period less than a year, that is to say, for a week, and so on from week to week, coupled with an agreement to sell the carriages in certain events which might or might not happen, and on payment of a sum of money for the purchase, and accordingly the person who let the carriages was under the provisions of the 11th section of the Customs and Inland Revenue Act 1875, to be deemed for the purpose of the said Act of the 32nd and 33rd years of the reign of Her present Majesty, chapter 14, to be the person keeping the carriage.

4. On the part of the respondent it was contended that the carriages in question had, under the said agreement, been sold to the said John Rutter, the purchase money being paid by way of instalments, and the purchase being subject to a proviso that the respondent might, on nonpayment of certain instalments of the purchase-money, seize and repossess himself of the said carriages, and that on the said 12th Oct. 1876, the said carriages were the property of and in possession of, the said John Rutter.

It was further contended on the part of the said respondent that if the said agreement disclosed an hiring, and not a sale, such hiring was for a longer period than a year, and that, therefore, the said respondent had not committed a breach of the said first named Act.

5. The police magistrate being of opinion that the respondent was right in his contention, dismissed the said information.

6. The question of law for the court was, whether, on the 12th Oct. 1876, the respondent had let the said carriages for a period less than a year, within the meaning of the 11th section of the Customs and Inland Revenue Act 1875.

If the Court should be of opinion that he had not, the police magistrate's dismissal of the information to be confirmed; if the court should be of a contrary opinion, then the case to be remitted to the police magistrate, or otherwise dealt with as the court should direct.

The following is the agreement referred to above:

Memorandum of agreement made this 15th day of June, one thousand eight hundred and seventy-six, between John Callow of 113, Cottenham-road, in the parish of Islington, of the one part, and John Rutter, of 3, Benenden-street, East-road, in the parish of Hoxton, of the other part.

The said John Callow agrees to let the said John Rutter two Clarence cabs, from this day, on hire, at the sum of 30*s*. per week, such sum to be paid by the said John Rutter to the said John Callow on each and every Friday in each week, from the date thereof, in advance, as the hire of such Clarence cabs, free from any reduction whatsoever on account of repairs on or otherwise.

And it is hereby agreed between the parties, that if the said John Rutter shall punctually and regularly pay to the said John Callow the sum of 30*s*. per week in a manner above described for seventy-five weeks consecutively, the said Clarence cabs shall be the property of the said John Rutter on his paying the further sum of 5*l*. for the purchase thereof, and the said John Callow shall and will hereby agree to accept the further sum of 5*l*. for the purchase thereof. And it is hereby agreed between the parties that if the said John Rutter shall neglect or omit to make any of the said weekly payments, at the time or times mentioned, it shall be lawful for the said John Callow, and he is hereby fully authorized, to seize and obtain possession of the said Clarence cabs, and this agreement shall be his full authority for so doing,

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and the said cabs must not be sold until paid for by the said John Rutter.

Witness to the signature of the said John Rutter,
W. E. COLLETT.

Bowen appeared for the appellant, and *Robertson* for the respondent.—The arguments of counsel were, in effect, the same as those advanced for the appellant and respondent, respectively, before the police magistrate, and are sufficiently indicated above.

Lord COLERIDGE, C.J.—This agreement is certainly not very artistically drawn, and it is not easy to construe the whole of it so as to give effect to every part of it, assuming that every part of it performs some function that has not been performed by portions of the agreement that precede it. Looking at it, however, and, as far as one can (to a document of this kind) applying a common sense construction, it seems specially to be an agreement for the sale of a cab, to be paid for by seventy-five weekly instalments of thirty shillings each, and a further payment of five pounds at the end of the seventy-five weeks or last instalment. That being really the substantial form of the agreement, I am of opinion that it is not a letting for hire for less than a year. It is not necessary, I think, to decide whether Rutter has hired it for a year, or for any longer period, but it is enough, for the purpose of affirming the judgment of the police-magistrate, which I think ought to be affirmed, to say, that the true construction of this agreement clearly seems to me to be that Callow had not let the carriage for hire for a period less than a year. It is, in fact, not a letting at all, it is really a sale by seventy-five weekly instalments.

Grove, J.—I am of the same opinion. The *onus* is upon the appellant, in this case, to prove that this carriage might be let for less than a year, or might be let for more; the words of the Act are "And every person who shall let any carriage for any period less than a year shall be deemed to be a person letting a carriage." Can it be said that this is a letting for less than a year? It appears to me that it is not necessarily a letting for less than a year, because the person to whom the carriage is let, as I read the agreement, has the power to keep it for more than a year if he chooses to pay the rent. It is the necessary implication from this agreement that the person to whom the carriage is let has the right to keep it for more than a year, if he continues to pay the rent for seventy-five weeks, and also the right of purchasing the carriage for 5*l.* at the conclusion of the seventy-five weeks. There is an agreement that if he does not pay the rent, the lessor of the carriage may take possession, but when you couple that with the fact that the person to whom the carriage is let has the power of purchasing the carriage at the conclusion of the seventy-five weeks, it shows that it is in the power of the person having the carriage to keep the carriage, if he so chooses, for at all events the seventy-five weeks, and it may be longer. It is not a letting for less than a year: it is a letting which the person to whom the carriage is let can compel to be for more than a year. No doubt there are one or two clauses that may be difficult to construe, and there is always this difficulty in construing an agreement of this sort. If you are to view it through the light of the agreement, it is impossible to say what level you

are to bring your mind to, or where the canon of construction is to come from. I do not see how to construe it, except by applying the ordinary rules of law, otherwise you must alter the level of construction according to the level of the mind of the person who drew the agreement. The appeal must be dismissed.

Upon an application for costs, counsel for the appellant inquired whether it was the custom to give costs when the prosecution was by the Commissioners of Inland Revenue.

Lord COLERIDGE, C.J.—Why not? Why should they vex the subject by an unnecessary prosecution?

Solicitor for the appellant, the *Solicitor of Inland Revenue*, Somerset House.

Solicitor for the respondent, *Wm. Bohm*.

EXCHEQUER DIVISION.

Saturday, June 23, 1877.

(Before CLEASBY, B. and HAWKINS, J.)

CARPENTER (app.) v. HAMILTON (resp.)(a)

The Medical Act 1858 (21 & 22 Vict. c. 90), sect. 40, schedule A.—Wilfully and falsely pretending to be a doctor of medicine—Person describing himself as "Doctor of Medicine of the Metropolitan Medical College of New York"—Question of fact for decision of the magistrate.

The Medical Act 1858 (21 & 22 Vict. c. 90), by sect. 40, imposes a penalty on any person who shall "wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine . . . or any name, title, addition, or description, implying that he is registered under this Act, or that he is recognised by law as a physician or surgeon," &c. The respondent kept a shop, where he dispensed medicine and gave advice; he had a diploma in the window, in which he was described as "John Hamilton, Doctor of Medicine of the Metropolitan Medical College of New York," and he so held himself out to the world and the magistrate reported that it was not satisfactorily proved that the respondent was not entitled so to describe himself. He was not registered, and held no qualifications which would entitle him to be registered under the Medical Act. The magistrate having dismissed a complaint brought against the respondent under sect. 40 of the Medical Act:

Held (by Cleasby, B. and Hawkins, J.), on appeal, that the decision of the magistrate was right, as the only evidence of any false pretence was, that the respondent pretended to be what he really was; and also that it was a question of fact for the magistrate's decision rather than one of law for the court.

CASE stated by Mr. Knox, a metropolitan police magistrate, under 20 & 21 Vict. c. 43:

Paragraphs 1, 2, and 3 stated that a complaint was preferred against the respondent and dismissed.

4. Upon the hearing of the said complaint it was proved on the part of the appellant, and found as a fact, that the respondent for some time past, and at the date of the occurrence of the offence charged, kept, and keeps, a shop at No. 404, Oxford-street, within the jurisdiction of this court,

(a) Reported by HENRY LEIGH and R. RIGWOOD, Esqrs.,
Barristers-at-Law.

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wherein he habitually dispensed and dispenses medicines, and gave and gives medical advice to patients.

5. I find furthermore, as a fact, that on the 18th Oct. now last past, 1876, Benjamin Fordham, a detective officer of the E Division of the Metropolitan Police, went to the said shop No. 404, Oxford-street, and had an interview with the respondent, in the course of which the witness spoke with the respondent in respect of his bodily ailments, and the respondent prescribed for him, and supplied him with a bottle of medicine for which he paid the respondent the sum of 5s. 10d.

6. I find furthermore, as a fact, that the respondent kept and keeps in his shop window at the said house No. 404, Oxford-street, and in a conspicuous way, a large diploma in a frame, in which he is described as "John Hamilton, Doctor of Medicine of the Metropolitan Medical College of New York in the United States of North America," of the validity of which, beyond production, he gave no further proof.

7. I find as a fact that the respondent described himself, and held himself out to the witness and to the world substantially as Dr. John Hamilton, Doctor of Medicine of the Metropolitan Medical College of New York.

8. I find as a fact that the respondent's name does not appear in any register showing that he is registered under the Medical Act, and that he does not hold any qualification or diploma which would entitle him to be registered under the said Medical Act.

9. The question of law then arising on the above statement for the opinion of the court, is whether or no, if, as on the facts as above stated, a man holds himself out as Dr. John Hamilton, Doctor of Medicine of the Metropolitan College of New York, and not otherwise, he can be held to offend against the 40th section of the Medical Act (21 & 22 Vict. c. 90), coupled with the 34th section of the said Act for interpretation of the words "recognised by law."

10. Or more generally, Does a man who actually practises medicine or the medical art, who holds himself out to the world as a medical graduate or the holder of a diploma of a foreign university or college and nothing else, come within the prohibition of the Medical Act (21 & 22 Vict. c. 90), s. 40?

11. I dismissed the said complaint, as I was of opinion that the respondent did not wilfully and falsely pretend to be or use the name of a doctor of medicine contrary to sect. 40 of the Medical Act, as he only represented himself to be, and used the name of, Doctor of Medicine of the Metropolitan Medical College of New York. It was not proved to my satisfaction that he was not entitled so to describe himself.

12. If the court should be of opinion that I was right in point of law in dismissing the said complaint, judgment is to be given for the respondent, and if the court should be of opinion that I was wrong in point of law, the case is to be remitted to me with the opinion of the court thereon, so that I may convict the said respondent and impose on him such penalty as I may think fit.

Sect. 40 of the Medical Act (21 & 22 Vict. c. 90) is as follows: "Any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine,

surgeon, general practitioner, or apothecary, or any name, title, addition, or description, implying that he is registered under this Act, or that he is recognised by law as a physician or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence pay a sum not exceeding twenty pounds."

Bompas, Q.C. (with whom was *Finlay*) for the appellant.—The Act was intended to prevent persons not registered from practising. Therefore, by using the title of Doctor of Medicine of the Metropolitan Medical College of New York, the respondent falsely pretends that his name is on the register. The magistrate was wrong in dismissing the charge, and he should have convicted the respondent of the offence charged against him.

Besley and Tickell for the respondent, *contra*.—The respondent need not be registered in order to practise. The Act only imposes certain disabilities on the unregistered, such as rendering them unable to recover their fees, or to be eligible for certain appointments (ss. 32, 36). The fact that such disabilities are mentioned shows that unregistered persons may practise. The respondent has no means of getting himself registered, not having practised here before the 1st Oct. 1858. By sect. 15 of the Act, the persons entitled to be registered are persons then possessed of, or who should thereafter become possessed of, any of the qualifications mentioned in schedule A. That schedule contains eleven clauses, the first ten of which relate to practitioners with British or Irish qualifications, and the eleventh is, "Doctor of medicine of any foreign or colonial university or college, practising as a physician in the United Kingdom before the 1st Oct. 1858, who shall produce certificates to the satisfaction of the council of his having taken his degree of Doctor of Medicine after regular examination, or who shall satisfy the council, under sect. 45 of this Act, that there is sufficient reason for admitting him to be registered." (For sect. 45, read sect. 46. See 22 Vict. c. 21, s. 5.) It is a question of fact for the magistrate, and not a question of law for this court, whether the respondent has committed the offence created by the statute.

Ladd v. Gould, 1 L. T. Rep. N. S. 335;

Ellis v. Kelly, 3 L. T. Rep. N. S. 331; 30 L. J. 35, M. C.; 6 H. & N. 222.

Bompas, Q.C., in reply.

CLEASBY, B.—We have to look at this case as it stands, and see what is the offence charged. The words follow those in the 40th section of the Act, and we may suppose all the words of that section to be put into the charge in the case. Now I do not like myself to deal with a question of fact, but how is it possible to make out a charge of falsely pretending to be something, when the only evidence is that the man pretends to be what he really is? Apart from the authorities referred to, it seems to me a question of fact, the decision of which the magistrate should not throw on the court. It is the magistrate who has to determine whether there has been a false pretence or not, and, the complaint having been dismissed, the case is really disposed of.

HAWKINS, J.—I am of the same opinion, and think the decision of the magistrate should be upheld. The offence charged is under sect. 40 of the Act. [The learned judge read the section.] Now, in order to understand this, we must see who

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are entitled to be registered. That depends upon sect. 15, coupled with Schedule A. The schedule contains eleven descriptions of persons, the first ten of which we may dismiss as not applicable to the present case. The eleventh refers to persons with foreign or colonial qualifications, and is as follows: [The learned judge here read the eleventh head or description of persons contained in Schedule A.] Now did the defendant pretend that he fell within the first head, or within the eleventh, as a "doctor of medicine of any foreign or colonial university or college," practising as a physician in the United Kingdom before the 1st of October 1858? If he did not, then he is not liable under this charge. The case expressly finds that he only represented himself to be, and used the name of "Doctor of Medicine of the Metropolitan Medical College of New York," and the magistrate adds that it was not proved to his satisfaction that he was not entitled so to describe himself, but there was no evidence to show that in using the words "doctor of medicine" he pretended that he practised as a physician in the United Kingdom before the 1st Oct. 1858. I give no opinion as to what would be the result if a fresh summons were taken out; but taking this case as it stands I think the respondent is entitled to our judgment.

Judgment for the respondent.

Solicitors for the appellant, *Green and Pridham.*

Solicitor for the respondent, *Ricketts.*

CHANCERY DIVISION.

(Before Vice-Chancellor MALINS.)

Tuesday, July 3, 1877.

SHEPHEARD v. BRETHAM. (a)

Statute of Mortmain (9 Geo. 2, c. 36, s. 3)—Charitable bequest—Premium on granting a lease.

A premium reserved on granting a lease is an estate or interest in land within the Statute of Mortmain.

FURTHER consideration.

Cordelia Angelica Read, by her will dated the 18th Dec. 1858, gave and bequeathed to the treasurer for the time being of the Hospital for the Cure of Consumption, at Brompton, Middlesex, certain personal property therein mentioned, "and all other her personal estate and effects, which she could by law bequeath to such an institution."

The testatrix died in Dec. 1871; and the bill in this suit was filed, for the administration of her estate in May 1872, by her surviving executor.

The decree, dated the 14th Dec. 1872, directed (amongst other things) an inquiry what parts of the testatrix's estate, either capital or income, passed to the defendants, the President and Governor of the Brompton Hospital, under the bequest in her will.

The chief clerk, by his certificate, dated the 20th April 1877, found that (in addition to a very large amount of pure personality) "the premium for the lease of the Old Coventry-street public-house and interest thereon from the 1st Aug. 1857 up to the testatrix's decease, amounting

together to 1019*l.* 8*s.* 4*d.*," passed under the above bequest.

By an agreement dated the 1st July 1857, and made between the testatrix of the one part, and John Walkor and Charles H. Walker of the other part, the testatrix in consideration of the sum of 600*l.* to be paid to her as thereafter mentioned, agreed to grant a lease of the above mentioned, public-house for a term of thirty-one years, at a yearly rent of 100*l.*, payable quarterly; and it was thereby agreed that the sum of 600*l.* should be paid by the lessees to the testatrix on the 1st Aug. then next; and, if from any cause whatever the said sum of 600*l.* should not be then paid, they should pay interest on the same at the rate of 5*l.* per cent. per annum.

The premium of 600*l.* had never been paid. This sum, together with a large arrear of interest, was still owing.

A summons had been taken out (by the devisees of the heir-at-law of the testatrix) to vary the certificate by declaring that the premium for the lease, and the interest thereon, did not pass under the bequest to the hospital.

Higgins, Q.C. and *E. Beaumont*, in support of the summons.—The premium, and the interest thereon, is in the nature of unpaid purchase-money. The premium is a sale *pro tanto*; it is not pure personality; and, therefore, cannot pass under the bequest to the hospital. They referred to

Brook v. Badley, L. Rep. 4 Eq. 106.

J. Pearson, Q.C. and *Norton*, for the Brompton Hospital.—The testatrix had no lien on the demised land for the amount of the premium: our only remedy is a personal action against the lessees. The amount in question is, therefore, pure personality. They referred to

Edwards v. Hall, 6 D. M. & G. 74.

Glasse, Q.C. and *Cracknall*, for the plaintiff; and *Humphry*, for some of the next-of-kin.

Higgins, Q.C. in reply.

MALINS, V.C., after stating the facts, said: In this state of things, the lessees being in possession, under a contract for a lease, the testatrix died, having given all her property, in the manner I have stated, to the Brompton Hospital. The question is, whether she could give this premium of 600*l.* Now, that it is her personal property nobody disputes, and it is perfectly settled that arrears of rent may be given to charities. The reason is that the remedy for nonpayment of rent is, not possession of the land, but distress upon the chattels that may be found upon it, or re-entry for nonpayment. There is no lien upon the land for the rent. Unpaid purchase-money cannot be given to charities, because it is an interest in the land within the Statute of Mortmain. Now is this premium purchase-money or is it rent? If it is rent, it is regulated by the case of *Brook v. Badley* (affirmed on appeal). That was the case of a mining lease, reserving a surface rent, and a large additional rent of 750*l.* per acre payable in a certain way. At the death of the testatrix a portion of this additional rent was in arrear. The Master of the Rolls decided that it was rent, not unpaid purchase-money; and, therefore, could be given to charitable purposes. The case of *Edwards v. Hall* is also a decision that rent can be given for charitable purposes. Now a premium cannot be distrained for: it has not a single incident of rent. Then, if it is not rent,

(a) Reported by JAMES E. HORNE, Esq., Barrister-at-Law.

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what is it? The law is perfectly settled that a lessee is a purchaser *pro tanto*. Therefore, *pro tanto*, the premium is purchase-money: it is purchase-money for a limited interest. Suppose no rent had been received; suppose a lease had been granted in consideration of 600*l.* premium for thirty-one years at a peppercorn rent, what would the 600*l.* be? Surely purchase-money for the lease. And if it is purchase-money for the lease, then there is a lien on the land to recover it. A lessee being a purchaser *pro tanto*, it seems to me to make no difference whether he pays a premium only, or a premium and rent. If he pays a premium only, that, to my mind, is clearly purchase-money for the interest he purchases; and it is not less so if he pays an additional sum by way of rent. Suppose these gentlemen (who had a contract for a lease) had sold their interest to a purchaser. He must necessarily have had notice that the 600*l.* was unpaid, because the contract, under which they were in possession, obliges them to pay the 600*l.*, and they could not have produced receipt for it. What would have been the remedy of the testatrix against the assignee? There would have been no privity of contract. There would have been no privity of estate, because no estate had been assigned, as the lease had not been granted. What then would have been the remedy? In my opinion the remedy which every vendor has. She might recover the money by a sale of the property out of which the money was payable; in this case by a sale of the lease for thirty-one years. In this case, therefore, I am of opinion that the testatrix had a lien upon the land for the 600*l.* premium; that the premium is purchase-money *pro tanto*, and, therefore, could not be given for charitable purposes. The summons will, therefore, be allowed; the costs will be costs in the cause.

Solicitors: *H. W. Davis; Shepherd and Sons; Norton, Rose, and Co.*

(Before Vice-Chancellor HALL.)

Saturday, July 14, 1877.

CRACKNALL v. JANSON. (a)

Bankruptcy—Secured creditor giving up security—Subsequent incumbrancers.

A. and B. were respectively first and second mortgagees. The mortgagor filed a liquidation petition, under which his affairs were liquidated by arrangement. A. proved in the liquidation for the full amount of his debt, giving up his security. B. did not prove in the liquidation.

Held, that the benefit of A.'s mortgage had passed to the trustee in the liquidation, and was kept alive for the benefit of the general creditors; and was not merged in the equity of redemption of the mortgaged premises for the benefit of B.

THE facts of this case were as follow: In Aug. 1871, Joseph Turnley mortgaged real estate at Selhurst, in the county of Surrey, subject to certain prior mortgages, to Diana Mary Heance Pellowe, to secure 1500*l.* and interest. In Feb. 1872, Turnley mortgaged the same property to the plaintiffs to secure 5500*l.* and interest. In March 1874, he filed a petition in the London Bankruptcy Court for liquidation of his affairs by arrangement, and resolutions for such liquidation were subsequently duly passed and registered.

(a) Reported by HENRY C. DRAKE, Esq., Barrister-at-Law.

Diana Pellowe proved under the liquidation for the full amount of the sum secured by her mortgage, giving up her security. The plaintiffs did not prove in the liquidation for any portion of the debt secured by their mortgage. The mortgaged estate, on being sold, proved insufficient, after providing for the prior mortgages, to pay the sum secured by Diana Pellowe's mortgage and also the subsequent incumbrances. The trustee in the liquidation claimed to be entitled to set up Diana Pellowe's mortgage against that of the plaintiffs.

A special case, stating the above facts, was accordingly prepared, and submitted to the court the question being whether the benefit of Diana Pellowe's mortgage had passed to the trustee in the liquidation proceedings, and was kept alive for the benefit of the general creditors, retaining the priority to which but for Diana Pellowe's proof it would have been entitled over the plaintiffs' mortgage, or whether by reason of such proof it was merged in the equity of redemption of the premises comprised therein, for the benefit of the plaintiffs.

Dickinson, Q.C. and Creed, for the plaintiffs.—This case comes within the ordinary rule of the court, that a mortgagor cannot acquire a mortgage security created by himself, and set it up against a subsequent incumbrancer, also claiming through him. The Bankruptcy Act and Rules provide, it is true, for a second creditor who desires to prove against the general estate giving up his security to the trustee, but the latter can only take it subject to the existing rights of other incumbrancers. The Act and rules nowhere say that the mortgagor's bankruptcy is to make any difference in the position of those incumbrancers. Indeed, they are not framed with any reference to them, but relate only to questions which may arise between an individual mortgagee and the trustee. If we are allowed to take part of our debt out of the proceeds of sale of the mortgaged property, we shall prove for less against the general assets, and the aggregate amount of proof by Diana Pellowe and ourselves against the general assets will be precisely the same as it would have been if she had realised her security and proved for the balance due to her; being, in either case, the total amount of the two debts, minus the value of the security. They referred to

Bankruptcy Act 1869, s. 6, subs. 6 and ss. 16 and 40; Bankruptcy Rules 1870, rr. 99, 100, 134, 135 and 136; *Ex parte King*, 82 L. T. Rep. N. S. 505; L. Rep. 20 Eq. 273; *Otter v. Lord Vane*, 29 L. T. Rep. 59; 6 De G. M. & G. 638.

Rigby for the trustee.—The object of the Bankruptcy Act is to divide a debtor's assets equitably amongst all his creditors; and, with that object, they do, to a certain extent, interfere with the rights of his mortgagees. Thus, they prevent a mortgagee from exercising his ordinary right of going, at the same time, against his specific security and against the general assets of the mortgagor. The principle is expressed by saying that the mortgagee is not allowed to have both the whole of a part and a part of the whole. Formerly, a mortgagee who proved under the bankruptcy lost his security; the only exception being that he might retain his security and prove against the general estate when the latter was so incumbered that the bankrupt would have no beneficial interest in it, even if the mortgage were removed

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(*Ex parte Turnley*, 3 Mont. D. & De G. 576). The reason why no mention is made, in the Act or rules, of subsequent incumbrancers, is that when the security is given up by a prior incumbrancer, they merely share rateably with the other general creditors. No special provision as to them was, therefore, needed.

Dickinson, Q.C. in reply.

HALL, V.C.—The question raised by this case is a new one. It seems to me that, in disposing of it, I must bear in mind the general principle of administration in bankruptcy, which is that the bankrupt's estate should be so administered as, on the one hand, not to benefit, and, on the other, not to hurt any creditor. Now, it appears that the plaintiffs held their security subject to prior incumbrancers. One of the prior incumbrancers preferred to give up her security and prove against the general estate of the bankrupt for the full amount of her debt. In order to do that, she had to give up her security, and the question is, for whose benefit did she give it up—for that of the subsequent incumbrancers, or for that of the general body of creditors? It is immaterial whether the security so given up was a chattel or real estate; it was, under the provisions of the Act, given up to the trustee in the liquidation. Now, the sections and rules which speak of a security being given up do not make any reference to the case of successive incumbrancers. The first part of the Act which it is necessary to refer to is that which follows sub-sect. 6 of the 6th section. It says that the debt of a petitioning creditor must not be a secured debt, "unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors . . . or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he shall . . . give up his security to such trustee for the benefit the creditors, upon payment of such estimated value." That contemplates two things; either that the secured creditor will give up his security "for the benefit of the creditors, and prove for his whole debt;" or that he will, on payment of the estimated value, give it up to the "trustee for the benefit of the creditors," and prove for the balance. The giving up in either case is the same. Then comes sect. 16, sub-sect. 4. This again provides for the secured creditor giving up his security "to the trustee," and, again, sect. 40 speaks of a secured creditor "giving up his security." The giving up is, in each case, to be a giving up to the trustee; and I am of opinion that the result of such giving up is to put the trustee exactly in the position of the person who has given up, and consequently that the giving up is not to confer any special advantage on subsequent incumbrancers. On the other hand, it will work them no disadvantage. They will be in precisely the same condition as they were before; and such a result will be in conformity with the general principle of the law of bankruptcy, which I have previously referred to.

Solicitor for the plaintiffs. *Henry White*.

Solicitor for the trustee, *John W. Sykes*.

(Before Vice-Chancellor BACON.)

Thursday, July 19, 1877.

MITCHELL v. MOBERLEY(a).

Will—Railway company—Mortgage debenture—Companies Clauses Consolidation Act 1845, schedule C—Mortmain Act—Charity.

A railway debenture, which is in the form given in schedule C to the Companies Clauses Consolidation Act 1845, is pure personality, and therefore not within the mischief of the Mortmain Act.

Chandler v. Howell (L. Rep. 4 Ch. Div. 651; 35 L. T. Rep. N. S. 593) discussed.

THOMAS ALEXANDER MITCHELL, by his will, dated 14th March 1875, gave sundry specific and pecuniary legacies, and bequeathed the whole residue of his property upon trust for his wife for life; and after her decease upon trust for charitable purposes benefiting the City of London.

In 1876 this action was instituted for the administration of the testator's estate, and on the 15th July 1876, a decree was made directing various accounts and inquiries, and on the 16th March 1877, a scheme was directed to be settled for the future management and regulation of the charity.

In prosecuting the accounts and inquiries directed by the decree, a question arose whether a debenture of the Bridport Railway Company, forming part of the testator's estate, was or was not an interest in land within the Mortmain Acts. The debenture was in the form given in schedule C of the Companies' Clauses Consolidation Act 1845, and by it the Bridport Railway Company, by virtue of the Bridport Railway Act 1845, in consideration of the sum of £2000 paid to them by T. A. Mitchell, "assigned to the said T. A. Mitchell, his executors, administrators, and assigns, the said undertaking, and all future calls on shareholders, and all the tolls and sums of money arising by virtue of the said Act, and all the estate, right, title, and interest of the company in the same, to hold unto the said T. A. Mitchell, his executors, administrators, and assigns, until the said sum of 2000*l.*, together with interest for the same," at the rate of £5 per cent. per annum was satisfied.

Kay, Q.C. and *Tremlett*, for the executors, contended that the debenture was pure personality.

A. T. Watson, for the charity, supported the same contention.

Sir H. M. Jackson, Q.C. and *B. Hughes*, for the widow, did not oppose.

Hemming, Q.C. and *W. Barber*, for the next of kin, submitted that the debenture was an interest in land, and therefore within the Mortmain Acts.

Kay, Q.C. in reply.

The following authorities were referred to in the course of the arguments:

Knapp v. Williams, 4 Ves. 429*n*;
Holdsworth v. Davenport, L. Rep. 3 Ch. D. 185; 35 L. T. Rep. N. S. 319;
Gardner v. London, Chatham, and Dover Railway, L. Rep. 2 Ch. App. 201; 15 L. T. Rep. N. S. 552;
Chandler v. Howell, L. Rep. 4 Ch. D. 651; 35 L. T. Rep. N. S. 593;
Langham's Trusts, 10 Hare, 446;
Re Myers v. Perigal, 3 De G. M. & J. 599;
Bunting v. Marriott, 19 Beav. 163;
Walker v. Milne, 11 Beav. 507;
Tothill Fields Private Act, 6 Geo. 4, c. cxxxiv., ss. 97, 98;

(a) Reported by H. L. FRASER, Esq., Barrister-at-Law.

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Ashton v. Lord Langdale, 17 L. T. Rep. O. S. 175
4 De G. & Sm. 402;

BACON, V.C.—No doubt there is very great difficulty in this case. The principal difficulty arises from the two most recent decisions on the subject. The earlier decisions, which have been gone through at great length on both sides, that of Lord Eldon, for example, *Knapp v. Williams* (*sup.*) which was first referred to, have established that tolls do constitute such an interest in land as comes within the Statute of Mortmain. Lord Eldon's expressions are very remarkable. I find him saying, "It is not at all within the mischief" (which means the mischief which the law of Mortmain was intended to prevent), "but the consequences would open a much larger field for charitable donations." Those struck me as being strange circumstances upon which to found a judgment; but nevertheless it is a judgment plain and distinct, and which I should not feel myself at liberty to call in question in the slightest degree, if the case before me fell within the facts or the law as Lord Eldon there decided it. It is unnecessary to go through the other cases which have been mentioned, in which there arises a plain difference of opinion between the judges. I allude more particularly to the decision of Lord Langdale in the case of *Walker v. Milne*, and the decision of Knight Bruce, V.C., in the case of *Ashton v. Lord Langdale*. The first decision is clear and plain, and is in favour of the debentures not being within the Statute of Mortmain. The judgment of Knight Bruce, V.C., is directly, in plain terms, and not only in spirit, opposed to it. The judgment is expressed in very few words. He recognises the principle which had then been established that shares in a railway company were not within the Statute of Mortmain, and then he says, "But with regard to mortgages of the undertakings and of the tolls, these interests proceed directly from the corporation, and appear to me to constitute a charge or encumbrance affecting lands, tenements, or other hereditaments, or some estate or interest therein," which are the words of the Statute of Mortmain. Then he says, "In my opinion they do directly and immediately charge hereditaments, namely, the tolls, if not the land itself by the use of which the tolls are obtained; and, if so, they are within the words of the 3rd section of the Act which has occasioned the bulk of the decisions that are sometimes complained of. Upon this point I dissent, though most respectfully, yet so strongly, from the decision of the Master of the Rolls that I ought, I think, to depart from it." That case was argued before Knight Bruce, V.C. by Sir William Page Wood, as I gather from the report, and at a later period Wood, V.C. decided *Re Langham's Trusts*, in which he seems to have followed that, but not without considerable hesitation. In his judgment he says (p. 449), after alluding to the decisions as to shares not being within the statute, "It was, however, different in the case of an express assignment of the tolls which the company were entitled to levy. The tolls did not belong to any individual shareholder, but they belonged to the company; and the company, by their assignment, placed their mortgagee in the same position, and gave him the same right as they had themselves. In certain events the mortgagee would be entitled to have a receiver of the tolls appointed; and a party who personally,

or through the hands of a receiver, might take the tolls, had acquired a direct interest in land within the meaning of the statute. Without going to the extent of some former cases upon this point, he knew of no authority for saying that a security which gave a direct right or charge upon a property, which was in fact land, could be made the subject of a charitable bequest." That brings it round then to this point—the shareholders' interest in the undertaking is not within the Statute of Mortmain. Then it is said that the interest in an unincorporated company is within the Statute of Mortmain, because that is necessary to be stated in order to justify the decisions. The decision by Vice-Chancellor Knight Bruce was pronounced at a time after railway companies had become somewhat familiar, but in Lord Eldon's time there was no such thing as railways known. Then it remains to be considered what the nature of this railway undertaking is before you can ascertain whether the interest which the shareholders have in it (already decided not to be an interest in land), or the interest which the undertakers, or the directors, or the incorporated company have, is such an one as that by their mortgage in the terms here expressed it can be said to bring the case within the enactments of the Statute of Mortmain. Now the principle of the law of Mortmain is old enough and much older than the Statute of Mortmain, than any statute even of this country. It is a matter of public policy, a matter of political economy. "It is against the interests of the Republic that land should be held in dead hands inalienable." That is a most wholesome law, which I believe exists in almost all civilized countries. But there has grown up in this country of ours things totally different either from the monastic establishment, or any other encroachments made by incorporated companies; and by the authority of the Legislature an incorporated company is entitled to hold in what may be said to be the dead hand the land which is necessary for them to complete their undertaking. They are the owners, no doubt, of the land, but they are owners in what sense and for what purpose? They are owners of land in order that they may by its possession carry on a commercial undertaking. The difference between buying land and making a dock and getting from the Legislature authority to levy tolls upon the persons who make use of their property; the difference between that and a trading company that carries on the business of common carriers, and is engaged in various other undertakings is perfectly obvious and cannot be questioned. I am talking now about the principle of it. In *Holdsworth v. Davenport* (*sup.*), Malins, V.C., in considering all the cases that had gone before, and expressing a strong opinion upon them, although convinced of the necessity of adhering to those cases and obeying the decisions as far as he was called upon to pronounce upon the case, nevertheless, seems to have been struck with the inconvenience—I was going to say absurdity—of applying the Law of Mortmain to a trading company, as indeed nobody can suggest a reason why it should be applied to a trading company. But then, finding the decision in *Gardner v. The London, Chatham, and Dover Railway Company* (*sup.*), he felt himself relieved altogether from the weight of the former decisions, and that it was unnecessary for him to endeavour to reconcile the

decisions as far as they were conflicting; and therefore upon the authority of *Gardner v. The London, Chatham, and Dover Railway Company*, he decided that the interest which the mortgagees took under a debenture was not such an interest in land as brought it within the Statute of Mortmain. That is a very plain and distinct decision of his. Then it is said that that is at variance with the decision more recently pronounced by Hall, V.C., in *Chandler v. Howell (sup.)* But the decision of Hall, V.C., is upon a totally different subject. The debenture there bears no kind of resemblance to the debenture in this case. That was a security made by a public company—not a trading company, but a municipal company—for the improvement of a town. An Act of Parliament had been passed “for improving and regulating the town of Aberystwith, and for supplying the inhabitants thereof with water,” and vested in the commissioners appointed thereunder the works and the soil thereof, and authorised them to purchase land, and so on. In exercising those powers they purchased land and erected works, and consequently acquired a power to charge the works, rents, rates, or whatever else was necessary in order to accomplish the purposes of their Act, not for their own benefit, not in the slightest degree for their own profit, for it could not be said that it was a trading concern in any sense. None of the attributes of a trading concern could apply to the waterworks company in that case, and they, for the purpose of performing their duties under the Act of Parliament, borrow money and then they secure the repayment of that money by stating in the instrument that they have borrowed money upon the credit of the works, rents, and rates authorised to be erected, reserved, and so on, and they grant and assign such proportion of the said works, rents, and rates as may be necessary for the purpose. What kind of resemblance is there between that and an incorporated company, incorporated for the purposes of trade, authorised to acquire land for the purposes of trade, which, but for their Act of Parliament, they could not acquire, and giving a variety of directions, which are contained in the statute relating to them, to carry on the business of common carriers and the other business connected with railway companies? The Vice-Chancellor (Hall) keeps this steadily in view in his judgment, and in commenting upon those cases which had preceded it, and some of which were in conflict, he says this (p. 659): “There is, however, a distinction between the case of shares and bonds which was recognised by Lord St. Leonards in *Myers v. Perigal*. There may also well be distinctions between shares in one company and in another, though the number of persons constituting each company would not affect the question. A partner in an ordinary company has no interest in land vested in the company within the Statute of Mortmain, and this may be said as to shares, whatever be the constitution of the company.” Then his Lordship refers, as I will immediately, to the judgment in *Gardner v. London, Chatham, and Dover Railway Company*, but he says this: “The form of the security given was such that upon the true construction of the debenture, it did not give the holder the right which he was seeking in that case to have enforced.” What was the right he sought to have enforced? There had been assigned to him

by the debenture the undertaking. A part of the undertaking consisted of land, which had been bought for the purpose of the railway, and which in the further progress of the railway turned out to be surplus land, but which was nevertheless land acquired under the powers of the Act of Parliament, and which, unquestionably, until they parted with it, was a part of the undertaking. Hall, V.C. says: “That was expressly held in the judgment of Turner, L.J., who put it entirely on that ground. And as to that the argument for the defendant has a strong bearing; that is, that necessarily from the character of the undertaking and the nature of the security, it is not a fair construction of the instrument to hold that the parties were ever intended to be in a position to take the undertaking itself or anything but the fruit of the going concern; and that what the debenture holder in that case was proposing to do would have the effect of stopping the concern altogether. Those observations have an important bearing upon the question whether the principles of the decision in *Gardner v. The London, Chatham, and Dover Railway Company*, when applied to a case like this, would show that the holder of the security in this case would not have an interest in the land.” Then when I turn to the case of *Gardner v. The London, Chatham, and Dover Railway Company*, it seems to me to bring it clearly within this case; railways having then become very numerous in this country, and their interests being frequently the subject of decision. What the court was called upon to decide there was whether the form of the debenture, being identical with the form here, did pass an interest in the land. If it did, the debenture holder's right was irresistible. There was surplus land part of the undertaking, and if he had an interest in the land then it was quite clear he might have asserted his legal right. Not only was the common law case referred to in the case before Knight Bruce, V.C., a clear plain decision, but I hold it to be so, notwithstanding the somewhat ambiguous expressions in which Knight Bruce, V.C., dealt with that case. It was a clear decision that there was no such legal interest in the land—legal, at least, in the common law sense—as will justify a shareholder in bringing ejectment; but, if he had an interest, I do not know why he could not have brought ejectment. It is a plain decision that he had no such interest in the land as would sustain ejectment. Mr. Hemming said he might still have such an interest as would entitle him to apply for a receiver. That is what was decided in *Gardner v. The London, Chatham, and Dover Railway Company*, namely, that he had no such interest. Now the judgment in that case is so clear, so elaborate, and was so well considered by both the judges who had to deal with it, that it is in vain to say that Lord Eldon's decision and the other cases were not cited in the course of the discussion. But whether they were or not, the principles of law must have been present to the judges who dealt with it, and if the objection could have been maintained at all that it was an interest in land, then the judgment in that case is all wrong, and all beside the matter. Lord Cairns takes the case by itself, and deals with it as if it were an interest created in the trading company, distinguishing it not in words, but in his observations from a canal company, or a dock and harbour company, entitled

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only to tolls and rates, or to any other than that with which he had to deal, namely, a commercial undertaking which required the assistance of a manager. The company could not be carried on without a manager, and the result of that was to produce what he, in his language, calls "a fruit-bearing tree"; and then the company, having that in their possession, and that being their undertaking, charge that undertaking with the payment of the money they borrowed, and although the words of "tolls and rates" are to be found, they must have meant the tolls and rates which this trading company could levy—not the tolls and rates mentioned in Lord Eldon's judgment, as to which I have nothing to say but to speak of it with reverence, whatever doubt I may feel—not tolls and rates upon a turnpike road, but tolls and rates which were earned by the expenditure of the company, by the labour of their servants, by carrying on that general undertaking; and until those charges were defrayed there could be nothing coming either to the debenture holders or to the shareholders, or to anybody else. Profits, and profits alone, are that which it is proposed to be assigned by the debenture. Now Lord Cairns, in the observations which have been frequently read, but which I may refer to shortly again, says: "Whatever may be the liability to which any of the property or effects connected with it may be subjected, through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete or to be completed; as a going concern, with internal and Parliamentary powers of management not to be interfered with, as a fruit bearing tree, the produce of which is to be found dedicated by the contract to secure and to pay the debt." If that is all, what becomes of the suggestion, whatever has been decided before, and whatever previous cases have decided, that it is an interest in land? The contrary is decided by the highest authority, except the House of Lords, and decided in a manner which shows, as all will admit, and as those who do not recollect the judgment cannot fail to see, on reading it, that it received the utmost attention and the most minute consideration from the judges who had to deal with it. I take it that *Gardner v. The London, Chatham, and Dover Railway Company* establishes this, that the undertaking, which was the subject there, was a thing which from its very nature never could be comprehended within the Mortmain Act. To hold the contrary would be to negative and disregard every word of this judgment, which applies to the undertaking itself, the nature of the undertaking and the consequences—the results of the trade as carried on under the Act of Parliament. Then his Lordship says: "The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*, that is to say, the earnings of the undertaking, must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees—by seizing or calling on this court to seize" (which is only the mode of exercising the legal or equitable right which they had) "the capital, or the lands, or the proceeds of sale of land, or the stock of the undertaking—either prevent its completion,

or reduce it into its original elements when it has been completed." The Lord Justice Turner's judgment is, in my opinion, equally conclusive upon the same point. He says at page 221: "The debenture assigns to Gardner all the estate, right, title, and interest of the company in the same. But these words are merely referential, and cannot alter the construction of what has gone before. They cannot, I think, be construed to extend the operation of the debenture. My opinion is, that upon the true construction of this debenture, it proceeds upon the footing of the railway being treated as a continuing and going concern, and that it operates only to charge the railway and the works connected with it, and the tolls and sums of money of the like nature arising from it, in favour of the debenture mortgage. Had it been intended to go further, and to charge the capital of the railway company, and the surplus lands" (which are quite distinguishable from any other land), "as it was contended before us that it does, there can be no doubt that apt words could have been found for that purpose." Then he speaks of the assignment of the undertaking, which was necessary to protect the debenture creditors against other claimants upon the property of the company. In other parts of the judgment he expresses a clear opinion that the only charge which the debenture holders have is a first charge on the profits. Now that was the state of the law when the question came before Malins, V.C. Now, nobody can doubt that Malins, V.C., bestowed as much consideration upon this difficult subject as the case required, or, indeed, as could be required. He goes carefully through all the cases that have been decided. It is not necessary for me to repeat them further, but referring to Lord Hatherley's distinction in *Re Langham's Trusts*, and the distinction which Knight Bruce, V.C., drew in the cases that have been referred to, he says, "That seems to me a refinement of distinction between cases as to which I agree with the opinion of Lord Langdale in *Walker v. Milne*, that there is no material difference, and though I feel a profound respect generally for the judgment of Sir James Lewis Knight Bruce, I entirely dissent from it in this instance; because to say that shares in a company are not an interest in land, but that an assignment of them, which is what a debenture really amounts to, is such an interest, seems so unreasonable that I should have decided the contrary without hesitation, if it had not been for those two decisions." As I read that expression of opinion by the Vice-Chancellor, it would then have been his duty to have considered those two decisions which were in conflict with the others he mentioned; but he thought it was not necessary, because he says: "All questions are now removed by *Gardner v. London, Chatham, and Dover Railway Company*, which decided that a mortgage debenture made by a railway company in the form given in schedule C of the Companies' Consolidation Act 1845, does not give the debenture holder a specific charge upon the surplus lands of the company, or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale monies or interim rents. Therefore the mortgagee has only a right to take the tolls, and it follows that he has not an interest which is within the Mortmain Act. Then it has been said in the course of the argument that the decision of Vice-Chancellor

Hall in *Chandler v. Howell* is directly at variance with that. In some sense it is. Vice-Chancellor Hall does not seem to have adopted the reasoning of the Vice-Chancellor Malins; but then it must be borne in mind that his attention was not called to, or at least he does not express any opinion upon the plain and manifest distinction between a turnpike road, where there is no property whatever in the trustees or any body else, and a dock or harbour company where there is no interest except that the shareholders are to take what profit may be derived from the thing created either by subscription or otherwise, as in the *Aberystwith* case, which was then before him, which was also not a trading concern. It cannot be denied that if it is true that this is an interest within the Mortmain Act, that would furnish the means of destroying a trading concern. It was not the intention of the Legislature that any such powers should exist in any creditor of a trading company or any other person. This is a debenture charging the undertaking, which I understand and construe to mean the trade the Legislature has authorised the company to carry on—that, and nothing else. All that is necessary to carry on the trade is vested in them, but for that purpose, not for holding it in mortmain, not for any of the mischief which it was sought to prevent by the law of mortmain, not for anything but what is consistent with the ordinary transactions of human life, and particularly with railway companies. They are entitled to the undertaking of the concern, they give to the mortgagee certain authority and power and interest by assigning to him the tolls and rates, as was done in the case of *Gardner v. The London, Chatham, and Dover Railway Company*. The extent of that right is defined and settled by a most deliberate and exhaustive judgment, and without saying that the conflict between Hall, V.C., and Malins, V.C., is irreconcilable—because I do not think it is, if regard is paid to the difference in the two subject-matters with which they had to deal—but if it were so, then, in the obedience which I feel bound to pay to the decision of *Gardner v. The London, Chatham, and Dover Railway Company*, I should feel myself constrained to prefer the judgment of Malins, V.C., to that which has been more recently pronounced by Hall, V.C. It is quite unnecessary for me to say, feeling as I do unbounded respect for both those learned judges, how glad and how ready I should be to follow what I found to be a clear decision of either of them. For these reasons I am of opinion that this is not an interest in land.

Solicitors: *Masterman, Hughes and Co.*; *Bateman Harcourt*; *The City Solicitor*; *Young, Jackson, and Beard*.

Nov. 7 and 13.

HEATHER v. PARDON. (a)

*Nuisance—Noise and vibration of machinery—
Injunction—Increased noise and vibration—
Form of injunction—Reasonable user of business premises.*

The plaintiffs, a firm of solicitors, were the owners and occupiers of offices adjoining the defendants' steam printing works, which had been working from 1848 to May 1875, without any complaint

by the plaintiffs of nuisance occasioned by the noise and vibration of the machinery, though a slight noise and vibration could at times be heard and felt. In May 1875 the defendants made some alteration in their machinery, which the plaintiffs contended increased the noise and vibration, and they accordingly commenced an action for an injunction to restrain the defendants from working their machinery so as to occasion a nuisance to the plaintiffs.

Held, that the plaintiffs were entitled to an injunction restraining the defendants from working their machinery so as to occasion a nuisance or injury by vibration to any greater degree than had previously been occasioned up to May 1875.

Semble, the fact that noise and vibration from machinery has never been complained of for more than twenty years, does not deprive a neighbour of his right to prevent any increased noise, even though such increase be slight.

THIS was an action for an injunction to restrain the defendants from working their printing machinery so as to occasion a nuisance to the plaintiffs. The facts were shortly these:—The plaintiffs were the owners of three leasehold houses, Nos. 16 and 17, Paternoster-row, and a house in Queen's Head-passage at the back of No. 17, Paternoster-row, on the first floor and upper part of which they carried on business as solicitors under the name of Heather and Sons. The defendants, Messrs. Pardon and Son, carried on their business as printers in premises in Lovell's-court, adjoining part of the plaintiffs' offices, and separated only by a party wall. These printing offices, which had been in use since 1848, contained eight printing presses driven by a steam engine in the basement. About May 1875 the defendants substituted a new and improved machine known as the Dryden machine for one of the older machines, and it was from this date that the plaintiffs complained of the excessive noise and vibration, caused by the defendants' machinery, in the said house, No. 17, Paternoster-row, and Queen's Head-passage, whereby they alleged that the use and enjoyment of the said houses and the exercise of their profession and business had been disturbed and disquieted, and the said houses rendered less habitable and valuable. In the month of August in the same year the plaintiffs wrote a letter to the defendants complaining of the noise and vibration, and giving notice that unless the nuisance were abated within a week proceedings would be instituted; and as the nuisance still continued the writ was issued in Jan. 1876. After issue of the writ, and in the hopes of avoiding litigation, the defendants caused the number of revolutions of their new machine to be reduced from 1500 to 800 per hour; but, as the plaintiffs still alleged that the nuisance continued, the action came on for trial in due course.

The defendants' machinery was at work almost continually during the day, and during the night also for two or three nights in each week; and a great deal of evidence was adduced as to the noise and vibration, and the damage done to the structure of the plaintiffs' houses by the vibration. The statement of claim asked for an injunction restraining the user of the machinery, "so as to occasion nuisance, disturbance, or annoyance to the plaintiffs, as occupiers of parts of the said houses, No. 17, Paternoster-row, and Queen's Head-passage,

(a) Reported by W. COWELL DAVIES, Esq., Barrister-at-Law.

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or so as to cause injury by vibration to the said houses," and for damages; but the latter claim was not pressed at the trial. That there was some amount of noise was not denied, but the defendants contended that it was no greater than had been going on for years, that it was not an unreasonable noise, and that the plaintiffs were over sensitive to it.

Kay, Q.C. and Freeling for plaintiffs. — The defendants' printing machinery is clearly a very great nuisance to the plaintiffs. The very fact that the revolutions of the Dryden machine have been reduced is of itself evidence that the defendants felt there really was some ground of complaint. The defendants contend that since this reduction the noise is no greater than it has been since 1848; but this we deny. But, even assuming the defendants' contention is correct, if an injunction is not granted, the speed of the Dryden machine may be restored to 1500 revolutions an hour, or even more, and the nuisance become worse than ever. We submit that we are clearly entitled to an injunction restraining the defendants from working their machines so as to be a nuisance to us :

Broder v. Saillard, L. Rep. 2 Ch. Div. 692.

Sir H. Jackson, Q.C. and Hornell for the defendants. — The steam printing has been carried on for twenty-nine years, and where a state of things has existed for such a long period, the court will not interfere by injunction. In the present case the plaintiffs have shown a nervous sensitiveness to the noise which the court cannot attend to. The law does not regard trifling inconveniences, and every alleged nuisance, such as the present, must be looked at from a reasonable point of view, the locality and all other circumstances being taken into consideration: (*St. Helen's Smelting Company v. Tipping*, 12 L. T. Rep. N. S. 776; 11 H. of L. 642.) All these cases of nuisance are questions of degree, and the degree of noise here is not such as to warrant the interference of the court, and particularly where there is no greater noise now than there has been since 1848 :

Gaunt v. Fynney, 27 L. T. Rep. N.S. 569; L. Rep. 8 Ch. 8;

Freeling, in reply, referred to

Ball v. Ray, 28 L. T. Rep. N.S. 346; L. Rep. 8 Ch. 467.

Bacon, V.C. — No one can doubt for a moment that the law is clearly and distinctly settled, and has been so settled for many years. It is the law that a man is entitled to the quiet comfortable possession of his own property, and although the law does not restrict the exercise of any proper industry or business by any neighbour, it does prevent his exercising his industry or business so as to be an annoyance to his neighbour. With that limit (and that is the only limit) the defendant is at liberty to carry on his business of a printer, or any other business that he thinks fit, to any extent he likes; but what the law prohibits, as I understand it, is, that, in doing that, he shall not commit a nuisance upon his neighbour; and the single question, therefore, is whether what is done by the defendant in this case is a nuisance or not. Now there has been evidence, wholly uncontradicted, by credible persons, that the plaintiff is disturbed in the enjoyment of his property by the manner in which the defendant carries on his business. There is not an attempt to dispute it. The witnesses have been cross-examined, but there has not been a

single fact upon which their testimony has been shaken. It is proved that that which was complained of when the action was brought did exist, and it is not disputed that at that time there was a noise which impeded the carrying on of the business and diminished the comfort of the plaintiff in the occupying of his house. Plaintiff confines his complaint to what took place in the year 1875, there having been the business of a printer carried on—a noisy business, as everybody must know—up to the year 1875; but at that time a change in the manner of the carrying on of the business was adopted by the defendant of which the plaintiff had reason to complain. Then what conduct did he pursue? He wrote a letter, not an uncivil and not an unreasonable letter, to the defendant, remonstrating with him on the nuisance of which he complains, and which he states in his statement, and which is plainly, distinctly, and emphatically that addition which had been made to the machinery employed by the defendant in the year 1875. He gets no answer, or no satisfactory answer, to that letter, and from the month of August when he made his complaint down to the month of January when he brought his action, nothing whatever was done to abate that nuisance. Then, the action being brought in Jan. 1876, at some period not very distinctly mentioned, but eighteen months ago—to adopt the expression of the defendant's witnesses—the revolutions of the machine were diminished from 1500 to 1100 per hour. Can there be a plainer confession on the part of the defendant that the plaintiff is entitled to the relief which he asks for than that which the defendant himself did? But it does not rest there, for still this dispute going on, the litigation having been commenced, nothing having been done until the litigation was commenced, about nine months ago another alteration is made by the defendant in this machine, the noise of which was the subject of the plaintiff's complaint, and it is reduced to 800 revolutions in an hour. After that, can the defendant with any hope of success try to prove, or try to argue, that the plaintiff's complaint is an unreasonable or frivolous one? Is it of any avail that he is bringing one witness, and one witness only, to say that he, an engineer, went into the house of the plaintiff while that machine was at work at its full speed, and that he could not hear any noise at all? because that is what it comes to. He says that with difficulty, putting his head against the bookcase against the wall, he could hear something like the rumbling of a passing cart. The plaintiff's case is wholly without a particle of contradiction. It has been proved by him, and admitted by the defendant, that for three nights in the week at least, all night long this noise has continued. It has been proved by the plaintiff, and not effectually displaced by anything that the defendant has stated, that the vibration is sensibly distinct. Mr. Heather, the plaintiff, proves it by that expression which has been used, and so often referred to, that he felt the vibration of the air on the back of his head as he sat in the room. The house-keeper has proved—and the cross-examination has not in my opinion shaken his statement at all—that the weights in the window frames by which the sashes were moved up and down were displaced by the vibration, that the windows themselves were shaken by the vibration, that the

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ceiling of a room came down by means of the vibration; and against that there is the single testimony of this gentleman who could not or did not hear, and, with that exception only, the case of vibration is distinctly made out. It is proved that the defendant carries on a noisy business, that he has as many printing machines as the premises will possibly hold, that he works all day long some of the machines, and that some of them he works all day and all night, and Mr. Pardon himself has said, in the plainest manner possible, and as might be expected from a gentleman of great respectability, as undoubtedly he is, that when the Anglo-French machine was removed and the Dryden machine substituted for it, at that moment an increase of the noise of which the plaintiff complains began. In my opinion a very clear case of nuisance has been established, and no effectual answer is made. In point of law, no answer can be made; and in point of fact, dealing with the case as a jury would have to deal with it, I consider the facts to be clearly and distinctly established. Now, the terms of the injunction which I think ought to be granted, therefore, require some consideration. I do not think it would be right to leave it in the vague manner in which the statement of claim proposes, and it is difficult to find any other words, because the last thing that I should do would be to make any order to impede, or fetter, the business carried on by the defendant. All that I propose to do is, to restrain him from doing any more than had been done up to the year 1875, in the way of disturbing his neighbours. I think, therefore, that there should be some such words in the injunction as these, "From working or using his engine and machines so as to occasion any greater amount of noise or vibration than had been experienced by the plaintiff up to the end of the year 1875," because it is from that time the plaintiff complains. He dates his complaint from 1875, and he asks no relief in respect of anything arising out of what took place previously to that date, and what he asks from that day the defendant has conceded to some extent, and if he had done a little more upon the receipt of that letter of the 13th Aug. 1875, this action might have been avoided. That is the order which must be made, and of course the defendant must pay the costs.

Solicitors: plaintiffs in person; Willoughby and Coz.

House of Lords.

July 2 and 3.

(Before the LORD CHANCELLOR (Cairns), Lords HATHERLEY, BLACKBURN, and GORDON.)

EDINBURGH STREET TRAMWAYS COMPANY v. TOBBAIN. (a)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION.

Edinburgh Street Tramways Acts 1871 and 1874—Construction—Maximum fares—Omnibus "worked in connection with" tramway.

By the Edinburgh Street Tramways Act 1871 (34 & 35 Vict. c. lxxxix.) the appellants were authorised to construct a system of tramways as therein specified, and the Act fixed a maximum

fare per mile, to be charged on such tramways.

By the Edinburgh Street Tramways Act 1874 (37 & 38 Vict. c. lxxviii.) the appellants were authorised to abandon some of the lines specified in the former Act, and to substitute omnibuses, and the Act authorised a higher rate of fares "on those routes, and any tramway routes worked in connection therewith." The omnibuses were worked in connection with the tramways.

Held (affirming the judgment of the Court below), that the second Act did not authorise the appellants to demand the higher fare from passengers travelling by the tramways only.

THIS was an appeal from a decision of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice Clerk (Lord Moncrieff) and Lords Neaves, Ormisdale, and Gifford, affirming a decision of the Lord Ordinary (Lord Shand) in favour of the respondent.

By the Edinburgh Tramways Act 1871 (34 & 35 Vict. c. lxxxix.) the appellant company were authorised to construct a system of tramways in the city of Edinburgh and its suburbs, to be completed within three years from the passing of the Act, and by sect. 38 it was provided that the maximum rate of fares should be at the rate of 1d. per mile. The construction of the tramways proved more difficult than had been anticipated, and in 1873 the company obtained an extension of the time for their completion (Stat. 36 & 37 Vict. c. cxxxvi.); and in 1874 they obtained leave from Parliament to abandon some of the lines altogether and to run omnibuses instead. (Stat. 37 & 38 Vict. c. lxxviii.) This later Act provided, by sect. 3, "the company may charge a sum not exceeding 2d. per mile for first-class passengers on those routes" (where the omnibuses had been substituted for the tramways), "and any tramway routes worked in connection therewith." The omnibuses were worked in connection and correspondence with the tramways, and the company maintained that the effect of the Act of 1874 was to empower them to charge the higher rate of fare over their whole system, as it was all virtually "worked in connection with the omnibus routes." This action was accordingly brought against the respondent, who had refused to pay the additional 1d. per mile, in order to try the right, but the Lord Ordinary decided that the Act of 1874 had not the effect contended for, and his judgment was affirmed, as above mentioned.

The case is reported in 3 Court of Session Cases (4th series) 655.

Thesiger, Q.C. and *Hunter* appeared for the appellants.

The *Lord Advocate* (Watson) and *MacLachlan*, who appeared for the respondent, were not called upon to argue.

At the conclusion of the arguments for the appellants their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns).—My Lords, I have seldom seen what appears to me a more unfounded action than that which was brought in the Court of Session in this case, and I certainly have never seen a more unfounded appeal. The opinion of the learned judges in the Court of Session was unanimous, and was in accordance with the opinion of the Lord Ordinary. I think your Lordships can entertain no doubt whatever that that opinion was entirely correct. In the year 1871 the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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Edinburgh Street Tramways Company obtained parliamentary authority for making a system of tramways in the city of Edinburgh. (Stat. 34 & 35 Vict. c. lxxxix.) They obtained that authority with the concurrence of the local bodies who were interested, and amongst others the Corporation of Edinburgh, and they obtained the authority after distinct and formal agreements were entered into with those parties. Those agreements were scheduled in the Act of Parliament, and were declared by the Act to have legislative authority, and were ordered to be carried into execution. I will call your Lordships' attention to one of those agreements, which may be taken as a sample of them all. In the agreement with the Corporation of Edinburgh there was a very clear and distinct stipulation with regard to the fares which the company was to be entitled to charge to passengers on these tramways. The 10th clause provided that "In no case shall the second party, or the company, demand or take for any passenger travelling upon any or either of the tramways, or any part or parts thereof respectively, tolls or charges exceeding in the whole 1d. for each mile, the fraction of a mile beyond an integral number of miles being for that purpose deemed a mile, but the second party or the company may charge for any less distance than two miles any sum not exceeding 2d." The agreement is a very long one, and it is obviously entered into for the public benefit of the city of Edinburgh, the corporation acting as the guardians of the public interest. The stipulation which I have read was one of those which were made in the interest of the public. There are a number of other similar stipulations with regard to the mode in which the works are to be conducted, and in which they are to be maintained. There is a particular provision that the system of tramways which was agreed upon should be executed as a whole within the period of three years from the passing of the Act, and there are penalties for any breach of any term of this agreement. It was, of course, obviously necessary in the interests of the public that, the construction of the tramways of the city being handed over to a company of this kind, the company should not be left free to pick and choose afterwards what particular portion of the tramways it would execute, but should be held bound to the city to execute the system as a whole. Such was the agreement entered into with the corporation. The Act of Parliament (sect. 44) enacted that "the agreements which respectively are set forth in the three schedules to this Act are hereby respectively confirmed and made part of this Act, and the same shall be carried into effect accordingly." And in addition there was a clause in the Act itself which made very careful provision with regard to the fares to be charged. By sect. 38 it was enacted, "The company may demand and take for every passenger travelling upon any or either of the tramways, or any part or parts thereof respectively, including tolls for the use of the tramway and of carriages, and for motive power, and every other expense incidental to such conveyance, any tolls or charges not exceeding 1d. per mile (and for this purpose the fraction of a mile beyond an integral number of miles shall be deemed a mile), but the company may charge for any less distance than three miles any sum not exceeding 3d." Then there follows a very careful stipulation that if a certain number of in-

habitants should represent that "the company are charging a greater sum than 2d. for distances not exceeding two miles, and that under the circumstances then existing such charge is unreasonable," the Board of Trade might be called upon to entertain and to declare whether that was an unreasonable charge by the company or not. The whole of these provisions, both those in the agreement and those in the Act of Parliament, point out in the clearest way that it was a paramount object, both with the Legislature and with the corporation as intervening before the Legislature, to tie the hands of this company to whom a large and probably a lucrative, undertaking was confided, against charging any fare which should be beyond the limit of fares provided by the Act and by the agreement. I pass over what took place in the year 1873, when Parliament authorised the time for the completion of the works to be extended (Stat. 36 & 37 Vict. cap. cxxxvi.), and I come to the year 1874. In the year 1874 one portion of the tramway system was found to be very difficult of construction, as we are told, by reason of the gradients, and of course it was a great object for the company to be relieved from that part of the undertaking, which, as things then stood, they were absolutely bound to construct. They applied to Parliament for that purpose, and they stated in the preamble of the Act (Stat. 37 & 38 Vict. cap. lxxviii.), which may be taken to be their representation to Parliament, that "by the second article of the agreement with the Corporation of Edinburgh it was provided, amongst other things, that the whole of the tramways authorised by the Act of 1871 should be completed within three years from the passing of the Act." Then the preamble recited "that it is expedient that the company be authorised to abandon and relinquish the construction of the tramways and parts of tramways in this Act specified, and for the convenience of the residents in the districts in which such tramways are authorised to be laid, to run a service of omnibuses in lieu thereof." The statement of the Legislature is that the company came as suppliants to be delivered from penalties to which they would be subject if they did not make these tramways in the specified time, offering, if they were allowed to be absolved from this obligation, to provide a service of omnibuses for the benefit of the public, who would thus be deprived of the benefit they had expected in the shape of tramways. That was the condition of things before the legislation of 1874. In that state of things the Act of 1874 (37 & 38 Vict. cap. lxxviii.) was passed. It dealt with other matters perfectly independent of that to which I am referring, but it had in it two sections, and only two, relating to the tramways which were to be abandoned, namely the 3rd and 4th. The 3rd section provided that the company might abandon and relinquish the construction of the tramways in question, and that, this benefit being conferred upon them, they were to pay in two instalments a gross sum of 3000l. to the Edinburgh Road Trust, as part of the compensation to the public for the indulgence they were to receive. Of course it was obvious that a large service of omnibuses thrown on the roads of a district might create wear and tear of the roads to a degree that would require some compensation to be made, and 3000l. in two sums was to be paid to the Edinburgh Road Trust. Then comes the

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provision with regard to the other equivalent for the release from the obligation of making tramways, in the shape of what they had offered in the preamble to provide, namely, the omnibus service. "The company shall by themselves or others, if and when required by the local authority of Edinburgh by one month's notice in writing to that effect, provide good and sufficient conveyance by means of omnibuses between the points which are here indicated," to run a certain number of times in the day. And then comes this provision: "It shall be lawful for the said company to apply its funds from time to time for that purpose, or for purchasing omnibuses, horses, and premises for that purpose, and to demand and take in respect of passengers and parcels carried in or by such omnibuses such tolls and charges as they think fit, not exceeding the charges which by the Act of 1871 the company are entitled to charge in the event of the construction of the tramways intended to be abandoned, and the company may charge a sum not exceeding 2d. per mile for first class passengers on those routes, and any tramway routes worked in connection therewith, and may also charge a sum not exceeding 1d. per mile for parcels by such omnibuses not exceeding 56lbs. in weight, and for parcels in excess thereof such charge as they may from time to time think fit. Provided always, that the fares between Stockbridge and Newington by omnibuses and car shall not exceed 3d. first class, and 2d. second class for each passenger." Then the 8th clause says that, "Saving as in this Act expressly provided, nothing in this Act shall prejudice or affect the three several agreements scheduled to the Act of 1871, but those agreements shall, subject to the provisions of the agreement and by the Act of 1873 and of this Act, remain in full force and effect." Now, the contention of the company is this, that having come as suppliants to Parliament for permission to abandon the particular parts of the tramway which I have referred to, and having had put upon them the correlative obligation of supplying the public with an omnibus service over the part of the city where these tramways were abandoned, they induced the Legislature to put words into this clause which enable them to double their fares over the whole system of tramways of the city of Edinburgh; those fares, the limit of which was so carefully contracted for, and so carefully legislated for, by the agreement and by the Act of 1871. And they contend that this is no unreasonable construction which they ask to be put upon the section, for they say that, although the fares will be doubled, it will only be for first-class passengers, and there is an impression that some singular privileges are to be conferred upon first-class passengers, who in return are to pay for those privileges the double fares. There is not a trace in this section, or in any part of the Act, of any privileges being secured for first-class passengers. But your Lordships have heard at the bar the view which the company take of these privileges. The passengers on the tramways were secured by the Act of 1871 the uniform privilege of being carried in proper and suitable cars, and were carried from that time forward in covered cars along the tramways; but the additional privileges which, according to the construction sought to be put by the company upon the Act of 1874, are to be given to first-class passengers, turn

out to be these: that all the passengers who up to that time were carried in the cars of the company are now, if they wish to be continued at the same fares, to be turned out of those cars and to be placed outside, and the first-class passengers are to be placed inside, paying double the amount for exactly the accommodation which all the passengers previously received. I am not surprised that the Lord Justice Clerk treated this contest on the part of the company as an "audacious" contest. It does appear to me to be the most violent construction that ever has been offered to be placed upon an Act of Parliament. It would require, in the first place, the clearest words to be inserted in the Act of 1874 before your Lordships would hold that that enactment had the effect of altering and breaking the contract made in 1871, and of replacing it by an entirely new and different contract. It would require the clearest words to induce your Lordships, when you find a section which deals with nothing but the provision of an omnibus service, to believe that in making that provision there was incidentally thrown in a clause which altered the rates, not in respect of that omnibus service, or of the points where it was to be conducted, but over the whole system of the tramways of the city. But there is no ground, as it seems to me, upon the ordinary and legitimate principles of construction, putting aside altogether these *a priori* considerations, which can lead to the construction which the company desire to put upon this clause. It is necessary, of course, in authorising a statutory company to purchase and run omnibuses, to give them a power also to demand and take fares, and there is that power given in the section. They are to be entitled to demand and take fares, and then come these very distinct words, which appear to me to be the key to the whole of what follows, "to demand and take in respect of passengers and parcels carried in or by such omnibuses such tolls and charges as they think fit, not exceeding the charges which by the Act of 1871 the company are entitled to charge in the event of the construction of the tramways to Stockbridge and Trinity." I put aside for the present the reference to parcels. Here is an authority to demand and take in respect of passengers carried in or by such omnibuses tolls and charges not exceeding those authorised by the Act of 1871. That appears to me to be the general and the governing power. What comes afterwards is an engrafting upon that of something which is not to have the effect of repealing what went before, but is to be read in conjunction and harmony with it—"and the company may charge"—charge for what? Charge for some service, not charge irrespective of service; and for the service for which the charge is to be made your Lordships, upon all sound principles of construction, are carried back to the introductory words at the commencement of the section. They are to charge "in respect of passengers carried in or by such omnibuses." Reading the section so, the company may charge in respect of passengers carried in or by such omnibuses, which in other words is, they may charge in respect of the omnibus service, "a sum not exceeding 2d. per mile for first class passengers on those routes, and any tramway routes worked in connection therewith;" that is to say, if there is omnibus service rendered

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or afforded to any person who is a passenger either upon the route to Stockbridge alone or upon that route combined with any portion of any tramway route, then in respect of the omnibus service the charge may be made of 2d. for a first class passenger; and that is made more emphatic, because, when the sentence goes on to take up the question of parcels, those words which I have read into the intervening clause, or words which are exactly equivalent to them, are found in the clause with regard to parcels, for it runs thus: "and may also charge a sum not exceeding 1d. per mile for parcels by such omnibuses not exceeding 56lbs. in weight," &c. Reading it in this way, you have a construction which is, I do not say merely in harmony with the general purport of the section, which is in harmony with all the *a priori* considerations applicable to the position in which these parties and the public stood, but which is in harmony with the first principles of construing a provision of this kind. Although it did not appear to some of the learned judges of the Court of Session to be necessary to define the precise wording of the construction in this way, and they were contented with saying that the company had not proved that they were entitled to make this charge which they had made, still upon this construction, or upon the principles upon which it is founded, the learned judges of the court below are entirely agreed. I submit to your Lordships that the case is one that cannot admit of any doubt whatever, and that this appeal, which I must repeat is one of the most groundless I have ever known, ought to be dismissed with costs.

Lords HATHERLEY, BLACKBURN, and GORDON, concurred.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Ashurst, Morris, and Co.*, agents for *Lindsay, Paterson, and Co.*, Edinburgh.

Solicitors for the respondent, *Simson, Wakeford, and Simson*, agents for *W. H. Couper*, Leith.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

July 4 and 18.

(Before JESSEL, M.R., JAMES, BAGGALLAY, and COTTON, L.JJ.)

LUCKRAFT v. PRIDHAM. (a)

Charity—Will—Devise of proceeds of real estate to charity—Mortmain Act—Previous special Act authorising devise of real estate—Retrospective operation of Mortmain Act.

A testator bequeathed the proceeds of the residue of real and personal estate to the "different charities of Plymouth." The only charity which claimed was the guardians of the Poor, who were incorporated by an Act of the 6th year of Queen Anne, which empowered them to receive testamentary gifts of real estate.

Held (affirming the decision of Hall, V.C.) that this

(a) Reported by E. S. ROCHER, Esq., Barrister-at-Law.
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power was taken away by the Mortmain Act (9 Geo. 2, c. 36), which was a general law passed for the purpose of applying, and meant to apply to all his Majesty's subjects in making dispositions in favour of charities; and that the principle that the powers and privileges given by a special Act were not taken away by the provisions of a general Act was inapplicable to the present case.

THIS was an appeal from a decision of Hall, V.C. The facts and arguments are fully reported 36 L. T. Rep. N. S. 501. The testator William Robert Phillips bequeathed the proceeds of the residue of his real and personal estate "to the different charities of Plymouth, the amount and charities to be at the discretion of my said trustees." The only charity which came forward to claim was the guardians of the poor who were incorporated by a special Act of the 6th Queen Anne which empowered them to receive testamentary gifts of real estate. The question was whether this special Act was repealed by the Mortmain Act subsequently passed (9 Geo. 2, c. 36). The Vice-Chancellor having held that this power was taken away by the Mortmain Act, the guardians appealed.

Hemming, Q.C. and Dryden for the appellants.

Hastings, Q.C. and Chubb for the plaintiff.

Eddis, Q.C. and F. Webb for the executors.

Dickinson, Q.C. and Whiteford, for the next-of-kin and heir-at-law.

The following cases were cited:

Attorney-General v. Corporation of Exeter, 2 Russ.

45 and 3 Russ. 395;

Widmore v. Woodroffe, Amb. 636;

Trustees of the British Museum v. White, 2 S. & S. 594;

Mogg v. Hodges, 2 Ves. Sen. 52;

London and Blackwall Railway Company v. Limehouse Board of Works, 3 K. & J. 123;

Attorney-General v. Eastern Counties Railway Company, 2 Rail. Cas. 833;

Thorpe v. Adams, 23 L. T. Rep. N. S. 810; L. Rep. 6 C. P. 125, 135;

Taylor v. Corporation of Oldham, 35 L. T. Rep. N. S. 696; L. Rep. 4 Ch. Div. 395;

Middleton v. Clitheroe, 3 Ves. 734;

Lyn v. Wyn, O. Bridg. C. P. 122, 127.

JESSEL, M.R.—An Act passed in the reign of Queen Anne before the date of the Charitable Uses Act enabled a charitable corporation to take and hold land without requiring a licence in mortmain. The words used for the purpose were proper legal words. It authorised donors or testators to give or devise, and it authorised the charitable corporation to accept and hold. The recitals show that the meaning of the Act was to dispose of the licence in mortmain. The state of the law showed this quite conclusively, that at that time there was no legal prohibition which prevented intending donors devising land by will to charitable uses. The purpose and meaning of that Act, therefore, are perfectly plain and clear. Then there comes a general Act, and the object of the general Act "the Charitable Uses Act" is to protect heirs from being disinherited or to use the words of the Act, "This public mischief has of late greatly increased by very large and improvident alienations or dispositions by languishing or dying persons as by other persons to uses called charitable uses to take place after their death to the disinherison of their lawful heirs, for the remedy whereof be it enacted," so that the Act is for the benefit of the lawful heirs, and what it enacted in substance is this, that you shall not give lands to charitable uses

except by deed, properly executed and attested by four witnesses twelve months before the death of the donor and enrolled. In other words it absolutely destroys the powers until that time possessed by men in England of devising land by will to charitable purposes. Why this should not apply to this charitable corporation, as well as every other charitable corporation, I am at a loss to conceive. It is not strictly *in pari materia* at all, though no doubt, it was in the same line of policy as the Mortmain Acts, but it does not deprive men of the power of devising which it had been found in practice had been abused. It seems to me that up to this point the case is quite unarguable, the licence in mortmain having nothing to do with the provisions of the Mortmain Act. Then there comes some private Act which continued the old provisions of the statute of Anne, and made them applicable to the provisions of the Act. Continuing the provisions did not alter their nature and effect. They meant just the same when they were continued as they meant before, and even if re-enacted in so many words it would not have altered their meaning in the slightest degree, the meaning being quite plain that it dispensed with the licence in mortmain and nothing else. That being so it appears to me there is no pretence for saying the Legislature has repealed that portion of the Charitable Uses Act which prohibited the man from devising. I am of opinion that he had no power of testamentary disposition *quoad* these lands in favour of charity, and that being so the attempted devise is null and void, and must fail as the Vice-Chancellor has rightly held.

JAMES, L.J.—It appears to me the Vice-Chancellor's decision was incontrovertibly right.

BAGGALLAY and COTTON, L.J.J. concurred.

Appeal dismissed with costs.

Solicitors: Deane, Chubb, and Co., agent for Pridham, Woolcombe, and Pridham, Plymouth; Hare and Fell.

Wednesday, May 30.

(Before JESSEL, M.R., Lord COLERIDGE, C.J., and BAGGALLAY, L.J.)

LORD COWLEY v. BYAS. (a)

Burial Acts—15 & 16 Vict. c. 85, ss. 9, 25; 17 & 18 Vict. c. 87, s. 12; 18 & 19 Vict. c. 128, s. 9—*Threat or intention of converting land into a cemetery—Prohibition of burial within 100 yards of a dwelling-house—Injunction.*

The defendant was the owner of a property immediately adjoining the plaintiff's estate, on which was a dwelling-house, situated close to the boundary of the defendant's land. In 1865 the defendant obtained the consent of the Home Secretary to convert his property into a cemetery, and made some attempts to get up a company for the purpose, but without success. In 1877 the plaintiffs wrote to the defendant, threatening to proceed against him for an injunction, unless he gave an undertaking not to use any part of the land for a cemetery. The defendant replied that he had no present intention of converting his property into a cemetery, but declined to give the required undertaking; if, however, at any future time he should wish to use his property as a cemetery he would give the plaintiffs two months'

notice of such intention. After this the action was commenced, and Bacon, V.C. granted an injunction until the hearing or further order.

Held (reversing the decision of the Vice-Chancellor) that upon the question of practice, the injunction ought not to have been granted, for there was no such threat or intention to use any part of the ground for a cemetery, assuming such use to be unlawful, as required the interposition of the court by injunction to prevent it.

Held, further, that the Act of 18 & 19 Vict. c. 128, s. 9, only prohibited the use of ground for actual burials within the distance of 100 yards of a dwelling-house, and did not interfere with the right to convert any part of the land to the purposes of a cemetery, and therefore an injunction could not, in any case, have been supported.

THIS was an appeal by the defendant from a decision of Bacon, V.C.

The plaintiffs were Earl Cowley—who, under the will of the late Earl of Mornington, was equitable tenant for life of an estate at Leyton in Essex—and the trustees of the will.

The defendant, Mr. William Byas, was the owner of a property called Leyton-park, immediately adjoining Earl Cowley's estate, on which there is situated, close to the boundary of Leyton-park, a dwelling house belonging to the Earl, and occupied by a Mr. Beresford, as tenant.

An action was brought to obtain an injunction to restrain the defendant from using Leyton-park, or any part of it, for burial or for a cemetery.

In the year 1865, the defendant, under the provisions of the Burials Act, obtained the consent of the then Home Secretary to the appropriation of Leyton-park to the purposes of a cemetery.

The defendant made some attempts to establish a company, but without success, and nothing further was done in the matter until the year 1876, when the subject was again mooted.

Some of the inhabitants of the district opposed the scheme, and endeavoured to induce the Home Secretary to withdraw the approval which had been given by his predecessor in 1865. This, however, he refused to do, stating that he was advised that he had no power to withdraw an approval once given, and referred Lord Cowley to the 18 & 19 Vict. c. 128, s. 9, as enabling an owner of a house within 100 yards from a site to prevent such site being used as a burial ground.

On the 23rd March 1877, the solicitors of the plaintiffs wrote to the defendant threatening to proceed against him for an injunction.

To this letter the defendants' solicitors replied:

We will first call your attention to our client's position. He holds the approval of the Home Secretary, dated the 12th Aug. 1865, and from that time till the summer of last year he has been endeavouring to convert his property into a cemetery, but without success. Lord Cowley's surveyors both live close to the land in question, and have known for the last ten or eleven years of the repeated endeavours to turn this into a cemetery, and have seen each one fail. Our client does not intend to give up any of his legal rights, and we observe your letter is only written the day after the result of the public agitation at Leyton is known. We presume, therefore, that you deferred writing or taking any steps till you saw how our client was situated, and that the threat to commence immediate proceedings is only another step taken by you, doubtless, at the request of others, and really without the slightest necessity. You can quite understand that the public inquiry was harassing enough to Mr. Byas without having threats of chancery suits or other proceedings, and we need only say

(a) Reported by E. S. ROCKE, Esq., Barrister-at-Law.

that no part of our client's land within 100 yards of any dwelling house would be used as a cemetery, unless he had taken the necessary steps prescribed by the Act. Your client has rested for eleven years without raising the question before, and we do not see that there is any probability at present of any cemetery being established at Leyton, but; as before stated, our client declines to be dictated to in the matter, and will not give up any of his legal rights, although he may never wish to exercise them, and may never be in a position to form a cemetery in the spot approved by the Home Secretary. There is no necessity whatever for any proceedings being taken, as one client, under our advice, would not form it into a cemetery without ascertaining that all the provisions in the Act, and approval had been complied with.

The plaintiffs' solicitors replied as follows :

You state that Mr. Byas declines to be dictated to in the matter, and will not give up any of his legal rights, although he may never wish to exercise them, and you add, that he would not form the land into a cemetery without ascertaining that all the provisions of the act, and the approval had been complied with. We think it right to repeat that such provisions have not been complied with, and as the establishing of a cemetery would, as we are advised, cause great damage to our client's estate, we beg to give you notice that unless Mr. Byas shall send us, through you, by the 10th April next, a written undertaking that no part of the land, the subject of the recent inquiry, shall be used for a cemetery, we shall, without further notice, apply for an injunction.

To this letter the defendant's solicitors wrote as follows :

We have seen our client again to day with reference to the correspondence between us, and, as we before told you, he has no present intention whatever of attempting to convert his property into a cemetery, and in fact for some years past he had abandoned the idea until it was suggested to him by the vestry clerk of Leyton and some of his friends. You are, no doubt, very fully informed of all that took place at the recent inquiry, and we presume that in consequence of that you have been instructed to write and threaten proceedings on Lord Cowley's behalf. Our client declines to give any such undertaking as you wish; but, under our advice, he writes and repudiates any notion of attempting to convert the property into a cemetery, although at the same time he will not give up his right to do so at any future time, or admit for one instant that the grant he has obtained is invalid, or give any undertaking in the matter. This, however, he is willing to do to meet your views and to avoid litigation if possible. If at any future time he should be advised or wish to use his property as a cemetery, he will give you and your clients two months' notice of such his intention, so that you can, if you are so advised, take what proceedings you think proper and expedient in the matter.

The plaintiffs thereupon issued a writ and moved for an injunction.

The following sections of the Burial Acts are material :

By the Act 15 & 16 Vict. c. 85, s. 25, it is provided that

No ground not already used as or appropriated for a cemetery shall be appropriated as a burial ground, or as an addition to such burial ground, under this Act, nearer than 200 yards to any dwelling house, without the consent in writing of the owner, lessee, and occupier of such dwelling house.

By the Act 17 & 18 Vict. c. 87, s. 12, it is provided that the above-mentioned provision

Shall not extend or be applicable to or in respect of any burial grounds which have been or may be provided under the Act 16 and 17 Vict. c. 134, and this Act, or either of them, or to or in respect of any addition which has been or may be so provided to any burial ground; but no ground not already used as or appropriated for a cemetery shall be appropriated under the last-mentioned Act, and this Act, or any of them, as a burial ground, or as an addition to a burial ground nearer than 100 yards to any dwelling house, without such consent as aforesaid.

And by the Act 18 & 19 Vict. c. 128, s. 12, it is provided that the above-stated provision of the Act 15 & 16 Vict. c. 85,

Shall be repealed; but no ground already used as or appropriated for a cemetery shall be used for burials under the said Act or this Act, or either of them, within the distance of 100 yards from any dwelling house without such consent as aforesaid.

On the 3rd May 1877, BACON, V.C., delivered the following judgment. — In my opinion the plaintiffs are most clearly entitled to the injunction they ask for. Eleven years ago, or more, the defendant got what he calls a grant from the then Secretary of State, and he would read it as if it repealed the Act of Parliament then in force, and the one which has since been passed. The grant is perfectly right; it is an authority to make a lawful cemetery; but it would be an authority to make an unlawful cemetery if it could be construed in the way for which the defendant contends. Ever since he obtained that grant he has been threatening, and he threatens now, that when it seems good to him he will make a cemetery on the land, and, fastening on the words of the Act, he says that unless he buries within 100 yards of the plaintiff's house he does not infringe the Act. I think that the Act is plain, and that it is a mere idle quibble to say that no burials shall take place within 100 yards of the house, and that what is within that distance shall be planted with trees or kept as a garden. It would not be any the less a cemetery for that. The plaintiff is entitled to his injunction to restrain the defendant from using for burial or for a cemetery the ground in question, or any part of such land or ground until judgment in the action or further order.

On the appeal,

Everitt, who (with Edmund Beaumont) appeared for the defendant, after referring to the Burial Act, 18 & 19 Vict. c. 128, s. 9, was stopped by the court.

Kay, Q.C. and Nalder, for the plaintiffs, in support of the Vice-Chancellor's order, contended that under the Acts 15 & 16 Vict. c. 85, ss. 9, 25; 17 & 18 Vict. c. 87, s. 12; and 18 & 19 Vict. c. 128, s. 9; not only could no burials take place, but no ground within 100 yards of a dwelling-house could be used for the purposes of a cemetery. They also submitted that the defendant's insisting on his right to use the ground as a cemetery was, under the circumstances, such a threatening and intending to do so as to justify the court in granting the protection claimed by the plaintiffs. They cited

Heat v. Gill, 27 L. T. Rep. N. S. 291; L. Rep. 7 Ch. App. 699; 41 L. J. 761, Ch.

JESSEL, M.R.—The appeal in this case raises a question of considerable importance as regards the practice of the court, as well as a question of some importance as regards the construction of the Acts of Parliament relating to burial grounds. The first-named plaintiff is the owner of a mansion-house within 100 yards of a portion of a field belonging to the defendant, and the defendant, Mr. Byas, is the owner in fee-simple of this field. The plaintiff alleges that the defendant is about to use his land for the purposes of a cemetery, that is, to appropriate it or lay it out in some mode or other which will render it more eligible for the purposes of interment of dead bodies. The defendant says that he has no immediate intention of doing anything of the kind; that he did in the year 1865

obtain the necessary permission of the Secretary of State to use his land for a cemetery, but that he has not been able to act on that permission, not having been able to form a company for the purpose of making a cemetery; that he has recently attempted to do so, but has not succeeded; and he also says that he does not intend to use any portion of the land within 100 yards of the plaintiff's mansion or dwelling-house for the purposes of burial without obtaining the requisite consents; and, further, that in any case, before putting into exercise his rights, whatever they may be, he will give two months' notice to the plaintiff to enable him to dispute, if he thinks fit, such rights as he alleges that he possesses. In that state of things the plaintiffs bring an action for an injunction to restrain the defendant from using for burial or for a cemetery his land or ground known as Leyton Park, in Leyton, in the county of Essex, or any part of such land or ground, and the Vice-Chancellor has granted an injunction in these terms. Now, in the first instance it appears to me, as regards the practice of the court, that even assuming the construction of the Act of Parliament to be favourable to the plaintiffs, no such injunction ought to have been granted. The defendant has not done anything whatever to the injury of the plaintiffs. He alleges that he has the right to do something which, on the assumption I have mentioned, he would not have the right to do, but he says, not only have I no present intention to do it, but I undertake to give you two months' notice (and the reasonableness and sufficiency of such notice are not disputed) before I attempt to do anything of the kind. How can the plaintiffs say in such a case that there is an immediate threat to do something which requires the interposition of the court by injunction to prevent it? So far from there being a case for interlocutory injunction, the evidence shows that at the time when this injunction was granted, there was not the remotest probability of the defendant being able to make the cemetery, nor the remotest intention of making it. His attempts had failed, they had been discontinued for a series of years, and there was no intention of renewing them. It appears to me, also, that the plaintiffs cannot say that they could not rely on the assurance of the defendant. So far from that being the case, they offered to take his assurance in writing if he would give the assurance to the full extent they demanded, so that they did not come into court saying, we cannot trust the defendant. It seems to me, according to the ordinary practice of the court, that there was no cause either for bringing the action or for granting the injunction, and on this ground alone it ought to be dissolved. I have thus far assumed the construction of the Acts to be in favour of the plaintiffs. The Vice-Chancellor, as I read his judgment, came to the conclusion that according to the terms of the Acts, the defendant had no right to convert any portion of his land into a cemetery, although the great bulk of the land was distant more than 100 yards from the mansion-house of the plaintiff, and although no portion of the land within the distance of 100 yards was intended to be used for the purposes of burial. The ground I have already mentioned is sufficient to dispose of the case, but I think it right to state what is my view of the meaning of the Act. It must be observed that these Acts of Parliament

give to neighbouring landowners a privilege in addition to their legal rights. As I understand the law, they could not, before these Acts, have prevented their neighbours from using their fee-simple properties for the purposes of burial unless such user amounted to a nuisance; but when these Acts were passed, which gave certain benefits to the public, and impose certain restrictions on landowners as regarded the use of their land for the purposes of burial, with a view to the health of the public, it was thought right also to give landowners some privileges, and one privilege given by 15 & 16 Vict. c. 85. s. 25, was that "no ground not already used as or appropriated for a cemetery shall be appropriated as a burial ground, or as an addition to a burial ground under this Act, nearer than 200 yards to any dwelling-house without the consent of the owner and occupier of the dwelling-house." But by the Act 18 & 19 Vict. c. 128, s. 9, the portion that I have read of the former Act was repealed, and the words substituted were these: "No ground not already used as or appropriated for a cemetery shall be used for burials under the said Act or this Act, or either of them, within the distance of 100 yards from any dwelling-house" without such consent as above. Therefore all that is prohibited is the use for burials of the ground within the distance. I cannot find any pretence for saying that there is any prohibition as regards any ground beyond the distance, and therefore, so far as the injunction extends to prohibit the use of the ground as a burial ground beyond the distance, I find nothing in the Act of Parliament to warrant it. But, then, what is the meaning of the words "used for burials?" On the one side it is said they mean used as a cemetery, and have the same effect as the words which were in the former Act, "appropriated as a burial ground, or as an addition to a burial ground." The mere appropriation was prohibited by those words, but in the present Act we have different words. Now the words "used for burials" are words commonly understood to refer, and which properly refer to actual burials within the ground, and they are so used over and over again in various sections of the former Act, to which the Lord Chief Justice has directed my attention, so that we find a change of words combined with a change of distance. The appropriation was prohibited within 200 yards; the Act 17 & 18 Vict. c. 87, s. 12, changed the distance to 100 yards; and the last Act uses different words to denote the Act prohibited. Therefore we come to this, that the Legislature has taken away to a certain extent the privilege before granted to landowners, for it has changed the original 200 yards into 100, and it appears to me it has altered it in another by saying in fact, "All the protection you want is a protection against nuisance; if so much of the cemetery as is within 100 yards of your house is laid out as a park, or garden, or a chapel, or for some other purpose of that kind, and not for actual burials, we do not intend to give you the right to prohibit its being so used, because such use does not hurt you;" and it must be remembered that under the first Act there is an express provision (sect. 30) enabling the burial board to lay out and embellish the burial ground, and also to erect a chapel upon any portion of it, showing that the Legislature were well aware that the whole of the burial ground was not used for the purposes of actual burial. It seems

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to me, therefore, that when we look at the reason of the thing, and the change of language of the Legislature, it is reasonably plain that the Legislature intended not to give the extensive privilege claimed by the plaintiffs in this case, but merely the right to prevent burials in the burial ground within 100 yards of the dwelling-house, and, therefore, upon the point of law, as well as for the other reason I have given, I think this injunction ought not to have been granted.

LORD COLERIDGE, C.J.—I am entirely of the same opinion, and for the same reasons. I would only add an additional argument, which appears to me to arise in confirmation of those which the Master of the Rolls has used in favour of the construction, which I agree with him in considering that we ought to put on these Acts. The 12th section of the 17 & 18 Vict. c. 87, which varies the distance limited by 16 & 17 Vict. c. 85, s. 25, repeats the words of the earlier section, only varying the distance. The third Act, while restoring the same limit of distance as the second Act, substitutes for the words, "shall be appropriated as a burial ground or as an addition to a burial ground," the words, "shall be used for burials." This alteration of the words shows that the clause in the third Act pointed at something different from what was pointed at in the similar clauses of the first and second Acts.

BAGGALLAT, L.J.—I also agree in the view expressed by the Master of the Rolls, and in the reasons he has given for discharging the order for the injunction; and I think we have only to look at the provisions contained in the clauses of the several burial Acts, beginning with the 15 & 16 Vict. c. 85, to see how clearly the word "burial" is used as denoting actual interment. We find "burial ground," "places of burial," and "cemetery," used almost interchangeably, but we constantly find the expression "burials" by itself, the Act appearing to use the words "burial" and "interment" indifferently. Thus, for instance, in sects. 2, 4, 5, and 7, the word "burials" clearly refers to actual burial. It appears to me, therefore, that the 18 & 19 Vict. c. 128, s. 9, intended to do away with the previous rule that no portion of the cemetery should be within a certain distance of a dwelling-house, and to substitute an enactment that no bodies should be interred within 100 yards of any dwelling-house. I also agree with what the Master of the Rolls has said, that if the law had been as the plaintiffs contend, still there is no ground made here on the facts of the case for the interference of the court.

Solicitors: Collyer-Bristow, Withers, and Russell; Lowless and Co.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 17 and 19.

(Before HALL, V.C.)

ATTREE v. HAWK AND WIFE. (a)

Will — Charitable bequest — Railway debenture stock — Statute of Mortmain.

Debenture stock the nature of which is regulated by the Companies Clauses Act 1863 is an interest in land within the Mortmain Act.

(a) Reported by A. B. ELLICOTT, Esq., Barrister-at-Law.

JOHN BATES, by his will dated the 11th Aug. 1873, amongst other gifts and bequests, bequeathed the sum of 1500*l.* to the feoffees of Market Harborough, upon trust to apply the interest of 1200*l.* in the purchase of meat, bread, and coals, to be distributed amongst the poor of Market Harborough above forty years of age, in such proportions as the feoffees should think right, and to pay the interest of 200*l.* to the church and chapels of dissenters' Sunday schools. The will contained another bequest of 12,000*l.* to the corporation of Brighton, upon trust to apply the interest arising from it in the purchase of meat, bread, and coals for the poor of Brighton above fifty years of age, in such proportions as the corporation should think right.

The said sum of 1500*l.* and 9000*l.* out of the said sum of 12,000*l.* were described in the will as being secured upon stock of the Midland Railway Company.

The testator died on the 28th May 1874, and the only Midland Railway Stock of which he was possessed at the time of his death proved to be debenture stock.

The plaintiff, who was the executor of the will, instituted this suit for the administration of the estate, and one of the questions for the consideration of the court was whether or not the bequests of debenture stock were void under the Statute of Mortmain.

W. Pearson, Q.C. and W. Benschaw appeared for the plaintiff.

Dickinson, Q.C. and Bunting for the next of kin.

Eddis, Q.C., H. Greenwood, and Davies for the defendants.

O. Morgan, Q.C. and Langley, for the feoffees of Market Harborough, relying on

26 & 27 Vict. c. 118, s. 23;

Myers v. Perigal, 16 Sim. 533; 2 D. M. & G. 599;

Ashton v. Lord Langdale, 17 L. T. Rep. 175; 4 De G. & Sm. 402;

Holdsworth v. Davenport, 35 L. T. Rep. N. S. 319; L. Rep. 3 Ch. 185;

Walker v. Milne, 13 L. T. Rep. 542; 11 Beav. 507;

Gardner v. London, Chatham and Dover Railway Company, 15 L. T. Rep. N. S. 552; L. Rep. 2 Ch. 201;

Wickham v. New Brunswick and Canada Railway Company, 14 L. T. Rep. N. S. 311; L. Rep. 1 P. C. 64,

contended that debenture stock was pure personal estate and not within the Statute of Mortmain, and distinguished the present case from those of

Chandler v. Howell, 35 L. T. Rep. N. S. 592; L. Rep. 4 Ch. 651;

Thornton v. Kempson, 23 L. T. Rep. 185; Kay 592;

and drew a distinction between the cases where the thing charged was the actual thing, and the cases where the mere fruits of the thing and not the thing itself were charged.

Millar, for the corporation of Brighton, contended that debenture stock was not within the Statute of Mortmain, on the ground that railway companies were in fact carriers, and that the tolls and profits of a railway company were pure personalty, being merely the earnings of carriers, and of quite a different nature to turnpike tolls and profits, which, being payment for the use of land, might be properly deemed impure personalty, and consequently within the Act.

Nov. 19.—HALL, V.C.—I have considered this case since Saturday, and I have looked again into the

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authorities which I examined not long ago in the case of *Chandler v. Howell*; and it appears to me that I really cannot distinguish the present case from those cases on which I then founded my judgment. This debenture stock is stock, the nature of which is regulated by the Companies Clauses Act 1863. I have considered all the sections in part 3 of the Act. The 22nd section provides for the creation and issue of debenture stock, and it describes it as "stock;" it is to be raised on mortgage or bond. [His Lordship read the section down to the words "have power to raise on mortgage or bond."] This, then, is a creation by bond or mortgage of stock to be called debenture stock, and that stock by the 23rd section is described thus: [His Lordship read the 23rd section.] That does not appear to me to do more than to provide for the transmissibility of the stock, that is to say, it is to go like ordinary shares and stock of the company to the legal personal representative, and in all other respects it is to have the incidents of personal estate. But that does not touch the question which has to be determined in this case, namely, whether it is to be taken as pure personal estate by reason of the circumstance that ordinary shares and stocks have been held to be pure personal estate. I do not think this Act goes far enough to effectuate that. The holders of debenture stock, by the 31st section, are not to rank as being holders of stock, that is, of ordinary stock, but are to be considered as entitled to the rights and powers of mortgagees of the undertaking other than the right to require payment of the principal money paid up in respect of the debenture stock. The 24th section does not appear to me to assist the determination of the present case. The 25th section provides for the appointment of a receiver when the interest has been in arrear for a certain time; and by the 26th section that receiver is to be a receiver of the whole, or a competent part of the tolls or sums liable to the payment of the interest. So the position of a holder of debenture stock is this. He is a person who may obtain a receiver of tolls or sums liable to the payment of his interest, and these tolls or sums become liable by reason of the charge upon the undertaking which is given by sect. 23. That charge carries with it the right to have a receiver of certain tolls or sums; that is to say, in so many words, the revenue arising from the undertaking. Such being the effect of this Act of Parliament, with respect to the cases which were referred to in my judgment in *Chandler v. Howell*, I do not propose to go into those cases again, because I do not believe it will be said or considered that in the course of my examination of them, I did not correctly and sufficiently refer to the particulars of the several cases. I may observe that in *Walker v. Milne* the judgment of Lord Langdale no doubt went the other way, but in *Ashton v. Lord Langdale*, Knight Bruce, V.C. respectfully declined to follow that case. I need not refer to any other authorities upon the case generally, but I will merely add one modern case, that of *Alexander v. Brame* (No. 2) which is in the 30th of Beavan. That was a mortgage in which the late Master of the Rolls held that debentures of the commissioners of a dock made under an Act of Parliament, and in the form of an assignment of the duties arising by virtue of the Act, were within the Mortmain Act, following the case of *Ashton v. Lord Langdale*.

There was not there an assignment of anything but what might be properly described as the fruits of the concern. It is said that there is a distinction between a charge upon the fruits and upon the corpus, and that was the real argument before me. The cases have been divided into two classes, one in which the thing itself producing the fruit was affected to be charged, and the other in which only the fruit of the thing was the subject of charge, in which latter case it was contended that such was not an interest in land within the Act. It seems to me that such a distinction is unsound both in reason and in principle. If you charge the fruit you charge the rents and profits. Although you may say you will not charge, and although you may be prohibited from selling the land, still you are getting within the mischief of the Mortmain Act. You are still getting an interest in land which the Act does not intend you to get. For although it is true that the 1st section does not in so many words include all interests in land, yet the 3rd section does, and it has always been considered that in construing sect. 1, you must have regard to the provisions of sect. 3. There is a case before Sir William Grant, where he observed that he could not make out any solid distinction between the case before him and the earlier cases bearing upon the construction of those two sections; in like manner it appears to me that there is no solid distinction between the present case and the cases to which I have referred. Mr. Millar contended that, in fact, a railway company is more in the nature of a carrying company, and therefore ought not to be considered as a company whose property is land. Many of the cases which have arisen have had that element of the property being mixed in its nature; but it has always been said that they cannot be distinguished on that ground so long as they are within the mischief of the Act. This was Sir William Grant's language in the case of *Finch v. Squire* (10 Ves. 41). In the case of *Gardner v. The London Chatham and Dover Railway Company*, the observations on the meaning of the word "undertaking," and the decision itself were upon an entirely different question, and not at all upon the construction of the Mortmain Act, and I cannot, therefore, consider that case to be an authority, displacing the decisions which were referred to by me in *Chandler v. Howell*, and in particular the case before Knight Bruce, V.C., of *Ashton v. Lord Langdale*, which is on all fours with the present case. I must, therefore, again follow the cases referred to, and having considered the present case in all its bearings, I am of opinion that the debenture stocks in question are an interest in land within the Mortmain Act, and these bequests consequently void.

Solicitors: *Clarke and Oalkin*, agents for *Clarke and Howlett*, Brighton; *Singleton and Tattershall*.

QUEEN'S BENCH DIVISION.

Wednesday, Nov. 7.

TURNER (app.) v. FORD (resp.) (a)

Metropolitan police—Right to search for deserters and prostitutes—Entry of licensed premises—23 & 24 Vict. c. 135—24 & 25 Vict. c. 51—29 Vict. c. 35—39 Vict. c. 9.

By 23 & 24 Vict. c. 135, the metropolitan police may

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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be employed in dockyards and military stations and within fifteen miles thereof, and shall have the powers and privileges and be liable to the duties and responsibilities of constables, and shall act as fully as in any part of the metropolitan police district, provided that the powers and privileges of the constables of the metropolitan police, when without the yards, &c., shall only be used in respect of the property of the Crown, or of persons subject to naval, or marine, or military discipline. The metropolitan police are authorised by the Contagious Diseases Act 1866, to carry out the police duties in respect of that Act; and the Mutiny Acts make provision for the capture of deserters.

Respondent, a metropolitan constable so employed, demanded without warrant to enter the appellant's licensed alehouse, situate within one of these districts, but without the yards, &c., to search for absentees from the navy or prostitutes. The appellant prevented the respondent's entry, and was convicted by justices of resisting a constable in the execution of his duty under 24 & 25 Vict. c. 51.

Held, upon a case stated, that the respondent had no authority to do what he demanded, and that the appellant was wrongly convicted.

THIS was a case stated by three of Her Majesty's justices of the peace in and for the county of Devon, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as hereinafter stated.

1. At a petty sessions holden at East Stonehouse, in and for the division of South Roborough, in the county of Devon, on the 13th Dec. 1876, an information preferred by Richard Ford (hereinafter called the respondent) against Charles Turner (hereinafter called the appellant), on the 7th Dec. then last past, under sect. 3 of the Act 24 & 25 Vict. c. 51, charging for that he the said Charles Turner did on the 1st Dec. last, at the parish of East Stonehouse, in the county of Devon, unlawfully resist one Richard Ford, an officer in the metropolitan police (the said Richard Ford being then and there in the execution of his duty), was heard and determined, the said parties respectively being then present, and upon such hearing the said appellant was duly convicted of the said offence, and the said justices adjudged him to forfeit and pay the sum of 20s., and also to pay the sum of 12s. for his costs in that behalf; and in default of payment to be imprisoned in the common gaol at Exeter for the space of seven days.

2. And whereas the appellant being dissatisfied with this determination upon the hearing of the said information as being erroneous in point of law, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to the justices in writing to state and sign a case setting forth the facts and grounds of such determination for the opinion of this court, and duly entered into a recognisance as required by the said statute in that behalf.

3. Now therefore the said justices, in compliance with the said application, thereby stated and signed the following case.

4. Upon the hearing of the information it was proved and found as a fact that the said appellant is a licensed victualler, and occupies a licensed house within an area in which certain

power is given to the metropolitan police under 23 & 24 Vict. c. 135, s. 2, and in a district in which the Contagious Diseases Acts are in force. The said respondent is a sergeant in the Metropolitan Police Force, and on Friday, the 1st Dec. 1876, he (the respondent) visited the appellant's house, in Clarence-place, in the parish of East Stonehouse aforesaid, to search for five stragglers from the Royal Navy, and for prostitutes liable to be taken into custody under 29 Vict. c. 35, s. 28. The respondent saw the appellant there, and said to him, "Turner, you know who I am. I am on duty. I want to look into your public rooms to see if you have any absentees from the navy, or any prostitutes there." Turner replied, "Fetch the town police," and asked for the names of the absentees or stragglers. Ford (the respondent) refused to give any names, and said he wanted to see for himself. Ford (the respondent) endeavoured to go in. Turner caught hold of him on both sides and prevented his going in. The respondent did not resist. The appellant said, "I have not assaulted you." The respondent had no warrant in his possession signed by the captain commanding the ship, although a document purporting to be a warrant so signed was produced. This document had many alterations and pencil additions in and to it, and was not impounded, and although the respondent has been applied to by us for it, he has neglected or refused to furnish it, and so we are unable to supply a copy. The respondent had not in his possession any warrant of any kind, nor was it alleged that any warrant had been granted empowering the respondent to enter the appellant's premises other than the document just mentioned.

5. It was contended by the appellant that the said respondent had no lawful authority to enter into his dwelling-house and to search the same or any part thereof, because the information was not laid under the Intoxicating Liquors Act or any Act relating to the sale of beer or exciseable liquors, and because the respondent was not then in the execution of his duty nor acting under a legal warrant or authority at the time of the said resistance, and because the said respondent had not in his possession any warrant authorising him to enter and search the said appellant's dwelling-house, although a document purporting to be a warrant in writing had been granted. It was contended on behalf of the respondent that the information was properly laid, and that the said respondent had a right to enter the said appellant's premises at any time to search for stragglers or absentees from ships belonging to the Royal Navy, or for prostitutes, without any warrant or authority in writing from the officers commanding such ships, and that in the event of any such warrant or authority having been given in writing, the said respondent had power to enter and search any premises without having the same in his actual possession?

6. The justices, however, being of opinion that the said respondent was properly in the execution of his duty, and that he had a right to enter the appellant's premises without any warrant being granted, and without the warrant (if any had been granted) being in his possession, gave their determination against the appellant in the manner as above stated.

7. The questions for the opinion of the court are: First, Had the respondent a right to enter

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and search the appellant's premises for sailors or prostitutes without a warrant having been granted authorising him to do so? Secondly, Had the respondent a right, if such warrant had been granted, to enter and search the appellant's premises for sailors or prostitutes without having it in his possession.

If these questions, or either of them, are answered in the negative, then the conviction is to be quashed; if in the affirmative, then the conviction is to stand.

Hopwood, Q.C. (with him Tarring) argued for the appellant.—By 23 & 24 Vict. c. 135, s. 1, any number of constables of the metropolitan police which the Secretary of State may direct, may be employed in Her Majesty's yards and in the principal stations of the War Department and within certain limits therein mentioned. By sect. 2, "It shall be lawful for the Commissioner of Police of the Metropolis to administer to any constable belonging to the Metropolitan Police Force, who may be appointed or employed as aforesaid, an oath to execute the office of constable within all or any of Her Majesty's yards or of the principal stations of the War Department in any part of England and Wales, and within fifteen miles of such yards or stations; and every constable so sworn shall have the powers and privileges and be liable to the duties and responsibilities of constable within the yards, stations, and limits for which he is so sworn, as well on seas as in harbours and havens, and on rivers and other waters as on land, and shall act within such yards, stations, and limits as fully as in any part of the metropolitan police district. Provided always that the powers and privileges of the constables of the metropolitan police, when without the yards, naval and marine hospitals and infirmaries, and marine barracks or stations, and not on board or in any ship, vessel, or boat belonging to Her Majesty or in Her Majesty's service, shall only be used in respect of the property of the Crown, or of persons subject to naval, or marine, or military discipline." After reciting this Act of the previous year, 24 & 25 Vict. c. 51, provides by sect. 3 that, "If any person shall assault or resist any constable belonging to the metropolitan police force acting in the execution of his duty, or shall aid or incite any person so to assault or resist, every such offender being summarily convicted thereof before any two justices of the peace shall for every such offence pay a fine or be imprisoned." There is no authority, however, in either of those Acts to enter a private house, and a licensed house does not for this purpose differ from a private house. The annual Mutiny Acts, too, although they provide for apprehension of deserters, expressly impose a penalty for forcibly entering a dwelling-house or outhouse of any person in pursuit of any deserters without warrant. (See Marine Mutiny Act 1876, 39 Vict. c. 9, ss. 48 and 83.) The other powers of the metropolitan police in this district are derived from the Contagious Diseases Act 1866 (29 Vict. c. 35), to sect. 28 of which reference is made by the justices in drawing the special case; by that section punishment is imposed upon women guilty of an offence against the Act; and its conclusion is, "In the case of the offence of quitting the hospital without being discharged as aforesaid, the woman may be taken into custody without warrant by any constable." But here again there is no authority

to enter a private house. Under the licensing Acts the local police, no doubt, are empowered to enter on any licensed premises (35 & 36 Vict. c. 94, s. 35), but such a privilege is excepted from those granted to the metropolitan police under 23 & 24 Vict. c. 135, s. 2, those privileges being only to be used in respect of the property of the Crown, or of persons subject to naval, or marine, or military discipline.

The respondent did not appear.

COCKBURN, C.J.—I think this conviction cannot be upheld. The Act which gives powers and privileges, usually belonging to the local police, to be exercised and enjoyed by the metropolitan police, confines their plenary use to the dockyards and stations; as regards other places within the fifteen miles, those powers and privileges are in respect only of Crown property, and persons subject to discipline. No power is given to a metropolitan constable to force his way into a house against the will of the occupier, even to search for such property or persons. The metropolitan police have but a limited authority in the districts to which they are appointed, and they are not empowered to act in all matters as if they were the local police. Here the appellant was justified in resisting the respondent's entrance, and the justices have made a mistake in convicting.

MELLOR, J.—I think Mr. Hopwood has clearly shown us that the authority vested in the metropolitan police in these districts does not include all the powers of the local police, and I think the justices have proceeded in this case under a mistaken view of the Act. I regret it, if we have overlooked any statutory provisions which might have altered our opinion; but, in consequence of the difficulty created by the respondent's not appearing, we have taken more than usual care in searching for such provision. The sections to which our attention has been called by the case itself are clearly inapplicable, and we can find no justification for the respondent's forcing an entry into the appellant's house on the grounds stated. The conviction therefore cannot be sustained.

Judgment for appellant.

Solicitors for appellant, *Shaen, Roscoe, and Massey.*

Friday, Nov. 2.

Re WILSON. (a)

Extradition—Exemption of English subject by treaty—Extradition Act 1870 (33 & 34 Vict. c. 52). By the Extradition Act 1870, s. 2, "where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that that Act shall apply in the case of such foreign state," and may limit the operation of such order. By sect. 6, "where the Act applies in the case of any foreign state, any fugitive criminal of that state becomes liable to be apprehended in any part of Her Majesty's dominions, and surrendered to such foreign state in the manner provided by the Act.

An arrangement was made by the Crown with the Swiss Government, whereby it was provided that fugitive criminals should be surrendered to that Government, with the exception that no Swiss subject should be surrendered to the British

(a) Reported by J. M. LILLY, Esq., Barrister-at-Law.

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Government and no English subject should be surrendered to the Swiss Government.

An Order in Council, relating to this arrangement, declared that the Extradition Act 1870 should apply to Switzerland.

W., a British subject, was arrested on prima facie evidence of larceny in Switzerland, and retained in custody for the purpose of being surrendered to the Swiss Government.

Held, that the exception in the treaty must prevail in his favour, and a rule for a habeas corpus made absolute.

THIS was a rule of *habeas corpus* to discharge from custody one Wilson, who had been apprehended on a charge of larceny alleged to have been committed in Switzerland. The return to the writ, made by the stipendiary magistrate sitting at Bow-street, showed that the prisoner was in custody under a charge of larceny alleged to have been committed in Switzerland, that the prisoner was a British subject, and that it was proposed to surrender him to the Swiss Government under the Extradition Act 1870. This Act enacts by sect. 2:

Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state.

Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals, who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement.

Every such order shall be laid before both Houses of Parliament within six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the *London Gazette*.

And sect. 6 enacts:

Where this Act applies in the case of any foreign state, every fugitive criminal of that state who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime.

In 1874 a treaty was made in pursuance of the statute between the British Government and the Government of the Swiss Confederation, and such treaty contained the following clause:

No Swiss shall be delivered up by the Swiss Government to the Government of the United Kingdom, and no subject of the United Kingdom shall be delivered up by the Government of the United Kingdom.

In Feb. 1875 an Order in Council was issued which recited the treaty and declared that the Act should be in force as regards Switzerland.

E. Clarke, for the prisoner, was stopped by the Court.

O. Bowen, for the Swiss Government, argued that the exception which the treaty contained in favour of British subjects was not imperative, and that, even if it was, it went beyond the statute, and introduced an exception which the statute did not authorise.

A. Venn Dicey watched the case for the Crown.

COCKBURN, C.J.—I am not sorry that this dis-

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cussion should have arisen, as I happen to be chairman of the Royal Commission which is now sitting upon the question of extradition, and I will take care that this blot on the law shall be removed. It is a serious blot on the law that a British subject who commits an offence in a foreign country should escape with impunity because he is a British subject. But I think the point is one on which there can be no doubt. By the Extradition Act Her Majesty is empowered to apply that Act to particular countries, "subject to any condition, exception, or qualification" made by treaty with those countries. The treaty with Switzerland contains an exception in favour of British subjects, and the Act can only have application so far as it is consistent with the treaty. The prisoner, therefore, must be discharged.

MELLOR and FIELD, J.J. concurred.

Judgment accordingly.

Solicitors for the Swiss Government, *Freshfield and Williams*.

Solicitors for the Crown, *The Solicitor to the Treasury*.

Solicitors for the prisoner, *Wontner and Son*.

Thursday, Nov. 16.

REG. v. CHURCHWARDENS OF HANDBOROUGH. (a)
Churchwarden, election of—Time of closing poll—Delay in questioning election.

On the Friday after Easter a vestry meeting of the parish of Handborough, of which meeting notice had been posted on the church door on Easter Sunday, was held for the election of churchwardens. The rector nominated one churchwarden, and there were two candidates for the office of parishioners' churchwarden, one being the existing churchwarden, and the other a candidate put forward by a party dissatisfied with the administration of the parish charities. The show of hands was in favour of the last-named candidate. The poll was closed by the rector at five o'clock on the day of the election, when there appeared a majority of votes for the existing churchwarden. The validity of the election was questioned by a rule, made on the 5th July, for a mandamus to the rector and churchwardens to hold a new election.

The Court discharged the rule on the grounds (1) that the closing of the poll was a matter in the discretion of the rector, which had not been shown to be unreasonably exercised; (2) that it had not been shown that, had the poll been kept open, the result of the election would have been different; and (3) that there had been too great delay in questioning the election.

THIS was a rule, made on the 9th day of July last, calling upon the Rev. William Higge, rector of the parish of Handborough, in the county of Oxford, and the churchwardens of the said parish, to show cause why a writ of *mandamus* should not issue to them directing them to convene a meeting in vestry of the inhabitants, ratepayers of the said parish, for the election of a churchwarden for the said parish for the current year; and to take all necessary steps for that purpose. The undisputed facts appeared from the affidavits to be as follows:

In the parish of Handborough there is an open vestry and an annual election of one churchwarden

(a) Reported by J. M. LEST, Esq., Barrister-at-Law.

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by the parishioners, the rector nominating the other. On Easter Sunday 1877 the following notice was posted on the door of the parish church:

PARISH OF HANDBOROUGH.

Notice is hereby given that a vestry meeting will be held in the school room on Friday next, at half-past ten in the forenoon, for the purpose of auditing the churchwardens' accounts for the year ended; and also to elect churchwardens for the year ensuing.

Edward Parker, Joseph Laitt, Churchwardens.

Mr. Parker was the rector's churchwarden, and Mr. Laitt was the parishioners' churchwarden.

The election had for some time previous been a matter of public discussion, and it was generally known that Mr. Laitt would present himself for re-election, and that a Mr. William Lay would endeavour to displace him. At half-past ten on the day appointed the meeting was held, and attended by an unusually large number of parishioners. Mr. Parker having been nominated by the rector, Mr. Lay and Mr. Laitt were duly proposed and seconded. Upon a show of hands being taken the votes were: for Mr. Lay, 48 or thereabouts; for Mr. Laitt, 22 or thereabouts. A poll having been demanded on behalf of Mr. Laitt, the rector announced (at about 11.30 a.m.) that it would begin forthwith, and would be kept open till 5 p.m. At the close of the poll, about that hour, the number of votes recorded were, Laitt 98, Lay 77; the number of persons qualified to vote being 227. The rector, notwithstanding the protestations of the supporters of Mr. Lay, closed the poll and declared Mr. Laitt to be duly elected.

The following extract from Mr. Lay's affidavit shows the case attempted to be made out in support of the rule:

The parish contains upwards of 200 electors, the majority of whom are labourers, and many of them work some miles from home, and had left for their work before the said poll was demanded, and did not return until after it was closed, and had no opportunity of voting at the said poll, or of knowing it was open. Several of those electors who did not vote have informed me that they should have voted for me had they had the opportunity; and from the amount of support I was promised when I became a candidate for the office, and from the conversation I have had with the parishioners since the election, I verily believe that, if the poll were taken at a time when the labouring parishioners of the said parish could attend, I should be elected parish churchwarden instead of Joseph Laitt.

An affidavit of one of Mr. Lay's supporters contained the following paragraphs:

Mr. Matthews demanded a poll for Joseph Laitt. The Rector thereupon said it should be taken immediately. I then proposed that the poll should be adjourned till a future day, in order to give every ratepayer an opportunity of attending. Richard Westbury seconded that proposition. I then asked the chairman to put that proposition to the meeting. He said, "I have a perfect right to do as I like, and the poll shall be taken immediately, and closed at five o'clock." I then said that five o'clock is an unreasonable hour for the labourers to attend, and asked him to allow the poll to be kept open till seven o'clock. He said, "The poll shall be closed at five o'clock, and you can take what steps you like in it afterwards." William Lay asked him if he would allow the poll to be open till six o'clock, and he said "No." He asked him to allow half an hour more. He said "No, I am determined it shall be closed at five o'clock." The poll was then taken at once; I voted for William Lay, and then left the room. I attended again at four o'clock, when the poll was going on, and again immediately after five when the poll was closed. The result of the poll was that Joseph Laitt was elected.

The time for the labourers to leave work at Handboro

is from five to half-past five o'clock in the evening. None to the best of my belief leave before five, and I believe that the object of the Rector, in closing the poll at five o'clock, was to exclude the votes of the labouring men. There are various charity matters relating to the parish, as to which the labourers are dissatisfied, and they were desirous of electing a churchwarden from their own body to inquire into those matters; and I believe that the object of the rector of the parish was to exclude such an inquiry. The great majority of the parishioners in the parish are labouring men, and are desirous of being represented by a churchwarden elected from their own body.

After the election I saw fourteen of the electors who had not voted, who all informed me that they should have voted had the poll been kept open a sufficient time to have enabled them to do so; the majority of them told me that they should have voted for William Lay had they had an opportunity. Several of them to my knowledge worked seven or eight miles from the place of polling, and had no opportunity of knowing that the poll was opened until their return from work after it was closed. I verily believe that if the poll had been kept open two hours longer William Lay would have been elected instead of Joseph Laitt.

Another supporter of Mr. Lay deposed as follows:

I have seen four or five of the parishioners since the election, and they have told me that they would have voted for William Lay if they had the opportunity, but that they did not know of the poll till after it was closed. The large majority of the population of the parish are labourers, and are desirous of being represented by a churchwarden elected by their own body, as they are dissatisfied with the administration of parish charities, and I verily believe that if the poll had been open at a time when the labouring parishioners were not at work, the said William Lay would have been elected parish churchwarden instead of Joseph Laitt; and I believe that the object of the rector in fixing the poll at a time which would exclude the votes of a large number of the labouring parishioners was to secure the election of Joseph Laitt, and so as to avoid that inquiry into the administration of the parish charities, which was one of the objects of the nomination of William Lay.

And there was an affidavit by five parishioners as follows:

We are respectively parishioners and householders in the parish of Handborough, in the county of Oxford.

We were respectively at work on the Friday after Easter at various places, and had no notice of the poll which was taken for parish churchwarden at Handborough aforesaid on that day until our return from work, after the said poll was closed.

If we had been aware that a poll had been demanded and was being taken, we should have attended, and voted for William Lay.

From conversations we have had with other parishioners of the said parish, and from our knowledge of the feeling in the said parish as to the desirability of electing some one not a farmer as churchwarden to look after the interests of the poor in the said parish, we believe that, if reasonable notice of the said poll had been given, or if the same had been kept open until after the return of the labouring parishioners of the said parish from work, William Lay would have been elected instead of Joseph Laitt; and, speaking from our said conversations and general knowledge, we say that it is the desire of the majority of the parishioners of the said parish that another election of a parish churchwarden may be held during the present year.

The principal affidavit in opposition to the rule was that of the rector of the parish, and the principal paragraphs of such affidavit are as follows:

The vestry meeting was attended by an unusual number of people, and, considering the number of persons present at the vestry, and the fact that the majority of them belonged to the labouring class, to whom, in my opinion, it would be inconvenient, and would cause the loss of a day's wages to attend upon another day, I announced that the poll would be taken forthwith at half-past eleven o'clock on the same morning, and would be kept open until five o'clock in the evening.

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An application was made to me to adjourn the poll to a future day, or to extend the closing of the poll to seven o'clock in the evening. But, influenced as well by the reasons above stated as by the fact that great notoriety had been given to the meeting, and, after conferring with my churchwarden and the most influential inhabitants of the parish, I considered that to close the poll at five o'clock was affording a reasonable length of time, sufficient for all qualified persons to vote; and therefore I made no alteration in the hour of closing which I had first announced. I was moreover induced to adhere to my decision by the opinion of the eminent counsel Dr. Stephens and Mr. Jeune, at that time published in the daily papers, in which it was recommended that five o'clock was a proper hour for closing the poll.

It was represented to me that some voters were absent at work as labouring men in the neighbourhood, and that the train from Oxford by which they might arrive might be too late to enable them to reach the polling place by five o'clock. I therefore consented to keep the poll open until after the arrival of the train; and, to the best of my belief, all the persons who came by that train recorded their votes, or had the opportunity of doing so. The voting, after the first commencement, was not kept up continuously, and some interval passed without a vote being recorded. I publicly asked more than once if it was known whether any more voters would come; and Mr. Lay, the candidate himself, informed me that he had no more supporters who would come.

After carefully counting the votes, I declared the result of the poll to be that the said Joseph Laitt was elected by a majority of 21 votes.

During the period of my incumbency and, according to the best of my information, for upwards of forty years, there has been no poll at a vestry meeting of the parish; and no custom exists in the parish as to the time at which a poll should be closed.

Some excitement prevailed among the supporters of the unsuccessful candidate at the result of the poll; but from that time until I was served with the rule of this honourable court, dated the 9th day of July inst., nothing has come to my knowledge to lead me to believe that the election would be impugned. From the time of his election as aforesaid, the said Joseph Laitt has acted as churchwarden. He was churchwarden the previous year, and was admitted as such, and is a proper person for the office.

In my opinion the hours prescribed for taking the poll were reasonable and proper, and such as I, in the exercise of my discretion as chairman and after consultation with the most influential parishioners, deemed it proper to define so as to give all qualified persons an opportunity of voting, and in my belief no one was debarred or excluded from voting by reason of the poll being held on the same day as the vestry meeting, or because it was closed at five o'clock in the evening. I do not believe that the result of the election would have been different if a longer time had been allowed for the poll, or if an adjournment of the meeting had taken place.

Other affidavits in opposition had been sworn by Mr. Parker, the rector's churchwarden, and by the assistant overseer of the parish.

Mr. Parker deposed that in his opinion the majority of voters well knew that a poll would be taken on the day of the election, and that every qualified person had full opportunity of recording his vote; and that sufficient and reasonable time was given to allow every one to vote who was entitled or willing to do so, unless any might happen to be at a great distance; and that the number of those so absent was very small, and could have made no difference to the result of the election. This was confirmed by the assistant overseer and another deponent, the former stating it to be within his knowledge that several qualified voters abstained from recording their votes for Mr. Laitt, because they considered his election to be secure.

Channell for the defendants now showed cause. He cited

R. v. D'Oyly, 12 A. & E. 139;

Ex parte Joyce, 23 L. J. 153, M. C.

In the latter of these cases a rule for a *mandamus* to the vicar to hold a new election was discharged chiefly on the ground that it was not shown that the result of the election would have been different, if certain rejected votes, upon the rejection of which the question arose, had been received.

Morten, for the prosecutors, supported the rule, and cited

Frideaux on Churchwardens, 121;

Baker v. Wood, 1 Curtes, 507;

Reg. v. Goole (Incumbent of), 4 L. T. Rep. N.S. 322;

R. v. St. Mary Newington, 6 D. & L. 162;

Westerton v. Davis, Spink, 388;

R. v. Winchester, 7 East, 13.

MELLOR, J.—I am of opinion that this rule ought to be discharged. It appears that the election was held in April, but that no application was made to this court until July. There would, therefore, be in all probability no time to try the issues of fact before next April; and at any rate there has been unreasonable delay in applying for the rule. As for the merits of the case, while on the one hand I cannot say distinctly that it might not have been wiser to extend the time for taking the poll, on the other hand, it is material to observe that the prosecutors do not make out that the result of the election would have been different if the time had been extended. The affidavits, in fact, merely show a case of suspicion under circumstances which were nothing more than ordinary circumstances. It is not enough to show that it would have cost a labourer half-a-crown or a shilling to leave his work and vote; it should be shown that intended voters were actually excluded from the poll. By refusing to make this rule absolute, we should be doing no harm, and, although I should be the last person to take a course prejudicial to the interest of the labourer in these matters, I think that I should be exercising an unwise discretion if I allowed this rule to go.

MANISTY, J.—I am of the same opinion. Nothing is further from my wishes than to put any limit on the exercise of the franchise in these matters by working men. But I utterly fail to see any ground for saying that a reasonable time was not allowed for the poll. The rector, in fact, waited for the train to come in, although he refused to extend the time further. For this refusal, no improper motive is proved. The rector appears to have done what he thought was reasonable; and I do not see that the result of the election would have been altered if he had acted otherwise, but rather the contrary. For the future it seems desirable that working men should have every time given them for exercising this franchise, and, without saying what time should be allowed for a poll, I would recommend all presiding officers to allow such a time as would not leave open even the slightest ground for suspicion that the time allowed was purposely inadequate. Lastly, if this application had been made in time, there might have been a trial at the Summer Assizes; as it is, it is made so late that on the ground of delay alone I think the rule ought to be discharged.

Rule discharged.

Solicitors for the prosecutors, *Sham, Roscoe, and Massey*.

Solicitors for the defendants, *Cunliffe and Beaumont*.

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HIGHAM v. WRIGHT AND ANOTHER.—MUIR v. HORE.

[C.P. Div.]

COMMON PLEAS DIVISION.

Friday, May 11.

HIGHAM v. WRIGHT AND ANOTHER. (a)

APPEAL FROM INFERIOR COURT.

Coal Mines Regulation Act 1872 (35 & 36 Vict. c. 76), s. 52—Force of special rule—Continuance of service.

A. and another, employed as miners, left their work in the mine during working hours with the object of determining their employment. The hooker-on refused to send them to bank until the usual hour, when they, in breach of a special rule of the mine, caused themselves to be drawn up. They were charged with having committed an offence under the above Act, but the local magistrates dismissed the charge. On appeal, The Court held that they should have been convicted.

THIS was an appeal from a decision of the Justices of the borough of Bolton.

The respondents were charged before the magistrates with breaking a rule of a mine of the Wigan Coal and Iron Company (Limited). The rule in question was (so far as material) as follows :

Miners and all other Workpersons.

42. He (a person employed in or about the works) shall not go down or up, or into the pit, contrary to the direction of the banksman or the hooker-on, &c.

The respondents went down the pit to work at six o'clock. At eight o'clock they ceased work, and in effect discharged themselves from their employment. At nine o'clock they required the hooker-on to send them to bank. He refused to do so until the usual hour, two o'clock, whereupon the respondents pushed him aside, and procured themselves to be drawn up.

Sect. 52 of the Coal Mines Regulation Act 1872, authorises the adoption of special rules, to meet the circumstances of particular mines, with the object of preventing accidents and enforcing discipline ; and these rules are to have the same force as if they were contained in the Act.

The magistrates, holding that the words of the section should be construed strictly, dismissed the charge against the respondents.

Herschell, Q.C. and FitzAdam for the appellant.

The respondents did not appear.

GROVE, J.—It would have been a matter of satisfaction if the respondents had been represented ; but, as we must decide upon this question, I am of opinion that Mr. Herschell's contention is right, and that the construction of the magistrates was too narrow. No doubt they were literally in the right in deciding as they did ; but, in construing statutes, it is a rule that, when the strict grammatical sense of the words made use of would lead to absurdities, a construction must be adopted in accordance with the reason of the case. In this case, the literal construction would lead, in effect, to an abrogation of the Act, and might even cause actual danger. Again, when persons undertake service in a mine, and actually go down to work in it, they must be held to accept that service subject to the regulations in force for the management of the mine, and their character of servants does not cease at any moment they choose to determine it, but must continue so long as they remain in the pit, or for a reasonable time. The joint effect of

(a) Reported by S. HARE, Esq., Barrister-at-Law.

the Act and the notice is to decide what is such a reasonable time.

LINDLEY, J. concurred.

Solicitors for the appellants, *Sharpe, Parkers, and Co.*

Friday, June 8.

MUIR v. HORE. (a)

Justices — Jurisdiction — Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70) ss. 2, 75, 109—Animals Order of Privy Council 1875, ss. 4, 44, 47, 53—33 & 34 Vict. c. 36, s. 2 (Irish Act)—Continuing offence—Practice—Stating case.

By Art. 44 of the Animals Order 1875 it is directed that when sheep are carried on the deck of a ship they shall be divided into pens by substantial divisions.

The Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70) does not extend to Ireland, but by sect. 109 it is provided, "For the purposes of proceedings under this Act, or any order of the Privy Council or order or regulation of a local authority thereunder, every offence against this Act or any such order or regulation shall be deemed to have been committed, and every cause of complaint under this Act or any such order or regulation shall be deemed to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the person charged or complained against happens to be."

Sheep were carried upon the deck of a vessel from Ireland to Wales without being divided into pens as required by the Animals Order 1875.

Held, that this was a continuing offence, punishable in Wales, and that Welsh justices had jurisdiction.

Sect. 108 of 32 & 33 Vict. c. 70 provides an appeal from a decision of justices with regard to any forfeiture or penalty under the Act to Quarter Session.

Held, that the power of justices to state a case was not thereby taken away, and that they might state a case, having heard the case, although they had declined jurisdiction.

Case stated by the justices of the peace for the county of Pembrokeshire under 20 & 21 Vict. c. 43 :

1. That the appellant is and was on the said 13th Feb. 1877, the inspector appointed by the Privy Council for the purposes of the Contagious Diseases (Animals) Act, 1869, at New Milford, and the respondent is and was on the same day the master of the steamship *Pelican*.

2. That the said ship belongs to a company carrying on business at Cork (under the title of the City of Cork Steam Packet Company), and plies regularly between that city and Newport, Monmouthshire, calling on her voyages to the latter place, at New Milford, but returning direct to Cork.

3. That animals consigned to New Milford, or to be sent thence by railway are landed from the said vessel thereat, and dispatched therefrom to their destination.

4. That on the said 13th Feb. 1877, eighty sheep were carried as cargo for hire on board the *Pelican*, from Cork, and landed at New Milford.

5. That during such transit by sea, the places on board such vessel used for conveying the sheep

(a) Reported by CAMERON CHURCHILL, Esq., Barrister-at-Law.

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were not divided into pens by substantial divisions as required by part 2, article 44 of the Animals Order of 1875.

6. That the respondent was the master of the *Pelican* during such transit.

7. That New Milford is situated in Milford Haven, at a distance of ten miles from the entrance thereof.

8. That the said Haven is in the body of the county of Pembroke (*Rex v. Bruce, R. & Ry. C. O. 243*).

9. That the respondent did not happen to be within the said county at the time the information was laid, but was a few days afterwards duly served with a summons on his arrival at New Milford with his vessel.

10. That the said Order of Council was duly passed, and no evidence was given, nor any statute or order produced to the justices relating to contagious diseases (animals) in Ireland.

11. That the solicitor for the respondent called no evidence to rebut the charge laid in the information, but contended that the justices had no jurisdiction to hear the same, inasmuch as the cause of complaint actually was committed or arose in Ireland, and that the said Act did not apply thereto, and that the fact of there being no such pens on board the *Pelican* as required by the said order after her arrival inside Milford Haven did not confer on the justices any jurisdiction within the meaning of sect. 109 of the said Act.

12. It was contended on behalf of the appellant that the facts as proved did confer such jurisdiction.

13. The justices found that the whole of the allegations in the said information were duly proved, and being of opinion that the said section did not under the above circumstances confer on them jurisdiction to convict the respondent, they gave their determination against the appellant in the manner above stated.

14. The question of law arising from the foregoing statement is, whether the justices had jurisdiction to hear the case or not.

15. The opinion of the court is asked upon the same question of law, whether or not the justices were correct in their determination, and as to what further should be done or ordered on the premises.

Thompson for the respondent took a preliminary objection on the ground, first, that by the 108th section of 32 & 33 Vict. c. 70, it is provided that "if any party feels aggrieved by the dismissal of his complaint by justices, or by any determination of justices with respect to any penalty or forfeiture under this Act, he may appeal therefrom, subject to the conditions and regulations following: 1. The appeal shall be made to some court of general or quarter sessions for the county or place in which the cause of appeal has arisen, holden not less than fifteen days and not more than four months after the decision of the justices." By this section the appeal should have been to the quarter sessions, and not to this court. The appellant has mistaken his remedy. [*Per CURIAM*.—This section does not take away the right to have a case stated.] Secondly, that where justices decline to hear on the ground that they have no jurisdiction, the proper course is by *mandamus* to hear: (*Wakefield Local Board of Health v. West Riding Railway Company*, (12 Jur. N. S. 936.)

Gorst, contra.—The case only applies to preliminary objections. The observations of Black-

burn, J., apply where the justices have not heard the case; in this case the justices heard and determined the case.

Grove, J.—We must hear the case. As to the first objection, we are of opinion that there is nothing in it, because the 108th section does not take away the appellant's right to have a case stated. As to the second objection, I have more doubt, because of the dicta of Blackburn, J. in the case of *Wakefield Local Board of Health v. The West Riding Railway Company*, in which he says, "Your proper course seems rather to have been to apply for a rule by way of *mandamus* calling on the justices to hear the case, for they have not heard it yet. I think there has never been an instance where the justices declined to hear the case for want of jurisdiction, and then stated a case for the opinion of the Superior Court." I think, however, that those observations would not be applicable in this case; for there the justices declined jurisdiction on account of a preliminary objection, which is not the case here, for in this case the justices did try and determine the case.

DENMAN, J.—I am of the same opinion. We are bound to hear the case. Mr. Thompson says they may appeal to the quarter sessions, but that does not interfere with 20 & 21 Vict. c. 43. I don't see anything in the case cited to indicate that the judges would think differently in this case.

Gorst, Q.C. (Moorsom with him), for the appellants.—The 109th section of the Contagious Diseases (Animals) Act provides that, "for the purposes of proceedings under this Act, or any order of the Privy Council, or order or regulation of a local authority thereunder, every offence against this Act or any such order or regulation shall be deemed to have been committed, and every cause of complaint under this Act, or any such order, or regulation, shall be deemed to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the person charged or complained against happens to be." The 47th of the Animals Order of 1875, assists in construing the 44th, and says: "Animals landed from a vessel shall, on a certificate of an inspector of the Privy Council, certifying to the effect that the foregoing regulations, or some one of them, have not or has not been observed in the vessel, be detained at the place of landing," &c. It is clear therefore that the offence against the Act may be at the landing as well as at the embarkation. The 53rd further makes the owner and the occupier of the place where animals are put on board of or landed from vessels, responsible for offences against the order.

Thompson for the respondent.—The Irish Act 33 & 34 Vict. c. 36, s. 2, is in the same terms as s. 75 of the English Act; therefore, if the offence was committed in Ireland, it can be punished under the Irish Act. The interpretation clause, sect. 6, which says that the term "foreign," as applied to cattle or animals, means brought from any place out of the United Kingdom, must be limited by sect. 2, which says that the Act is not to extend to Ireland, and the term "United Kingdom" therefore does not include Ireland, which places Ireland in the position of a foreign country. In the case of *Mahoney v. Ashtin* (2 B. & S. Ad. 478) it was held that a bill drawn in Ireland upon a person in England is not an inland

bill, and may therefore be accepted without writing on such bill. In the case also of *Mentons v. Gibbons and another* (3 T. R. 267) Ireland is regarded as a foreign country. This vessel is to be treated as foreign, and the Order does not apply to animals brought in foreign vessels, or from a foreign port; the dividing the cattle into pens would take place at the starting place, and not on the transit or at the port of destination, and so the alleged offence did not take place within the jurisdiction.

GROVE, J.—The question turns on the point whether the offence was committed in England or not. The Act gives the Privy Council power to make regulations, the infraction of which is to be visited with certain penalties. The contention is that the offence was committed in Ireland. The vessel starts from Ireland and comes to Milford Haven, and then sails up twenty miles to New Milford. New Milford is in the county of Pembroke. When the ship sails into Milford Haven it has not conformed with the regulations of the Animals Order of 1875; it was not divided into pens as required. The question is, whether the offence, which commenced in Ireland, was a continuing offence, and applied to the landing as well as to the embarkation. We are of opinion that it was, as the 47th section expressly mentions animals landed from a vessel. Moreover, the power given by the Order can only be exercised by the inspector on the landing. I cannot see any argument that will show that, presuming a vessel might fail to conform with the regulations at starting from Ireland without being liable to a penalty, it is not an offence to continue to disregard the regulations in the ports and waters of Great Britain. By section 12 of the Order, if anything is omitted to be done which is required by the Order, the owner and master of the vessel on which the omission takes place is held responsible, and the omission applies to every condition named in the section. It is argued that the offence was completed in Ireland. I think that it was a continuing offence in England. The object of the Act is to restrain the spread of the cattle disease in England. If a man could do as the respondent has done without coming under the provisions of the Act, the whole object of the Act would be defeated. Mr. Thompson argued that the term "United Kingdom" did not include Ireland, which, for the purpose of the Act, was to be considered foreign, but I think Ireland is not to be treated as foreign; nor do the provisions as to foreign animals apply to Irish animals; and the 4th section places it beyond reasonable doubt, and therefore that contention cannot be maintained. Irish animals when they come to England and Scotland are clearly subject to the provisions applied to animals of the United Kingdom.

DENMAN, J., concurred.

Case referred to justices.

An application was made on behalf of the respondents to be allowed to appeal; which was refused, on the ground that where the original decision is final, as the magistrates' would have been, no appeal can be given.

Solicitor for the appellant, *The Solicitor to the Treasury.*

Solicitors for the respondent, *Prior, Bigg, Church, and Adams.*

Tuesday, Nov. 6.

(Before Lord COLERIDGE, C.J. and DENMAN, J.)

BURGESS v. NORTHWICH LOCAL BOARD.(a)

Public Health Act 1875—Arbitration—Liability of local authority to make compensation for damage—Jurisdiction of arbitrator under 38 & 39 Vict. c. 55, s. 308.

The owner of house property alleged to have been damaged by the operations of a local board of health brought a claim against the board for compensation, and gave the usual arbitration notices prescribed by the Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 179, 180. The board refused to acknowledge that they were in any way liable, or to appoint an arbitrator, and the reference proceeded before the arbitrator appointed by the claimant without the board becoming in any way party to the proceeding. On a motion to set aside the award for want of jurisdiction in the arbitrator,

Held, that it was not sufficient, in order to oust the jurisdiction of the arbitrator, that the board should deny their liability to make any compensation, but that at any rate some primâ facie ground for asserting their non-liability must be shown.

THIS was a motion for a rule nisi to set aside an award made by the County Court Judge for Cheshire, sitting as arbitrator under the Public Health Act 1875 (38 & 39 Vict., c. 55), against the Local Board of Northwich, on the ground that under the provisions of the Act, the arbitrator had proceeded without jurisdiction. The district within the powers of the Northwich Local Board contained a number of salt works, and the extraction of the salt occasioned not unusually more or less subsidence of the ground in the neighbourhood. To meet this danger of subsidence some of the houses in the district were constructed on what was called the raiseable principle, being built upon a large wooden framework, and capable of being elevated by means of powerful screw jacks. In 1876 a subsidence of one of the roads took place so as to lower the houses which were built along it, and the Local Board for Northwich caused the road to be raised to its former level, thus leaving it several feet higher with regard to the houses bordering it than it had been originally. One Burgess, who owned certain of these houses, constructed upon the movable principle above described, thereupon gave notice to the local board that he claimed compensation for the injury sustained by his property in consequence of the board having caused the road to be restored to its former level. The local board having refused to entertain the claim, Burgess appointed an arbitrator under sect. 180, sub-sect. 4, of the Public Health Act, and gave notice to the local board of such appointment. The board, without entering into the amount of damage sustained by the claimant, refused to admit that they were under any liability whatever, and did not appear before the arbitrator. The reference was brought to a conclusion in their absence, without any arbitrator being appointed in their behalf, and an award was made against them. The material sections of the Public Health Act, 1875 (38 & 39 Vict. c. 55), upon the construction of which the argument turned, are as follows:

Sect. 179. In case of dispute as to the amount of any

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

compensation to be made under the provisions of this Act (except when the mode of determining the same is specially provided for), and in case of any matter which, by this Act, is authorised or directed to be settled by arbitration; then, unless both parties concur in the appointment of a single arbitrator, each party shall appoint an arbitrator to whom the matter shall be referred.

Sect. 180. With respect to arbitrations under this Act, the following regulations shall be observed (that is to say).

- (1.) Every appointment of an arbitrator under this Act when made on behalf of the local authority shall be under their common seal, and on behalf of any other party under his hand, or if such party be a corporation aggregate under their common seal.
- (2.) Every such appointment shall be delivered to arbitrators, and shall be deemed a submission to arbitration by the parties making the same.
- (3.) After making of any such appointment the same shall not be revoked without the consent of both parties, nor shall the death of either party operate as a revocation.
- (4.) If for the space of fourteen days after any matter by this Act authorised or directed to be settled by arbitration has arisen, and notice in writing by one party who has duly appointed an arbitrator has been given to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fails to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties.

Sect. 308. When any person sustains any damage by reason of the exercise of any of the powers of the Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act; or if the compensation claimed does not exceed the sum of £20, the same may, at the option of either party, ascertained by and recovered before a court of summary jurisdiction.

Horace Brown, for the Local Board of Northwich.—There was no dispute here either as to "the fact of damage or amount of compensation," in the words of sect 308, and the arbitrator had, therefore, no jurisdiction to proceed. Even assuming that the claimant had sustained damage or deterioration to the amount of 10,000*l.*, the board denied that they were under any legal liability whatever. The question whether or not the local authority is liable is not left to the arbitrator, whose only function is to decide the amount of compensation to be paid, if any. The decision in *Reg. v. The Metropolitan Commissioners of Sewers* 1. E. and B. 391, was under sect. 69 of 11 & 12 Vict. c. 112, but the principle involved is really the same: (*Bradley v. Corporation of Southampton*, 24 L. J., Q. B. 239.) [Lord COLERIDGE, C.J.—Unless you go so far as to say that the mere denial of any liability by one of the parties to the reference ousts the jurisdiction of the arbitrator, you must give some *prima facie* reason for non-liability.] The arbitrator has no jurisdiction to decide the question of liability at all; he can only inquire into the fact of damage and the amount of compensation. It was never intended to submit so important a question as that of liability to the judgment of an inferior tribunal. [Lord COLERIDGE, C.J.—If the Lands Clauses Act provisions are incorporated with the Public Health Act, then the arbitrator has power to state a case.] They are not incorporated for the purposes of arbitration, and the decision of the arbitrator would be practically final. Assuming that we could still dispute our liability in

an action on the award, we should be concluded as to amount by the award, which we have treated throughout as a nullity; so that this motion to set it aside is the only proceeding open to us.

Lord COLERIDGE, C.J.—I am of opinion that there is no ground for this application. If the matter had been so brought before us, either by affidavits or in any other way, that we could see that the arbitrator had not jurisdiction to decide the matters he did decide, and that there was no liability imposed on the defendants by law, I am not prepared to say that in that case his award might not have been aside. But here we are asked to set an award aside in a matter *apparently*—I say no more—within the provisions of those sections of the Act which give the arbitrator jurisdiction, on the single ground that the applicant asserts his non-liability. I can see no ground for holding that a mere unsupported assertion to that effect will oust the jurisdiction of the arbitrator.

DENMAN, J.—I am of the same opinion. I express no opinion as to the actual meaning and effect of sect. 308 of the Public Health Act, on the question whether the arbitrator has jurisdiction to decide if the board are under any legal liability at all, but here there has been nothing brought before us to show what the real ground of the arbitrator's decision was. The words of sub-sect. 15 of sect. 180 of the Act are extremely strong; and though the applicants have stood aloof from the proceedings, they are made in a sense parties to the reference by standing aloof. I do not intend to prejudge any subsequent proceedings that may be taken with regard to the award, but give my opinion on the ground that I have no means of knowing what the grounds of the arbitrator's decision were.

Motion refused.

Solicitors for the applicants, *Sharp, Parkers, and Co.*, for *Green and Dixon*, Northwich.

Friday, June 15.

WHITEHEAD v. SMITHERS. (a)

Preservation of wild fowl—35 & 36 Vict. c. 78, s. 2—39 & 40 Vict. c. 29—*Possession of protected birds during prohibited periods.*

The statute 35 & 36 Vict. c. 78, s. 2, forbids the killing, wounding, or taking of certain wild birds of the United Kingdom, or exposing them for sale, within certain periods, and imposes a penalty, but provides that proof that such birds were received from a person residing out of the United Kingdom is a sufficient defence to a charge under the Act.

The statute 39 & 40 Vict. c. 29, after stating in its preamble that it was expedient to provide for the further protection of wild fowl of the United Kingdom, provides, in its second section, that any person who shall have in his control or possession any of the said wild fowl within the prohibited periods shall be liable to a penalty. The second statute makes no reference to a defence that the fowls were obtained from a person residing out of the United Kingdom. The penalty in the second statute is larger than in the former statute; and the prohibited period in the second statute is earlier in the season than in the former.

Reported by CAMERON CHURCHILL, Esq., Barrister-at-Law.

Held (reversing the decision of the City magistrate) that it is an offence for a person to have in his possession, during the prohibited period, a protected bird, whether such bird came from abroad or not.

Held also, that the second section of the second Act was in substitution for the second section of the former Act, although the former Act is not in terms repealed.

THIS was a case stated by one of the aldermen of the City of London, one of Her Majesty's justices of the peace in and for the City of London, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with the determination of the magistrate upon the question of law which arose before him as hereinafter stated, on the 16th of June, 1877, at the Mansion House Justice Room in the City of London.

The facts of the case were as follows :

1. Upon the hearing of a certain information and complaint preferred by the appellant against the respondent under the statute 39 & 40 Vict. c. 29, s. 2, entitled "An Act for the Preservation of Wild Fowl" (hereinafter referred to as the Act of 1876) charging that the respondent had unlawfully had in his control and possession a certain wild fowl, to wit, a plover, then recently killed, in the City of London, between the 15th of Feb. and the 10th of July 1877, to wit, on the 10th of April, 1877, contrary to the statute, &c.

The magistrate dismissed the information and complaint.

2. Sect. 2 of the Act of 1876 provides as follows :

Any person who shall kill or wound, or attempt to kill or wound or take any wild fowl, or use any boat, gun, net, or other engine or instrument, for the purpose of killing, wounding, or taking any wild fowl, or shall have in his control or possession any wild fowl, recently killed, wounded, or taken between the 15th Feb. and the 10th July, in any year, shall on conviction of any such offence before any justice or justices of the peace in England or Ireland, or before the sheriff or any justice or justices of the peace in Scotland, forfeit and pay for every such wild fowl so killed, wounded, or taken, or so in his possession, such sum of money not exceeding one pound, as to the said justices or sheriff shall seem meet, together with the costs of the conviction.

3. On behalf of the appellant, it was proved or admitted by the respondent, that Henry Read, an officer of the Royal Society for the Prevention of Cruelty to Animals, on the 10th April, 1877, purchased for 1s. 3d. at the shop of the respondent, situate in Cannon-street, in the City of London, a plover, then and there in the possession of the respondent and exposed for sale, which had been recently killed.

4. On behalf of the respondent, it was proved or admitted by the appellant that the plover so purchased by the said Henry Read was one of a consignment of dead plovers received by a Mr. Howard, a poulterer, from Holland, and by him sold to the respondent.

5. It was contended on behalf of the respondent that, the plover in question being a foreign wild fowl, and killed abroad, the case did not come within the said statute, inasmuch as the preamble of the Act of 1876, which is as follows : "Whereas the wild fowl of the United Kingdom, forming a staple article of food and commerce, have of late years greatly decreased in number, by reason of their being inconsiderately slaughtered during the

time that they have eggs and young, and whereas, owing to their marketable value, the protection accorded to them by the Act of the 35th & 36th years of the reign of her present Majesty, chap. 78, intitled 'An Act for the Protection of Certain Wild Birds during the Breeding Season,' is insufficient, it is expedient therefore to provide for their further protection during the breeding season," shows that the Act was intended for the further protection of the wild fowl of the United Kingdom only.

6. On behalf of the appellant it was contended that if the information had been laid under sect. 2 of the statute 35 & 36 Vict. c. 78 (hereinafter referred to as the Act of 1872), which provides as follows : "Any person who shall, knowingly or with intent, kill, wound, or take any wild bird, or shall expose or offer for sale any wild bird recently killed, wounded, or taken, between the 15th March and the 1st August, in any year, shall, on conviction of any such offence before any justice or justices of the peace in England or Ireland, or before the sheriff or any justice or justices of the peace in Scotland, for a first offence be reprimanded and discharged on payment of costs and summons, and for every subsequent offence forfeit and pay for every such wild bird so killed, wounded, or taken, or so exposed or offered for sale, such sum of money as, including costs of conviction, shall not exceed 5s., as to the said justice, justices, or sheriff shall seem meet, unless he shall prove to the satisfaction of the said justice, justices, or sheriff that the said wild bird or birds was or were bought or received on or before the said 15th March, or of or from some person or persons residing out of the United Kingdom. Provided, nevertheless, that every summons issued under this Act shall specify the kind of wild bird in respect of which an offence has been committed, and that not more than one summons shall be issued for the same offence," then the defence set up by the respondent would have been good in law, as provided by the exemption clause in the said section ; but he submitted that as the Act of 1876 in its preamble declares the protection accorded to wild fowl of the United Kingdom during the breeding season, by the Act of 1872 to be insufficient, and that "further protection" is expedient, the provisions of the Act of 1876 were designed to be more far-reaching than the provisions of the Act of 1872, and that they actually do more effectually enlarge and extend the protection of wild fowl of the United Kingdom, and he also contended that, inasmuch as the words contained in the 2nd section of the Act of 1872, forbidding any person "to expose and offer for sale" a protected bird, are omitted in the Act of 1876, more comprehensive words being used instead thereof, namely, that no person shall "have in his control or possession" a protected fowl, and that inasmuch as the Act of 1872 contains a clause exempting foreign birds from its operation, and the subsequent Act of 1876 contains no such exempting proviso, the protection of wild fowl had been enlarged and extended by the substitution of such more comprehensive words, and by the omission of such proviso, and, consequently, that the mere control or possession of wild fowl, whether foreign or not, recently killed, during the prohibited season was an offence against the Act of 1876.

7. After hearing the witnesses and arguments on both sides, the magistrate arrived at the conclusion :

First, that the Act of 1876, as appears by the preamble, was for the preservation of wild fowl of the United Kingdom only, and that for their marketable value as an article of food and commerce.

Secondly, that the wild fowl in question, a plover, having been bought or received of or from some person or persons residing out of the United Kingdom, was not proved to be a wildfowl of the United Kingdom.

On these two findings the magistrate dismissed the summons.

Thirdly, that it was doubtful whether the 2nd section of the Act of 1876 was intended to apply to an offering or exposing for sale of a wild fowl.

This section, making it an offence for anyone to have in his control or possession any wild fowl recently killed, &c., within the limited period, the magistrate considered that this could not be intended to apply to the possession of wild fowl imported from Holland or elsewhere, but to refer only to wild fowl recently killed, or taken, and found on the person, or under the control, or in the possession of one engaged in killing or taking the same, in the United Kingdom, but who could not be proved to have actually killed or taken the same.

Fourthly, the magistrate considered that proceedings in this case ought properly to have been taken under the 2nd section of the Act of 1872, as that Act provides for the unlawful exposing or offering for sale of any wild bird, &c. (a plover being a wild bird mentioned in the Act of 1872, and also a wild fowl mentioned in the Act of 1876, recently killed, wounded, or taken); and the Act of 1876 is silent as to the exposing and offering such for sale, and does not in terms repeat the former enactment. The magistrate considered that the Act of 1876 must therefore be regarded as an amending Act, and must be taken concurrently with the Act of 1872, and that, as the facts proved in this case showed an exposing and offering for sale within the meaning of the 2nd section of the Act of 1872, that section applied, and further, that, as express provision is made for exempting the sale of a "wild bird" from the penal operation of that section if it were proved to the satisfaction of the magistrate, as was done in this case, that the said wild bird was brought or received of or from some person or persons residing out of the United Kingdom, no conviction could take place.

The questions of law submitted for the opinion of the court were :

1. Whether the Act of 1876 makes it an offence for any person to have in his control or possession, within the prohibited time a wild fowl recently killed, &c., although such wild fowl shall have been bought or received of some person or persons residing out of the United Kingdom.

2. Whether the second section of the Act of 1876 applies to the control or possession (by exposing or offering for sale in a shop), of a wild fowl recently killed, within the prohibited time, such exposing or offering for sale being a distinct offence in itself, punishable under the 2nd section of the Act of 1872, if such wild fowl be not bought or received of or from some person or persons residing out of the United Kingdom.

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Waddy, Q.C. (with him *Willis Bund*) for the appellant. — There must be a conviction. Under the 2nd section of 35 & 36 Vict. c. 78 (the Act of 1872), "An Act for the Protection of Wild Birds," &c., it is provided that "any person who shall knowingly, or with intent, kill, wound, or take any wild bird, or shall expose or offer for sale any wild bird," &c., should be punishable, but that statute did not provide that any person who should have in his possession any wild bird, &c., should be punishable. The second Act, 39 & 40 Vict. c. 29, the Act of 1876, supplements the first, which had been found insufficient, owing to the difficulty of proving that a person had himself killed, wounded, or taken the bird. Under the first Act, proof that the bird had been bought or received out of the United Kingdom was a sufficient defence. Under the second Act it is no defence. The first part of the first Act with regard to exposing for sale is omitted in the second Act, thus showing that it is not necessary for a person to do more than have a protected bird in his possession, to bring him within the statute, and the second part, with regard to the reception of a bird from without the United Kingdom, is also omitted, showing that the reception from any quarter of a protected bird is within the statute.

Reginald Brown for the respondent.—There can be no conviction. It appears from the first Act that Parliament intended it to apply to birds of the United Kingdom; and the second Act does not repeal the second section of the first Act. The preamble of the second Act says *their* further protection, i.e., the wild fowl of the United Kingdom. In this case the fowl is not from the United Kingdom. If a conviction were obtained in such cases as this, the laws of England would exercise control over the trade of other countries in birds. [Lord COLERIDGE.—If the Act accidentally interferes with the slaughter of birds in foreign countries, is that an argument against it? The Copyright Act prevents printed matter being circulated in England; but it does not prevent the matter being printed in France. So this Act may prevent the importation of certain protected birds during prohibited periods into England, but it does not, except incidentally, interfere with the slaughter of such birds in other countries.] If the contention of counsel for the appellant be good, then the Legislature has repealed a section of a former statute without mentioning it expressly.

Lord COLERIDGE, C.J.—Our opinion is that the judgment of the magistrate must be reversed, and that there must be a conviction in this case. The first Act, which is the statute 35 & 36 Vict. c. 78 enacts in its 2nd section that "any person who shall knowingly, or with intent kill, wound, or take any wild bird, or shall expose or offer for sale any wild bird recently killed, wounded, or taken, between the 15th March and the 1st Aug. in any year, shall on conviction," &c., "unless he shall prove to the satisfaction of the said justice," &c., that the said wild bird or birds was or were bought, or received on or before the said 15th March, "of or from some person or persons residing out of the United Kingdom." Obviously, therefore, under that statute, it was a sufficient defence to a charge of this description to prove that the wild bird in question had been purchased or obtained from some person residing out of the United Kingdom. But this statute was supplemented by a

second statute, and it becomes necessary, in a decision upon this case, to consider carefully, first, what was the deficiency in the first statute which the second statute was designed to supply; and, secondly, how was that deficiency supplied? The preamble of the second Act states that the wild fowl of the United Kingdom have of late years materially decreased in number by reason of their being inconsiderately slaughtered during the time that they have eggs and young, and that owing to their marketable value the protection accorded to them by the provisions of the former Act, *i. e.*, the Act of 1872, has proved to be insufficient, and that it is therefore desirable and expedient to provide for their further protection during the breeding season. How is that further protection accorded to them? The second statute omits all mention of exposing or offering for sale the protected bird, and makes it penal to have any such bird in control or possession within the prohibited period. It alters the date of the prohibited period from the 15th March and the 1st day of Aug. in any year, to the 15th of Feb. and the 10th July. It further omits all mention of its being a defence to a charge of this nature to prove that the bird in question was received from some one residing out of the United Kingdom. Mr. Brown argues that the two statutes must be taken together, that the second does not repeal the first, and that what would have been an answer to the former statute is still an answer to the second, and, further, that making one statute to repeal another which it does not refer to is an unusual mode of construing an Act of Parliament. But the earlier statute is expressly referred to, and amended and strengthened, and with regard to the question as to whether a subsequent statute can repeal a previous statute, which it does not in express terms repeal, the case of *Mitchell v. Brown* (1 Ellis & Ellis, 267) will be found very instructive. In that case it will be found that the statute 19 Geo. 2, c. 22, s. 1, which imposed a penalty for the offence of throwing ballast, &c., into navigable rivers, was impliedly repealed by the subsequent statute 54 Geo. 3, c. 159, s. 11, which provides a different punishment for the same offence, and prescribes a different mode of procedure, although the preamble of 54 Geo. 3, c. 159, states the expediency of repealing certain other statutes (which are repealed) and the expediency only of enlarging the statute 19 Geo. 2, c. 22. Lord Campbell, in his judgment, says: "If that part of statute 19 Geo. 2, c. 22, on which this conviction was founded be still in force, we think that the conviction would be supported by the evidence. But after a careful comparison between this statute and statute 54 Geo. 3, c. 159, we have come to the conclusion that such part of the former statute is repealed. . . . If a later statute again describes an offence created by a former statute, and affixes a different punishment to it, varying the procedure, &c., giving an appeal where there was no appeal before, we think that the prosecutor must proceed for the offence under the later statute. . . . These considerations may justify the editors of the statutes in saying that the former statute is repealed, although some of its enactments are extended as well as re-enacted, in a later statute. When such specimens of legislation come before us, we are driven to form

the best conjecture we can as to the intentions of the Legislature." There can be no doubt, therefore, that the second statute does repeal, though not in terms, the part of the former statute which renders penal an exposing or offering for sale, and, instead, renders the possession of a protected bird, within the prohibited period, a punishable offence, and, further, that the second statute repeals that portion of the former statute which allows proof that the bird was obtained from persons residing out of the United Kingdom to constitute a sufficient defence. It is further said that, if the law be construed in this way, the slaughter of birds in foreign countries, which the legislature of those countries does not control, would be controlled by British law. That, however, is merely saying in other words that the direct protection of British birds means the indirect protection of foreign birds. There must be a conviction, and the judgment of the magistrate must be reversed.

GROVE, J.—This clause is in substitution for a clause in the previous statute. How does the second statute provide for the further prosecution of wild birds in accordance with the terms of its preamble? The penalty is increased for one thing, and whilst by the former statute the first offence is punishable by a reprimand and payment of costs, and subsequent offences by a fine not exceeding 5s. for each bird, to include the costs of the conviction, the second statute makes every offence punishable by a fine not to exceed 1l. for every bird so found in possession of the person charged, and the costs of the conviction. There are two distinct provisions; and it is not as if a new provision, partly consistent with, and partly varying from, an old one were here, but the old one is directly altered and enlarged. It was found hard under the previous Act to prevent people saying, when detected in selling English protected birds during prohibited periods, that the birds came from a foreign country, and so the second Act fines the person who has a protected bird in his possession during the prohibited period, whether the bird be a foreign bird or not. The two questions submitted for the opinion of the court must be answered in the affirmative.

Solicitor for appellant, *A. Leslie*.

Solicitor for respondent, *T. Beard*.

Nov. 19 and 20.

(Before GROVE, DENMAN, and LINDLEY, JJ.)

GRANT v. OVERSEERS OF THE PARISH OF PAGHAM (a.)

Parliament — County vote — Disqualification — Bribery at Election (31 & 32 Vict. c. 125, s. 43).

Upon the trial of an election petition in 1874, in which the appellant was respondent, under the Election Petitions Act 1868, the judge determined that the election was null and void, and the appellant was thereupon unseated.

The judge further certified and reported that it was proved before him that the appellant was guilty of a corrupt practice at the said election within the true intent and meaning of the Corrupt Practices Prevention Act 1854, and that the nature of the corrupt practice was the promising before and at the time of the said election to certain voters for the borough and other inhabitants thereof that he (the appellant) would, in

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the event of his being returned at the said election and after such return, give to such voters and other inhabitants an entertainment consisting, amongst other things, of meat and drink, with the intent to induce such voters to vote for him, the appellant, at the said election.

Held, that this report did not amount to a finding by the report of the judge upon an election petition that bribery had been committed by or with the knowledge or consent of the appellant, so as to render him personally guilty of bribery at such election, and affect him with the disability imposed by 31 & 32 Vict. c. 125, s. 43.

Per Grove, J.—In order to ascertain whether or not such personal guilt of bribery is reported as having been found, the report alone of the election judge must be considered, and not the judgment given upon the hearing of the election petition.

APPEAL from the decision of the revising barrister for the Western Division of the County of Sussex, disallowing the appellant's vote.

The following case was stated :

1. The said Albert Grant claimed to have his name inserted in the list of voters for the Western Division of the county of Sussex, as being duly qualified in respect of his ownership of certain freehold property situate in the parish of Pagham, in the polling district of Bognor, in the said division of the said county.

2. One Eugene Edward Street, a voter for West Sussex, duly objected to the said appellant being so inserted on such list of voters.

3. The claim came on and was heard before me at the court holden by me as revising barrister for the said Western Division of the county of Sussex, at Bognor, on the 1st day of October 1877, and the said Albert Grant was proved to be duly qualified in respect of his said claim, unless the objection put forward by the said Eugene Edward Street, and mentioned in the next paragraph of this case, should be decided by me to be a valid one.

4. The said objection was that, the said Albert Grant having been returned by the returning officer for the borough of Kidderminster as having been duly elected on the 31st day of January 1874 to serve in Parliament for the said borough, a petition had been presented against such election and return, and at the trial of the matters alleged in such petition before Mr. Justice Mellor, the election judge appointed to try the same, such election and return were determined to be null and void; and that the certificate and report made by Mr. Justice Mellor, as such election judge, on the trial of the said petition, and dated the 17th day of July 1874, rendered the said Albert Grant incapable of being registered as a voter and voting at any election in the United Kingdom during seven years next after the said 17th day of July 1874.

5. The certificate and report, so far as the same is material, is in the words and figures following :—“ Now I, Sir John Mellor, Knight, one of the judges on the rota for the trial of Election Petitions in England, having, according to the Parliamentary Elections Act 1868, tried the matters alleged in the said petition, and determined the same, do hereby certify and report that at the trial of the matters alleged in the said petition I determined that the said Albert Grant was not duly elected and returned as to the said election, and that his election and return were and are wholly null and

void. And in compliance with the directions of the Parliamentary Elections Act 1868 I further certify and report that it was proved before me that the said Albert Grant was guilty of a corrupt practice at the said election within the true intent and meaning of the Corrupt Practices Prevention Act 1854. And I further report that the nature of such corrupt practice was the promising before and at the time of the said election to certain voters for the said borough of Kidderminster and other inhabitants thereof that the said Albert Grant would, in the event of his being returned at the said election and after such return, give to such voters and other voters and inhabitants of Kidderminster an entertainment consisting, among other things, of meat and drink, with the view and intent to induce such voters to vote for him, the said Albert Grant, at such election. And I further report that, in course of the trial, it appeared, more or less clearly, that a number of voters had been induced to vote for the said Albert Grant by virtue of a promise made to them by persons canvassing them for their votes, that their names should be put down upon a committee, and that it would be worth to them 10s. each when all was over, and in other cases that they would be paid for their services when it could be done with safety; but, inasmuch as in some cases the persons implicated were not clearly identified and in other cases the counsel for the respondent did not call them to contradict or explain the circumstances on the ground that their evidence did not affect Mr. Grant, I think that I cannot safely report the names of any persons as having been proved to have been guilty of bribery. I am not able, from the evidence before me, to report that there is reason to believe that corrupt practices extensively prevailed at the said election.”

“ There was evidence of a good deal of illegal treating during the election. But it was not proved to my satisfaction to have been corrupt.”

6. The evidence produced before me, and admitted by the claimant and objector, as common to both, consisted of a return to an order of the Honourable the House of Commons, dated 12th June 1874, for a copy of the shorthand writer's notes of the judgments delivered by the judges selected in pursuance of the Parliamentary Elections Act 1863, for the trial of election petitions, and ordered by the House of Commons to be printed 5th Aug. 1874. With consent I annex to this case, as part thereof, a copy of the said return, and for the purposes of this appeal I incorporate in this case as facts proved before me the facts stated in Mr. Justice Mellor's judgment and certificate.

7. After hearing arguments in support of the said objection and against the said claim, and arguments in support of the said claim and against the said objection, I adjourned the further hearing and determination of the said claim and objection until the sitting of the court to be holden by me as such revising barrister at Horsham, within such western division of the said county on the 8th day of October 1877. And at such further hearing I did, as such revising barrister, decide and determine, having regard to the distinction existing between bribery and treating as affecting a voter's mind, and that treating as defined in the Corrupt Practices Act 1854 does not include a promise to treat, but that bribery, as defined in the said Act, does include a promise

to give; and having regard to Mr. Justice Mellor's judgment and certificate, and to the nature of the promised entertainment, and the value of the proposed accompanying gifts as set forth in Mr. Justice Mellor's judgment, and for other reasons, that the corrupt practice reported by Mr. Justice Mellor to the House of Commons to have been committed by the said Albert Grant at the Kidderminster election was and amounted to bribery within the true intent and meaning of the Corrupt Practices Prevention Act 1854 and the Parliamentary Elections Act 1868, and was not treating, as contended before me on his behalf, and that consequently it was found by the said report that bribery had been committed by the said Albert Grant at the said election, I accordingly disallowed his claim to have his name inserted in the list of voters.

If the court shall be of opinion that the corrupt practice found by the said report to have been committed by the said Albert Grant at the Kidderminster election was and amounted to bribery within the true intent and meaning of the above-mentioned Acts, and that it was found by the said report that bribery had been committed by the said Albert Grant at the said election, my decision, so far as it disallowed his claim, will be affirmed.

If the court shall be of a contrary opinion, then my decision will be reversed, and such order made as may be fitting.

The 31 & 32 Vict. c. 125 (the Parliamentary Elections Act 1868), s. 143, is as follows, so far as is material:—

Where it is found by the report of the judge upon an election petition under this Act, that bribery has been committed by, or with the knowledge or consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election, and his election, if he has been elected, shall be void, and he shall be incapable of being elected to, and of sitting in the House of Commons during the seven years next after the date of his being found guilty, and he shall be further incapable during the said period of seven years,

(1) Of being registered as a voter, and voting at any election in the United Kingdom.

By sect. 11, sub-sect. 14 of the same Act, it is enacted,

Where any charge is made in an election petition of any corrupt practice having been committed at the election to which such petition refers, the judge shall in addition to such certificate, and at the same time, report in writing to the Speaker as follows:

(a) Whether any corrupt practice has or has not been proved to have been committed by, or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice.

Pollard for the appellant.—The question for the court is not whether the appellant has been guilty of personal bribery or not; but whether he has been so found by the report of an election judge. That is the condition of the disability imposed by the statute. He has not been so found by the election judge in his report; and neither the revising barrister nor this court have jurisdiction to try the case over again (*Lord Huntingtower v. Gardner*, 1 B. & O. 297; *Britt v. Robinson*, 23 L. T. Rep. N. S. 188; L. Rep. 5 C.P. 503). [DENMAN, J.—You say that the election judge is the sole judge both of law and fact, and that we are not to say whether the corrupt practice stated by him amounts to personal bribery or not?] Exactly. In the present case another revising barrister has actually held that the same report does

not amount to a finding of personal bribery, so that the evil of not accepting the words of the report itself as conclusive is manifest. First, the appellant contends that the report, in order to satisfy the section, must not be argumentative, but must find personal bribery *eo nomine*. Secondly, this report does not, even argumentatively, amount to such a finding. It is consistent with such a corrupt practice, amounting even to bribery by an agent, as will suffice to unseat; but there is a distinction between such bribery and bribery with the knowledge or consent of the candidate. Besides, it has been held that an entertainment of meat and drink comes under the head of treating merely, and is not bribery proper. Promising to do an act cannot be an offence greater than the actual performance of the promise.

GROVE, J.—I am of opinion that the decision of the revising barrister should be reversed. I regret very much that the case should have been argued only on one side, and that the court should thus have been deprived of the great advantage of hearing the cases and statutes which may be in point brought before them on behalf of both parties. We can only act upon the material presented to our minds; and upon these I am of opinion that the finding of the learned judge in this case does not bring the case within sect. 43 of 31 & 32 Vict. c. 125, the Act under which alone the voter can be disqualified. An election judge is required by the Act to report to the House of Commons not only whether the candidate has been duly elected or not, but also to make a report under three heads set out in sect. 11, sub-sect. 14, and has also an optional power of adding anything else that it may appear desirable to him to report. Under this provision he is directed to report, first, whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, and the nature of such corrupt practice. That is very clear and explicit, and similar words are used in sect. 43 of the same Act, which provides that, where it is found by the report of the judge upon an election petition under the Act that bribery has been committed by or with the knowledge and consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election, and his election, if he has been elected, shall be void, and he shall be incapable, amongst other things, of being registered as a voter and voting at any election in the United Kingdom during the seven years next after the date of his being found guilty of such personal bribery. Now, there is no doubt at all that the learned judge has not reported in the words of the statute, because he has not reported that a corrupt practice has been committed with the knowledge and consent of the candidate. He may have intended to have found him personally guilty within the meaning of the enactment when he says that he has been guilty; but he has not said so in words that are unambiguous and plain, according to the Act of Parliament. In the Corrupt Practices Act 1854 (17 & 18 Vict. c. 102), the term "corrupt practice" is used of practices committed without the knowledge and consent of the candidate, and in sect. 36 of that Act it is expressly said that a man may be "guilty" of bribery by his agents as well as by himself. The terms of sect.

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46 of the 31 & 32 Vict. c. 125 (the Parliamentary Elections Act 1868) are, to my mind, still stronger to the same effect. In that section it is said that for the purpose of disqualifying, in pursuance of sect. 36 of the Corrupt Practices Prevention Act 1854, a member guilty of corrupt practices other than personal bribery within sect. 43, the report of an election judge shall be deemed to be substituted for the declaration of an election committee. Now there the Act expressly distinguishes between a member guilty of a corrupt practice and a member guilty of a corrupt practice committed with his knowledge and consent. The words of sect. 43, "committed by or with the knowledge and consent," are not contained in the judge's report, which uses expressions not necessarily imputing personal knowledge or personal guilt; and I therefore am of opinion that on the face of this report it is consistent with it that Mr. Grant was guilty of a corrupt practice not necessarily committed with his knowledge and consent, but by his agent. The learned judge goes on to state the nature of the corrupt practice, and the same infirmity—or rather the same absence of the words of the section imposing the penalty—is still noticeable: "And I further report that the nature of such corrupt practice was the promising before and at the time." The report does not say by whom the promise was given, and does not do more to fix it upon the candidate than the first branch of the report does. On the whole it appears to me that there is nothing which is not consistent with guilt by the agent of the candidate, and without the knowledge and consent of the latter. It is necessary to see, in construing a penal statute, that the offence comes clearly within that which the Act contemplates, and it does not appear to me that the offence set out on the face of this report is clearly within sect. 43 of the Parliamentary Elections Act. I also think that we should not regard the explanatory terms of the judgment for two reasons: first, because, as a rule, in ordinary cases the reasons of a judgment are not evidence for the court, because they are remarks openly expressed by the learned judge, who may comment upon the witnesses and make a number of remarks which are not evidence at all; and, secondly, because the whole qualification of sect. 43 is made to depend not upon the judgment of the judge, but upon his report. This report, therefore, being consistent with the candidate having been guilty by an agent only, it is unnecessary to consider the other point argued by Mr. Pollard, as to its being impossible that a promise should amount to bribery when the actual performance of the promise does not.

DENMAN, J.—I entirely concur in regretting that only one side has been argued by counsel in this case. It is one of considerable importance, but all the questions that have been raised need not be decided. We were anxious that it should be discussed before a judge of so much experience in elections as my brother Grove, and for that reason were glad that a great part of yesterday's argument should be repeated to-day. The case turns upon the short question whether it has been found in this case by the report of an election judge that bribery has been committed by or with the knowledge and consent of the candidate, who is the present appellant. The barrister seems to have thought that the finding of the judge amounted to a finding to that effect. On the first point that has been raised before us, that no find-

ing will do unless the offence pointed at is stated expressly and in so many words, and that the omission to do that here is fatal, it is not necessary to decide. It has been argued, and some authority has been cited for it, that it is necessary that the offence should be reported by the judge in the very words of the statute. That may be so; but yet some very startling results would follow from such a doctrine. An election judge might have reported facts which all the world could say amounted to gross bribery, and yet the man might be left in possession of his franchise. I do not decide the case upon that ground, especially as we have only heard the argument of counsel on one side. It may be necessary to meet it hereafter, but I do not intend to decide it now. I agree with my brother Grove in holding that this is a case in which it does not appear with reasonable certainty that personal bribery has been committed. The judge has found Mr. Grant guilty of a corrupt practice, and that the corrupt practice was the promising of an entertainment if he were elected; but I so entirely agree with the observations of my brother Grove as to this finding that I will only say that, even though it may not be necessary to use the express words of sect. 43 of the Act, there must be a statement equivalent to them, and here there is no such statement. It is unnecessary, therefore, to consider whether the facts as reported by the judge would have amounted to personal bribery if done with the knowledge and consent of the candidate. It would certainly be rather startling that a mere promise to treat should be looked upon as something more serious in its consequences than treating itself, the actual performance of the promise. It may be that it would not be straining the law to treat it merely as equivalent to actual treating, so as not to amount to bribery. I wish to leave that question alone, and to confine my decision to that point which my brother Grove, J.J. has treated.

LINDLEY, J.—I am of the same opinion. The only point we have to consider is whether this finding of the learned judge comes within sect. 43 of the Parliamentary Elections Act. That section imposes the penalty of disqualification where it is found by the report of a judge upon an election petition that bribery has been committed by or with the knowledge and consent of the candidate. There is no form of report given in the Act, and no actual or precise words need be employed; but, still, in the absence of any finding that the candidate has been guilty of bribery by himself or with his knowledge and consent, if that has to be spelt out of the facts as stated, I do not think that is sufficient. Now, when we come to look at this report, it is by no means clear that bribery has been committed within sect. 43 of the Act. I think the words should be so clear and precise as to leave no reasonable doubt as to their effect. The appeal must be allowed, and the vote allowed.

Decision reversed; no costs.

Solicitors for the appellant, Robinson and Preston, for Bostock and Rawlinson, Horsham.

Monday, Nov. 19.

(Before DENMAN and LINDLEY, JJ.)

BEAL v. FORD. (a)

Parliament—Borough vote—Residence—2 Will. 4, c. 45, s. 27.

The name of the appellant, being upon the list of voters for a borough, was objected to on the ground that he had not resided for the six calendar months required by 2 Will. 4, c. 45, s. 27, within the limits of the borough or within seven miles thereof.

It was proved that the appellant had occupied a house within the prescribed limits as tenant during part of the time; but that, for a period of two calendar months out of the six months required by the statute, he had lived with his wife and child in a cottage occupied by his mother-in-law. The cottage so occupied was one of certain houses called "Free Cottages," granted by the trustees thereof to inhabitants of the borough free of rent, and, under certain regulations, one of which provided that no person should reside with any inmate without the permission of the trustees. Such permission had not in this case been given.

It was further proved that, on one night in the course of the two months, the appellant had been absent in London on business, leaving his wife and child in the said cottage.

Held that the requirements as to residence in 2 Will. 4, c. 45, s. 27, had been fulfilled.

APPEAL from the decision of the revising barrister for the city and county and borough of Exeter.

The following case was stated:—

At a court held by me, the barrister appointed to revise the list of voters for the city and county and borough of the city of Exeter, Brutton John Ford duly objected to the name of James Beal being retained on the list of persons entitled to vote in the election of members for the borough of Exeter, in respect of a freehold house in Albion-place in the parish of Heavitree, on the ground that the said James Beal had not resided for six calendar months next, previous to the last day of July in the present year, within the said borough, or within seven miles thereof, pursuant to 2 Will. 4, c. 45, s. 27.

The following facts were duly proved before me:

1. The qualification of the said James Beal was duly proved, and admitted in all other respects.
2. On 31st July 1876, the appellant resided in a house (which he occupied as tenant), situate in Queen's-road, in the parish of St. Thomas the Apostle, within the said borough, where he continued to reside until the 29th day of March in the present year 1877.
3. On the said 29th day of March, the appellant's term having expired, he gave up possession of his residence in Queen's-road, and he, his wife, and child of necessity went to his wife's mother's house, she being a widow, (at her invitation), with the intention of remaining there (if he was so permitted) until such time as he could obtain a suitable dwelling-house within the said borough.
4. The mother-in-law of the appellant resides at No. 5, Mount Durham, within the said borough. The house so occupied by her is one of a number of houses called the "Free Cottages," which are given by the trustees of the same to inhabitants

of Exeter, to be occupied free of rent during the pleasure of the trustees.

The following are the printed rules of the Free Cottages:

Rules contained in the trust deed.

Except in a case of a married couple, no person shall reside with any inmate, except by permission of the trustees.

Every inmate, by whomsoever nominated, shall be subject to the rules and orders of the trustees, and shall be subject to dismissal by the trustees as hereinafter mentioned.

The trustees shall from time to time have full power and authority to remove and displace any person from the cottages who shall wilfully transgress such rules or orders, or be guilty of other misconduct.

Bye-laws and regulations (amongst others):

1. No inmate shall receive parochial relief without the special consent of the trustees, and every inmate shall be considered as occupying during the pleasure of the trustees.

2. Any inmate marrying shall within one week give notice thereof to the trustees, who will be at liberty to regard such marriage as a forfeiture of the cottage, and the like regulation shall apply to the withdrawal of the guaranteed allowance to any inmate or any material alteration in his or her circumstances.

5. From the said 29th of March to the 29th of May in the present year the appellant (with the exception of one night, the night of the 2nd of April 1877, when absent in London on business) continuously lived and slept in the house so occupied by his mother-in-law. The appellant's wife and child lived and slept in the said house of the appellant's mother-in-law every day and night throughout the whole period from the said 29th of March to the said 29th of May, during the whole of which time the appellant and his wife and child exclusively used and occupied one sleeping apartment in the said house, but lived during the day in certain other rooms in the said house, and occupied them in common with the appellant's mother-in-law, and during this period had no other residence or dwelling within the said borough or in any other place. The appellant's mother-in-law had not obtained any permission from the trustees, as required by rule 1, to have her son-in-law to reside with her.

6. The appellant did not pay his mother-in-law for such use and occupation, but lived there as her guest, without any interference on the part of the trustees, until the said 29th of May, when he went to reside in the house in which he is now residing, which house is also within the said borough.

7. The appellant is a clerk to a solicitor carrying on business in the said city of Exeter.

On behalf of the objector it was urged that, from the 29th of March to the 29th of May the voters had no residence within the said borough or seven miles thereof:

First, because the room which he used at his mother-in-law's house was used by him as her guest or visitor.

Secondly, because that the house in which he resided for this time being an almshouse, the occupier had no right by the rules of the Free Cottages to give him the separate and entire use and occupation of any room in the said house. The case of *Ford v. Pys* (L. Rep. 9 C. P. 269) was relied on.

On behalf of the voter it was urged,

That during the whole of the six months previously to the 31st July 1877, he actually resided within the said borough.

That the residence at the mother-in-law's was *bona fide*, and that he went there with the inten-

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tion of remaining there until he could find another suitable dwelling, and did remain there until that object was accomplished.

That he had had the separate and entire use and occupation of a sleeping apartment in the house of his mother-in-law without interruption on the part of the trustees during the time he resided there.

That he was a tenant at will of the said room of his mother-in-law.

That in the case of a freehold qualification all that was required was that the voter should actually and bodily reside within the borough or seven miles thereof.

That the words of the statute "shall have resided" should be read as "shall have lived" or "have had" a "residence" or "dwelling."

That the case of *Ford v. Pye* did not apply.

I decided that the residence required by the Act is that of a *bond fide* inhabitant having a *domus* of his own within the distance therein set out.

That the said James Beal between the 29th March and 29th May, 1877, was a trespasser *ab initio*, or, at most, a visitor in the house of his mother-in-law. That the six months' residence was thereby interrupted. I therefore expunged his name from the said list.

The question for the opinion of the court is whether, consistently with the above facts stated, I could legally find that the said James Beal had not resided for the six months next previous to the last day of July in the present year within the said borough.

If the court should be of opinion on the question in the affirmative the list is to remain unaltered. If the court should be of opinion in the negative the name of the said James Beal is to be inserted in the list of voters, and the register of voters amended accordingly.

Sect. 27 of 2 Will. 4, c. 45, provides that no person shall be registered in any year as an elector for a city or borough "unless he shall have resided for six calendar months next previous to the last day of July in such year within the city or borough, or within the place sharing in the election for the city or borough, in respect of which city, borough, or place respectively he shall be entitled to vote, or within seven statute miles thereof, or of any part thereof."

A. Charles, Q.C. and *Bucknill* for the appellant.—The decision of the barrister was erroneous. The case turns upon the meaning of the word "reside" in 2 Will. 4, c. 45, sect. 31. Until that statute there was no enactment as to the necessity that a voter should reside within the borough. He might have resided anywhere, and merely have come up to vote. The statute, however, has avoided giving any definition of the term "residence," and does not limit it, as sect. 29 does the term "occupation," to that of an owner or tenant. A voter may reside, or rather sleep, anywhere he likes, provided only that it is within the prescribed limits. So far as the provision as to the franchise is concerned, he might sleep under a hedge. In *E. v. Sowton* (cited in Burn's Justice, tit. "Poor," "Settlement by Estate") it was said that a man is a stranger on the first day after his arrival in a place, a guest on the second, and an inhabitant on the third. At any rate, mere bodily presence within the statutory limits is sufficient to make him a resident for this purpose.

Bompas, Q.C. for the respondent.—First, the

term "reside" in this section is used of a man having a fixed local house of his own. There are good reasons why this should be the law as to boroughs and not as to counties. Secondly, even if residence is to be taken merely as equivalent to existence within the limits, then that existence must be continuous; and the mere fact that the voter's wife and family were left behind during the night of his absence does not prevent his residence in this sense from having been broken. On that night, at least, he was away without the legal right of returning to any home whatever. He cited on the first point

Whitehorse v. Thomas, 7 M. & G. 1;

Powell v. Guest, 11 L. T. Rep. N. S. 599; 34 L. J.,

C. P. 69;

Ford v. Pye, 29 L. T. Rep. N. S. 684; L. R. 9, C. P. 269.

DENMAN, J.—The decision of the court must be for the appellant. The revising barrister decided the case on the ground that the residence required is that of a *bond fide* inhabitant having a place of residence of his own; and the addition that he goes on afterwards to make, that he regarded the claimant as a trespasser *ab initio*, does not seem to me relevant. The statute gives a vote to all persons who have the property qualification, requiring only in addition that there shall be residence within certain limits during the last six months before they exercise it. The word residence has not necessarily the same meaning here that it has in other statutes referring to different kinds of franchise. Great expense was formerly incurred by bringing in voters to take part in elections, so as to throw a heavy burden upon the candidates, and to disappoint those who had more direct knowledge of the place, and a greater interest in it. But I do not think that in imposing that limit of residence it was intended to make the restriction so strict as that contended for by Mr. Bompas. All that was necessary was, that the person who exercised the vote should not have ceased to know the place, and to be interested in it, so as to be still in the fair construction of law a resident. Then it is said that the tenure of the voter in this particular case was precarious, and that he might have been turned out at any time if certain parties had chosen. That does not appear to me to affect the question. It is said also by Mr. Bompas, that if the person who resides in this sense is away for a single day, he must be held to have broken his residence. I think that is a fallacy. Looking at the substance of the thing, I do not think that his absence for a single night in London on business broke his residence in such a manner as to take away from him his franchise; and, further, looking at the subsequent addition made by the barrister to the case before us, I think that the distinction between the two kinds of residence which the statutes contemplate may not have been brought before the barrister's attention. The cases which have been cited are not, I think, applicable to this particular enactment, and need not be further considered.

LINDLEY, J.—I am of the same opinion. The whole question is as to the meaning of the word "reside" in 2 Will. 4, c. 45, s. 31. In this case the voter seems to have had a house of his own for a certain time, and after that he lived, in point of fact, with some of his family in another house within the prescribed limits. In every sense he

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seems to me to have had his residence within those limits. I am not prepared at present to follow Mr. Charles to the full extent of his argument, that any presence within those limits will do, and that a man may in fact be regarded as resident who has no residence at all, which is really what his contention comes to. But I think that here, according to the facts as stated in the case, the voter did in reality, during the six months, reside in the place, and that it was as much his home as any he ever had. The vote should, therefore, have been allowed.

Decision reversed.

Solicitor for the appellant, *Hamilton*, for *J. W. Friend*, Exeter.

Solicitor for the respondent, *J. E. Fox*, for *H. and B. J. Ford*, Exeter.

Nov. 21, 24, and 26.

(Before GROVE and LINDLEY, JJ.)

PHILLIPS v. HENSON. (a)

Lodger — Under-tenant — Distress for rent — Lodgers' Protection Act 1871 (34 & 35 Vict. c. 79).

A., the tenant of a house, let the greater portion of it unfurnished to B., her brother-in-law, under a written agreement. B. occupied part and sub-let part. A. paid the rent to the superior landlord, and the rates and taxes.

Held, that B. was a lodger within the meaning of the Lodgers' Protection Act.

The fact that a person is under-tenant of part of a house is not inconsistent with his being a lodger.

This was an action for wrongfully seizing a lodger's furniture.

The evidence given at the trial was to the effect that a Mrs. Ffolkes, sister-in-law of the plaintiff, was lessee of No. 3, Park-lane, Regent's Park, at a rent of 170l. per annum, the defendant being her landlord. The plaintiff, under an agreement dated 18th Dec. 1875, took the greater part of the rooms in the house from Mrs. Ffolkes, leaving her in occupation of the rest. She was to pay the rent of the house to the landlord, and the rates and taxes. The rooms taken by the plaintiff were unfurnished, and he put a considerable amount of furniture therein. Two of the rooms were under-let by him. The defendant, failing to obtain payment of his rent from Mrs. Ffolkes, sent broker's men, who seized all the furniture in the house, including the plaintiff's. In consequence, the plaintiff brought this action, and obtained 300l. damages. The above-mentioned agreement of Dec. 18, 1875, between the plaintiff and Mrs. Ffolkes, was as follows:

The said Jane Ffolkes doth agree to let unto the said George Phillips, and the said George Phillips doth agree to take from the twenty-fifth day of December instant, for a quarter, and unless either of the said parties shall give to the other three months' notice to quit previous to the end of the said term, but not otherwise, from thence afterwards for another quarter year and so on from quarter to quarter, while and until one of the said parties shall give to the other three months' notice to quit. All that kitchen, dining-rooms, drawing-rooms, second floor, three rooms on third floor, together with the appurtenances, at and under the quarterly rent or sum of twenty-seven pounds ten shillings, the same to be paid on the day of the expiration of each quarter of a year during the term or terms aforesaid, and the first payment to commence on the 25th day of March 1876 next, which said quarterly rent or sum of twenty-seven pounds ten shillings, the said George Phillips

doth agree to pay accordingly free and clear of and from all deductions whatever. And the said Jane Ffolkes doth also agree to pay all taxes and assessments for the said premises and keep the same in good and sufficient repair during the term or terms aforesaid, damage by fire or other inevitable accident only excepted.

As witness the hands of the said parties.

GEORGE PHILLIPS,
JANE FFOLKES.

MARIA PHILLIPS.

At the trial it was contended for the defendant that the above agreement was a collusive one between the plaintiff and Ffolkes, that the plaintiff never intended to pay rent to Ffolkes, but conspired with her to defraud the landlord.

A rule had been obtained for a new trial on the ground that Manisty, J., before whom the action was tried, misdirected the jury in telling them that the plaintiff was a lodger within the meaning of the Lodgers' Protection Act, and on other grounds.

Kemp, Q.C. and *Gibbons* now showed cause.—Mrs. Ffolkes remained in occupation of the house, paying the rent to the landlord, when it was paid by anyone, and the rates and taxes. When the broker's men came to seize the furniture, Mrs. Ffolkes locked them out, and they had to break in. There is nothing inconsistent in the agreement with the plaintiff being a lodger, and the facts show that he was so.

Murphy, Q.C. and *Shaw* in support of the rule.—The Act is confined to lodgers, because they have no stake in the house, a mere licence to occupy. But this agreement gives the plaintiff something more than that. A lodger cannot bring trespass *quare clausum fregit* (Com. Dig.); but a person occupying under this agreement could bring such an action. He is an under-tenant, not a lodger. [LINDLEY, J.—The question is whether he may not be both.]

The following cases were cited in the course of the argument:

Monks v. Dykes, 4 M. & W. 567;

Allen v. Liverpool, L. Rep. 9 Q. B. 180, 181;

Roads v. Overseers of Trumpington, L. Rep. 6 Q. B. 56, 62;

Barnes v. Peters, L. Rep. 4 C. P. 539;

Smith v. Overseers of St. Michael's, Cambridge, 3 E. & E. 390; 30 L. J. 77, M. C.;

Toms v. Luckitt, 5 C. B. 23, 28;

Smith v. Lancaster, L. Rep. 5 C. P. 246.

Nov. 26.—GROVE, J.—I am of opinion that this rule must be discharged. The chief question that we have to decide is, whether certain furniture upon which a landlord distrained for rent in arrear was the furniture of a lodger within the meaning of the Lodgers' Protection Act. The facts are, that a Mrs. Ffolkes, being tenant of a house, let a large part of it unfurnished to the plaintiff, who was her brother-in-law, by a written agreement, and that, her rent being subsequently in arrear, the landlord distrained upon furniture in the house which belonged to the plaintiff. The written agreement is as follows [reads it]. It was contended that this agreement created an under-tenancy, and was not applicable to an occupation as a lodger. We are of opinion that it is unnecessary to decide whether this agreement did or did not create an under-tenancy; as it appears to us that the fact of the plaintiff being an under-tenant would not be inconsistent with his being also a lodger. The question is not whether the agreement may create a tenancy, but whether it prevents the plaintiff being considered a lodger. The Act itself gives no assistance to a definition of what constitutes a

(a) Reported by A. H. BITTLETON, Esq., Barrister-at-Law.

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lodger. The mere fact that a person occupies the greater part of the house certainly does not negative the idea of his being a lodger. The cases cited seem to show that the real test is whether the landlord continues to occupy any part of the house, retaining his character of master of it. We had before us, a day or two ago, the question whether a particular house was a common lodging-house within the meaning of the Public Health Act. That statute may require a very different definition of the term "lodging-house," because its object is different, viz., to prevent dirt and disease. Here the object is to protect the goods of persons, between whom and the landlord there is no direct privity, and who do not owe any rent, from being seized. It is unnecessary to say anything as to the argument that the effect of this agreement would be to give a right to bring an action of trespass against the landlord, which it is said a lodger could not bring, further than that we think that it contains nothing inconsistent with the plaintiff's being a lodger. As to the other point, that the question whether the agreement was a collusive one was not left to the jury, we are of opinion that it was in substance left to them. We think, however, that the damages were excessive; and the rule for a new trial will only be discharged upon the plaintiff's agreeing to reduce the damages to 150l.

LINDLEY, J.—I agree with my brother Grove that this rule should be discharged. With respect to the question, whether the plaintiff was a lodger within the meaning of the Lodgers' Protection Act, considerable difficulty exists in determining who is a lodger within that Act. The Act throughout uses no other description of the persons coming within its scope than the word "lodgers." Although there is perhaps in this case a strong temptation to adopt a narrow construction of the Act, we ought to resist that and give the full benefit that we think the Act intended. I am not prepared to say that an under-tenant may not be a lodger. It seems to me that to say so would be to narrow the scope of the Act. Of course an under-tenant need not necessarily be a lodger. He might be in exclusive occupation of the tenement, and then he certainly would not be. But the mere fact that a person is an under-tenant is not conclusive against his being a lodger. I have no doubt that the agreement between the plaintiff and Mrs. Ffolkes did create an under-tenancy, but that is not the question we have to decide. I think, whether we look at this agreement or at the facts of the case, there is nothing inconsistent with the plaintiff's being a lodger.

Rule discharged, the plaintiff agreeing to reduce the damages to 150l.

Solicitor for the plaintiff, G. H. Finch.

Solicitor for the defendant, J. C. Tompkins.

Friday, Nov. 23.

(Before GROVE and LINDLEY, JJ.)

LANGDON (app.) v. BROADBENT (resp.) (a)

"Common lodging-house"—Unregistered—Public Health Act 1875.

A lodging-house, where hawkers and persons of a similar class were received, staying for various

periods, having their meals in one room, and paying sixpence a night, held to be a common lodging-house within the meaning of the Public Health Act 1875, and therefore to require registration.

SPECIAL CASE.

1. At a Petty Session, holden at Cumbleton, in and for the division of Branton, in the county of Devon, on the 5th Feb. 1877, an information preferred by William Edgar Langdon, as clerk to the local board of health of the district of Ilfracombe, in the said county, such local board being the urban sanitary authority of the said district (hereinafter called the appellant), against the said Benjamin Broadbent (hereinafter called the respondent), under sect. 86 of the Public Health Act 1875, for that he, the said Benjamin Broadbent, lodging-house keeper of Ilfracombe aforesaid, on the 22nd Jan. instant, at the parish of Ilfracombe, in the said county, then and there being a keeper of a common lodging-house within the true intent and meaning of the Public Health Act 1875, and within the said district of Ilfracombe, unlawfully did receive into such house, as lodgers, one George Jones and others, such house not being duly registered as required by the said Act, contrary to the form of the statute in such case made and provided, was heard and determined by us, the said justices, the said parties respectfully being present or represented, and upon such hearing we ordered that the said information should be, and the same was by such order, then and there dismissed.

2. And whereas the appellant being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law, pursuant to sect. 2 of the statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and the grounds of such our determination as aforesaid for the opinion of this court, and he duly entered into a recognisance as required by the said statute in that behalf.

3. Now, therefore, we the said justices, in compliance with the said application and the provisions of the said statute 20 & 21 Vict. c. 43, do hereby state and sign the following case:—

4. Upon the hearing of the information the following evidence was adduced before us on behalf of the appellant, that is to say:

Henry Lang, sworn, said:

I am clerk to Mr. Langdon, who is clerk of the Ilfracombe Local Board of Health. That board has by resolution directed the present proceedings to be instituted. I have referred to the register of common lodging-houses, and find that the defendant is not registered as the keeper of such house.

John Shepherd, sworn, said:

I am a police constable, stationed at Ilfracombe. The defendant lives in High-street, Ilfracombe, where he has a shop and keeps a lodging-house. He has done so during the time he has lodged on those premises, which is about six months. Before that he carried on similar business on premises at the bottom of Church-hill. He has received hawkers, bone gatherers, and men whom we have suspected of begging; and one or two have been convicted. Persons of that class have come to me for lodging, and I have recommended them to defendant's house, for there was no other place to recommend them to. I have seen these people in the back kitchen. On the 22nd Jan. last, a chair mender, named Jonea, was lodging there, and had been there a fortnight or three weeks. There are two sawyers there now, and one of them, as I believe, a relation of Mrs. Broadbent. There is a young man, a

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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mason, there, and a man named Essery, who hawks fish and lounges about the streets. He has been there some considerable time. A man with his wife and child, an itinerant maker and hawker of picture frames, lodged there some time. A drover came to me on the 22nd Jan. last. He asked me where he could get lodgings, and I sent him to defendant's house, and he stayed there that night.

On cross-examination by the solicitor for the respondent, the witness said:

There are no registered lodging-houses in Ilfracombe, and that is an accommodation which is wanted. Defendant kept a similar house before, but I don't know whether it was registered or not. I don't know whether he has a refreshment licence for this house, but I have heard him say he has. It is a more modern house and different to the one he formerly occupied. Mrs. Broadbent told me one day last week that the landlord of the house would not allow it to be kept as a common lodging-house. I have known musicians, the Japanese, or what they call themselves, stopping there for a night.

Henry Lang called by Sir Bruce Chichester, Bart. (one of the justices), said:

There is no registered lodging-house in Ilfracombe at present. The house defendant formerly occupied was registered.

John Shepherd, re-examined by the solicitor for the appellant, said:

As far as I can judge defendant carries on a precisely similar business to what he did at the old house, receiving lodgers for a short time. I have over and over again sent lodgers there, and Mrs. Broadbent has sent them to the police station to ask if she should take them in. I have said she could, but she was not compelled to do so. I cannot see that there is any difference in the defendant's business now to what it was in the old house.

George Potter, sworn, said:

I am a police constable stationed at Ilfracombe. I have heard the evidence given by the witness Shepherd, and can corroborate all he has said.

George Jones, sworn, said:

I am a chair mender, and resident at Exeter; for the present I am staying in Ilfracombe and lodging at defendant's house, paying sixpence a night. A picture-frame maker, with his wife and child stayed there for eight or nine days. I have lodged there about three weeks, and there are others who have been there about as long. I have worked in the back kitchen, and the picture-frame maker worked there also. His wife did not cook there, but in the other kitchen. We all had our meals in the kitchen at the same table. A fish hawker lodged there, and he has told me he has done so for two years. I only know one person who has lodged there for a single night.

5. The preceding evidence raised doubts in our minds whether we were in law entitled to hold that the respondent was the keeper of a common lodging-house within the true meaning of those words in the Public Health Act, 1875 and we thereupon ordered that the said information should be, and the same was by such order, then and there dismissed.

6. The question of law arising on the above statement for the opinion of this court, therefore, is, whether upon the evidence above stated we were entitled or bound to hold, as a matter of law, that the respondent was the keeper of a common lodging-house within the true meaning of those words in the Public Health Act 1875.

7. It was contended for the defendant that the question for us was one of fact, namely, whether, upon the evidence produced by the complainant, it was proved to our satisfaction that the defendant was the keeper of a common lodging-house within the meaning of the Public Health Act 1875, and that we rightly decided upon such evidence, and that, therefore, our decision was not erroneous in point of law.

8. If the court should be of opinion that our decision was wrong, the said order of dismissal is to be quashed, and the court is humbly solicited, according to the power vested in the court by the said statute (20 & 21 Vict. c. 43), to remit the case to us, the said justices, with the opinion of the court thereon, or to make such order as to the court may seem fit.

9. If the court shall be of opinion that our decision was right, the said order of dismissal is to stand.

Given under our hands this 15th day of June, in the year of our Lord 1877.

A. C. BASSETT,

A. ARTHUR NYE.

A. Charles, Q.C. and Murch for the appellant.

St. Aubyn for the respondent.

GROVE, J.—I am of opinion that this case must be sent back to the magistrates. If they had given any reasons for their decision I should have been inclined to say that the question here was one of fact upon which their finding would be conclusive. But they have left the question to us as a matter of law whether, assuming the evidence set out in the case to be true, they were bound to hold that the house in question was a common lodging-house within the meaning of the Public Health Act 1875. I am of opinion that there is ample evidence that it was. It appears to have received all comers, the itinerant character of the greater number of the lodgers making it probable that they did not as a rule make any long stay at the house. The object of this provision in the Act being to promote health by preventing dirt and overcrowding, the evidence seems to me clearly to show that this is a house to which such a provision is applicable. Of course each case must be decided on its own facts. There may be lodging-houses resorted to by a higher class of persons to which the term "common lodging-house" would not be applicable. The case does not find whether these lodgers occupied separate sleeping apartments. But I do not think it is necessary to show that the lodgers are all herded together, in order to bring the case within the statute. Even if a common room is necessary to constitute a common lodging-house, the evidence here shows that they all took their meals together. I think, therefore, that the decision of the magistrates was wrong.

LINDLEY, J.—I am of the same opinion. It is very difficult to define what a common lodging-house is; but it is not very difficult to define it by a type. If one looks at sects. 86 to 89 of the Act, it is evident that the kind of house that is meant is one that is open to all comers, and therefore requires supervision in order to insure cleanliness. The upper classes in society are fastidious, and will not go to dirty houses; they, therefore, exercise the necessary supervision for themselves. That this house did require such supervision is shown, I think, by the evidence as to the class of persons who frequented it. I therefore hold that this was a common lodging-house within the meaning of the Act.

Decision of the magistrates reversed, without costs.

Solicitors for the appellant, *Church, Sons, and Clarke, for Thorne, Barnstaple.*

Solicitors for the respondent, *Kennedy, Hughes, and Kennedy, for B. J. Bencraft, Barnstaple.*

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BALLARD v. ROBINS.

[C.P. Div.]

Monday, Nov. 19.

(Before DENMAN and LINDLEY, JJ.)

BALLARD v. ROBINS. (a)

Parliament—County vote—List of Voters—Correction of mistake—6 Vict. c. 18, s. 40.

The name of the appellant, who claimed a vote for the county as an occupier of house and land, rated at 12l. and upwards, under the Representation of the People Act 1867, together with a correct statement of that qualification, appeared in the register of voters under the heading, "Voters in respect of property including occupiers at a rent of 50l. and upwards." Notice of objection to the retention of the voter's name was given, the objection being to the nature of the qualification and to the column in which such qualification appeared.

The appellant had not, in fact, such a qualification as to entitle him to remain upon the list where his name appeared, but possessed the qualification actually set out after his name. The appellant's name did not appear upon the alphabetical list of persons entitled to vote in respect of the occupation as owner or tenant of lands or tenements of the rateable value of 12l. or upwards, which had been made out by the overseers under 31 & 32 Vict. c. 58, s. 19, nor had he sent notice of claim to be placed thereon.

Held, that the revising barrister was empowered by 6 Vict. c. 18, s. 40, to correct the mistake by striking out the appellant's name and inserting it in the "separate list" under the heading where it should properly have appeared.

APPEAL from the decision of the revising barrister for the county of Southampton, who stated the following case:

In the register of voters for the parish of Lyndhurst, in the Totton polling district for the county of Southampton, under the heading "voters in respect of property, including occupiers at a rent of 50l. and upwards," the name of John Ballard, the appellant, appeared in its alphabetical order.

In the third column, under the heading "nature of qualification," was inserted "occupier of house and land rated at 12l. and upwards."

Notice of objection was given to the name of the appellant being retained on the list, the objection being to the third column and to the nature of his qualification.

There were twelve other persons whose names appeared in this list in a similar manner, and with a qualification similar to that of the appellant, and of these seven had been objected to.

It was admitted that the appellant had not, in fact, such a qualification as to entitle him to be upon this list; but he had the qualification set out in the third column.

There was an alphabetical list of persons entitled to vote "in respect of the occupation as owner or tenant of lands or tenements of the rateable value of 12l. or upwards." In this list the names of the appellant and the other twelve persons mentioned above did not appear, nor did he or they send notice of claim to be placed thereon before the 25th Aug., as provided by 31 & 32 Vict. c. 58, s. 17.

It was contended that the appellant, possessing a qualification which would entitle him to vote, it was a mistake his name appearing in the first-mentioned list instead of in the 12l. occupiers' list,

and that under 6 Vict. c. 18, s. 40, this might be corrected by the revising barrister by striking the name of the appellant out of the list in which it appeared, and inserting it in the 12l. occupiers' list.

I was of opinion that I had no power to do this, and I struck out the name of the appellant and the seven other persons objected to, and refused to insert them in the 12l. occupiers' list.

Notice of appeal was given, and this case is stated at the request of the appellant and the other persons whose names were struck out, the appeals in whose cases are consolidated herewith.

If my decision was wrong, the names of the appellant and the seven other persons named in the schedule hereto are to be inserted in the list of persons "entitled in respect of the occupation as owner or tenant of lands or tenements of the rateable value of 12l. or upwards."

The schedule above referred to—George Half-acre, George Harris, Stephen Harvey, Stephen Olden, Charles Pack, James White, and William Bolter Withiers.

Ridley (for the appellant).—This was a mistake which should have been corrected by the revising barrister. Sect. 40 of 6 Vict. c. 18 enacts that the barrister "shall correct any mistake which shall be proved to him to have been made in any list. . . . provided always that, whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be; nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." Here the qualification is correctly stated, and the only defect is that it appears with the name under the wrong heading. It will be contended by the respondent that the section only enables the revising barrister to amend the register of voters, and not to transfer from one list to another; but this is a misapprehension. The list directed by sect. 19 of the 31 & 32 Vict. c. 58 is in reality only a portion or subdivision of the whole list of voters, and that this is the meaning of the Act, is shown by the use of the words "list" and "lists" respectively in sects. 6, 7, 31, and 37. Until the Representation of the People Act 1867 (30 & 31 Vict. c. 102) there was only one list for the barrister to amend, and sect. 59 of that Act provides that it shall be read, together with 6 Vict. c. 18; and, lastly, if the barrister is not empowered to amend the "separate list" directed in sect. 19 of 31 & 32 Vict. c. 58, under section 40 of the earlier statute (6 Vict. c. 18), he has no power to touch it at all, since that is the only enactment giving him authority to correct mistakes.

Hooper (for the respondent).—This is not an application to correct a mistake in a list, but to transfer a name bodily from one list to another. An intending objector, looking for the appellant's name, would look under the proper heading, and, not finding it there, would be misled. He cited

Bennett v. Brumfitt, 19 L. T. Rep. N.S. 283; L. Rep. 4 C. P. 407;

Mather v. Overseers of Allandale, 23 L. T. Rep. N.S. 539; L. Rep. 6 C. P. 273.

DENMAN, J.—This objection turns mainly upon sect. 40 of the statute 6 Vict. c. 18, which enacts that the revising barrister shall correct any mistake which shall be proved to him to have been

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made in the list, with a proviso that no change shall be made in the description of the qualification. In the present case the name was on the register, and the list has been made out in such a way that it appears the voter is entitled to his vote by virtue of the 50*l.* qualification, the real fact being that he is not entitled by that, but by virtue of the 12*l.* qualification. The objection has been taken on the ground that his name has been put in the wrong place—in the list of those entitled under the 50*l.* qualification instead of that of the tenants or occupiers of lands or tenements rated at 12*l.* The question is whether that objection is fatal; whether the revising barrister must disallow the vote, because the subsequent statute, the 31 & 32 Vict. c. 58, provides that there shall be separate lists of the 50*l.* and the 12*l.* voters. It appears to me that this is a mere play upon words. There is nothing in the statute to that effect. It enacts that there shall be a separate list of the 12*l.* voters; but not a separate list in this sense, that it shall cease to be, or not be, a portion of the voters for the particular parish or district. I think it would be a statute, if that were its meaning, imposing a duty on the overseers, or enabling them to perform a function which might be most unjust in its operation, i.e., the power of disqualifying the voters by placing them in the wrong list. It is not necessary to construe sect. 40 of the Act (6 Vict. c. 18) in that manner. Its natural meaning is that the revising barrister shall correct any mistake in any list of voters, no matter of how many portions that list may consist. There is nothing in it to say that a man whose qualification is truly described in any part of the list shall be disfranchised, because the barrister is tied hand and foot, so as not to be able to transfer a name from one part of the list to another. As his decision was given simply upon that question, I think that the barrister took a limited view of his powers, and that the correction should have been made. The appeal must be allowed.

LINDLEY, J.—I am of the same opinion. The question turns on the true construction of the powers of correction which are given by sect. 40 of the statute 6 Vict. c. 18. I think that that section applies not to that separate list which is made under the later statute by itself, but to that separate list as part of the original list, and that the barrister cannot have exercised his power rightly. Here we have a list of persons entitled to vote by virtue of the 50*l.* qualification, and by virtue of the 12*l.* qualification. It is unquestionably the duty of the overseers to keep these lists separate, and to make them as accurate as they can. But the real object of giving the barrister power to amend at all is to give him power to correct mistakes of this sort, made by the overseers. Anyone looking at this list will find the name of this man and his qualification correctly stated, and can object to the vote if he chooses. That such an intending objector may have been misled is not a sufficient answer, and I think this amendment ought to have been made.

Decision reversed.

Solicitor for the appellant, J. E. Coxwell, for W. Coxwell, Lyminster.

Solicitors for the respondent, Bradley, Robins, and Son.

Friday, Nov. 30.

(Before GROVE and LINDLEY, JJ.)

SMITH v. WALTON. (a)

Truck Act (1 & 2 Will. 4, c. 37)—Payment of wages otherwise than in current coin—Artificer's wages.

On the hearing of an information under sect. 9 of the Truck Act (1 & 2 Will. 4, c. 37), the following facts were proved before the justices:

*The respondent was a cotton manufacturer, and the appellant a power-loom weaver in his employ. A complaint was made by the respondent's manager to the appellant of a defect in a piece of cloth woven by him, and he was cautioned; but at the end of the week received his full wages without abatement. In the following week a similar defect was discovered in another piece of cloth woven by the appellant; and the appellant was told by the respondent's book-keeper—first, that something would have to be deducted from his wages for the defective pieces of cloth, or that he would have to take the piece of cloth home; and, on a second occasion, that he would have to take one of the pieces of cloth home, and that there were no wages for him. The appellant ultimately took away one of the damaged pieces of cloth, the value of which in a perfect condition was 1*l.* 1*s.* 3*d.*, and left the respondent's employ at the end of the week following that in which the dispute had arisen. The full wages earned by him during that time were 2*l.* 1*s.* 3*d.*, of which amount 1*l.* 2*s.* 6*d.* was earned during the week in which the last damaged piece was delivered, and 18*s.* 8*d.* during the last week. On applying for his wages he received 1*l.* in cash and retained the damaged piece of cloth.*

Held (reversing the decision of the justices), that the facts above disclosed amounted to a payment of wages in goods, and that the Truck Act had been infringed.

APPEAL from the decision of two of the justices of the borough of Burnley, dismissing an information under the Truck Act (1 & 2 Will. 4, c. 37, s. 9). The following case was stated by the justices:

CASE.

1. At a petty sessions holden at the sessions-room in Burnley, in and for the said borough, on the thirteenth day of June, in the year of our Lord one thousand eight hundred and seventy-seven, an information preferred by Thomas Smith, hereinafter called the appellant, against James Walton, hereinafter called the respondent, under sect. 9 of the Act 1 & 2 Will. 4, c. 37, commonly called the Truck Act, charging for that he, the said James Walton, on the tenth day of March, one thousand eight hundred and seventy-seven, at the said borough, then being the employer of the said Thomas Smith, the complainant, an artificer employed in the manufacture of cotton, unlawfully did, by the agency of one John Walton, his servant, or book-keeper, pay to the said Thomas Smith, certain wages then due and payable in respect of such employment by the said James Walton to the said Thomas Smith, to wit, 18*s.* 8*d.*, otherwise than in the current coin of the realm, to wit, in a piece of cotton cloth, contrary to the provisions of the Act to prohibit the payment of wages in goods, was heard and determined by us, the said Thomas Smith being then present,

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and the said James Walton not appearing but being represented by his solicitor, and upon such hearing we dismissed the said information.

2. And whereas the appellant, being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law, hath pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to us in writing, to state and sign a case setting forth the facts and the grounds of such our determination as aforesaid, for the opinion of this court, and hath duly entered into a recognisance as required by the said statute in that behalf.

3. Now, therefore, we, the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case:

4. Upon the hearing of the information it was found and proved that the respondent was a cotton manufacturer in the borough of Burnley, and that the appellant of the age of nineteen years was a power-loom weaver in his employment.

5. That on Wednesday, Feb. 28 last, the appellant delivered in the warehouse of the respondent a piece of cotton cloth which the appellant had woven in the respondent's shed. That day was the day up to and including which the week's wages of the weavers were reckoned, and called the making-up day, and the piece of cloth was included in the making-up or calculating the wages of the appellant for that week. No complaint was made as to the weaving of the piece of cloth that day, as it was not examined by the respondent's manager until the following day, and it is not the practice of the respondent to examine the pieces of cloth delivered by the weavers at the time they are delivered by them in his warehouse.

6. On the following day, Thursday, the 1st of March, a complaint was made to the appellant by the respondent's son (Robert Walton) who manages the respondent's mills; he said to the appellant that it would not do to let such like pieces as that pass—it was not worth twopence; but that, as the appellant was a new weaver, he would not like to discharge him, and he must mind for the future. That was all that was said at that time. The ground of complaint of the respondent's son, Robert Walton, was, that the piece of cloth was damaged by the existence in it of what is known as a "float" at the side of the piece of cloth. A "float" is caused by the warp not being woven into the cloth, and the weft passing underneath the warp instead of being woven into the warp. The piece of cloth was produced in court. The "float" was caused by the negligence of the appellant. The "float" was seen by the respondent's manager on Thursday, the 1st of March, before the appellant got his wages. Friday, the 2nd of March, was the payday for that week, and on that day the appellant received his wages including the full wages for the weaving of the damaged piece. No abatement in appellant's wages was made in respect of that piece.

7. On Saturday, the 3rd of March last, the appellant delivered another piece of cloth in the warehouse that was woven in a different loom, and was of a different class of cloth. On the 5th of March last the respondent's book-keeper, John Walton, complained to the appellant that there was a "float" in the middle of the last-mentioned

piece of cloth, and that the appellant would have to have something deducted from his wages for that "float," and for the "float" in the first-mentioned piece of cloth also, or that he would have to take the piece of cloth home. The appellant said that he would leave, meaning that he would leave at once the respondent's service, and the book-keeper said that he would not have to do so. On the Tuesday following (the 6th of March last) the appellant again saw John Walton, respondent's book-keeper, and asked him what he was going to stop out of his wages for the piece, and he replied that he would have to take one of the pieces of cloth home. To this the appellant made no reply. On the 7th of March (the following day) the appellant gave one week's notice of his intention to leave the respondent's service. That was the day for making up the wages for that week, and up to that time the appellant had earned 18s. 8½d. as that week's wages. On Friday, March 9, the appellant went to the respondent's office for his wages, and saw John Walton, the book-keeper, and asked him for his wages, but did not receive them. John Walton said that the appellant "would have to take the piece home, and there were no wages for him." The appellant said if "there were no wages he would leave the piece;" that was the piece produced in court. On the following day, Saturday, March 10, in consequence of the recommendation of the Weavers' Union, the appellant went to the respondent's warehouse, and again saw John Walton, and asked for the piece, which he received and took away with him. The appellant did not receive anything that day in cash. The appellant left the respondent's employment on the 14th day of March last, in pursuance of the notice he had given; at that time the appellant would have earned as wages, if all his work had been properly done, 1l. 2s. 6½d. for the week then last past, and for the previous week 18s. 8½d.

8. The appellant retained the piece of damaged cloth, and on the 16th March he again went for his wages, and saw the respondent's manager, Robert Walton, and received from him 1l., the sum of 2s. 6½d. was retained out of his wages last earned, because there was not sufficient owing to the appellant for the previous week's wages to pay for the damaged piece of cloth which the appellant had taken. That would be 18s. 8½d. for the first week's wages, and 2s. 8½d. deducted from the last week's wages, making together the sum of 1l. 1s. 3d., the value of the piece of cloth. The appellant had on the 14th March ascertained from the respondent's book-keeper that the value of the damaged piece was 1l. 1s. 3d. After the commencement of the action in the County Court hereinafter referred to, Edward Nuttall, the out-looker of the respondent, went to the appellant's house and suggested to him that the respondent would pay him his wages if the appellant would return the piece of cloth; to which the appellant replied that the respondent should come to him himself. On the 16th March, when the appellant went again to the respondent for his wages, he did not ask the respondent to take the piece again.

9. The appellant commenced an action against the respondent in the County Court at Burnley for 1l. 1s. 3d., and on 3rd May last, when the case came on for hearing, the case was adjourned for the production of the piece of cloth, and to ascer-

tain what damage was done. The case was finally heard by the County Court judge on 7th June last, when it was agreed between the parties that the appellant should give up the piece of cloth to the respondent, and receive his wages less the amount of the actual damage done.

The justices were of opinion that the offence charged was not of the class of offences contemplated by the statute, and dismissed the information. The question upon which this case is stated for the opinion of the court is, whether that decision is right.

By sect. 3 of the Truck Act (1 & 2 Will. 4, c. 37) it is enacted that "the entire amount of the wages earned by or payable to any artificer, in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of the realm, and not otherwise; and that every payment made to any such artificer by his employer or in respect of any such wages, by the delivery to him of goods, or otherwise than in current coin, shall be and is thereby declared illegal, null, and void.

Sect. 23 of the same Act permits certain stoppages or deductions from the wages of an artificer for medical attendance, materials, tools, food, fuel, and similar purposes, provided that such stoppage or deduction shall not exceed the real and true value of the articles supplied, and that the agreement or contract for the deduction shall be in writing, and signed by the artificer.

Sect. 9 of the Act, under which the information was laid (*inter alia*), imposes upon any employer who shall make any payment by the Act declared illegal a penalty for the first offence not exceeding ten pounds nor less than five pounds, and sect. 10 provides that such penalty may be sued for before two justices having jurisdiction where the offence was committed, by a common informer.

Cave, Q.C. (R. S. Wright with him) for the appellant.—The Truck Act has been infringed. The whole wages for one week, and a portion of the wages for the next, were paid for in damaged cloth, which the workman had to take at the price fixed by the employer. It is immaterial that the appellant had an option to take cash, deducting only the amount of the damage done, if he had that option, which is not clear: (*Wilson v. Cookson*, 8 L. T. Rep. N.S. 53; 32 L. J. 177, M. C.) [*Grove, J.*—They deducted the value that the piece would have borne had it not been defective, and not its actual value as damaged. That may have been nothing to them.] It cannot be assumed that they gave it to him, and, as a matter of fact, the damage done was trifling. The County Court judge had jurisdiction to adjust and set off this damage under 38 & 39 Vict. c. 90, s. 3. He also cited *Archer v. James* (31 L. J. Q.B. 153).

The respondent did not appear.

Grove, J.—I regret that no one has appeared to argue this case on the other side, but have come to the conclusion that the decision must be reversed. I had some doubt at first with regard to the fact that the amount really deducted—as I use the word deducted—was the full value of the piece of cloth, assuming it not to have been damaged; and I thought it uncertain whether the real arrangement was not this, that the creditor—whether rightly or wrongly is immaterial—instead of deducting the actual value, and therefore paying him with the damaged piece of cloth,

had treated the damaged piece as worthless, and given him leave to take it away, stopping from his wages the full amount that it ought to have been worth. I should hesitate before saying that that would have come within the Truck Act, as it is to my mind clearly arguable whether that would be paying him in cloth. But, upon looking more minutely into it, it does appear to me that the real contract between the parties was that the value of the cloth should be deducted, and that the intention in giving the workman the cloth to take away with him was that a certain amount of wages should be satisfied with it. The case states that the respondent's book-keeper complained to the appellant that there was a "float" in the middle of the cloth, and that the appellant would have to have something deducted from his wages for that "float," and for the "float" in the first-mentioned piece of cloth. But then it goes on to add, "or that he would have to take the piece of cloth home." On the Tuesday following the appellant asked the respondent's book-keeper what he was going to stop out of his wages for the piece, and the reply was that he would have to take one of the pieces home, to which the appellant made no answer. First, then, the question is asked, what has to be deducted? next he is told that he will have to take one piece home; lastly, he does take it, and his wages are adjusted on the footing that that was a payment for his wages. Now, if that piece of cloth had been assessed at its actual value as a damaged piece, I should have had no doubt. It is taken at a value exceeding its actual value, but still they have deducted from his wages a certain amount, treating the receipt of the damaged cloth as part payment. They say, in effect, "You may take the damaged piece home, and then you shall set it off against the damage done at our valuation." That is, I think, against the spirit and letter of the Act; and, though the man could have repudiated the arrangement, and refused to take the damaged piece home, yet it is offered and taken as a thing to be deducted from his wages. It was not taken, it is true, in a way which one can approve of; but, even though this may have been something in the nature of a trick, and we may think it rather a shabby thing, yet, having regard to the terms of the Act itself, and to the specified exceptions in which a set-off is permissible, which show that a set-off cannot be allowed upon any other terms, we must come to the conclusion that the transaction was within the prohibition of the statute. The decision must be reversed.

LINDLEY, J.—I am of the same opinion. In order to understand the substance of the transaction, we must look to the state of facts at the end of the second week, when the workman had earned altogether 2*l.* 1*s.* 3*d.*, and the appellant paid him in cash 1*l.*, and nothing more. The arrangement was not, however, that they were to give him so much, and leave him to sue for the rest, but they had also given him a piece of goods which he had spoilt, and which they valued at 1*l.* 1*s.* 3*d.* In substance, then, they did pay him his wages in goods to the extent of 1*l.* 1*s.* 3*d.*, and in cash only to the extent of 1*l.* That is certainly within the prohibition of the Truck Act. Or looking at it in another way, they assumed, with regard to the sum of 2*s.* 6*d.*, which they deducted from his wages for the second week, to exercise a right of set-off, which by the provisions

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of the Truck Act they had not a right to do. In either light they must be regarded as having transgressed the Act, and the decision must therefore be reversed. *Decision reversed.*

Solicitor for the appellant, *O. H. Edwards*, for *T. J. and H. Backhouse*, Burnley.

EXCHEQUER DIVISION.

June 11 and 18.

THE ATTORNEY GENERAL v. LAMPLOUGH, (a)

Duty on medicines—Mineral waters—Beverage recommended for medicinal properties—Effect of repeal of a part of a statute—52 Geo. 3, c. 150—3 & 4 Will. 4, c. 97, s. 20.

By 52 Geo. 3, c. 150, any persons vending any of the preparations set out in the schedule of the Act, without stamped wrappers as prescribed by the Act, were made liable to a penalty. The schedule contained a list of preparations with a general clause at the end, one item in the list being as follows: "Waters, *videlicet*, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters." The general words at the end of the schedule were, "And also all other powders . . . waters . . . to be used or applied externally or internally as medicines, for the prevention, cure, &c., of any disorder . . . or which shall be recommended to the public by the makers . . . as beneficial to the prevention, cure, or relief of any disorder . . ."

By 3 & 4 Will. 4, c. 97, s. 20, so much of the schedule of 52 Geo. 3, c. 150, as was contained under the head "waters" was repealed.

Lamplough's Pyretic Saline was composed of carbonate of soda, tartaric acid, and a small quantity of chlorate of potash. It was sold by the defendant in the form of a powder without a stamp, and, when mixed with water, was drunk as a mineral water as a beverage, though it was also recommended and advertised by him as a valuable medicine, the medicinal property being afforded solely by the chlorate of potash.

Upon an information for a penalty against the defendant under 52 Geo. 3 c. 150,

Held, by Cleasby and Huddleston, BB. (Kelly, C.B., dissentient): First: That before the passing of 3 & 4 Will. 4, c. 97, the preparation was taxable under the general clause of the schedule, and not under the item "waters," and that, therefore, independently of all question as to the effect of the repealing statute, the preparation still fell within that clause. Secondly, assuming that it was originally taxable under the item "waters," and not under the general clause, its taxability was not taken away by the repeal of that item; but that after that repeal, 52 Geo. 3, c. 150, must be read as though the item "waters" had never existed, in which case the preparation would clearly be taxable under the general clause as a water recommended as a medicine.

INFORMATION for a penalty under 52 Geo. 3, c. 150, for the sale by the defendant of a preparation entitled "Lamplough's Pyretic Saline" without a stamp or payment of duty as required by the Act.

At the trial before Cleasby, B. and a special jury the following facts were proved or admitted.

Pyretic Saline was composed of the following ingredients: Tartaric acid 45·7, Bicarbonate of soda 52·4, and chlorate of potash 1·9. It was sold as a powder, and with water drunk as a beverage; but it was also recommended on the wrappers and by advertisement as being beneficial as a medicine and curative for fevers and other disorders, and it was admitted that it was, in fact, a very valuable medicine. The chlorate of potash was admittedly not a mineral alkali; and had no part in the effervescing properties of the mixture which was afforded by the other two ingredients forming together carbonic acid gas, but the medicinal quality of the saline was given by the chlorate of potash, which is used as a medicine for fevers.

Upon these facts the verdict was entered for the Crown, with leave to the defendant to move to enter it for him on the ground that on the above facts he was not liable to a penalty under 52 Geo. 3, c. 150, when read in conjunction with 3 & 4 Will. 4, c. 97, s. 20. (a)

The Solicitor-General (Sir H. Giffard) and Dicey for the Crown. — The pyretic saline is not a mineral water at all, within the meaning of the words "waters, *videlicet*," &c. It is recommended as a medicine, and besides carbonic acid gas contains chlorate of potash. The preparations under the head "waters" were intended only to mean beverages. This is clearly shown by sect. 4,

(a) By 52 Geo. 3, c. 150, s. 2, any person, whether licensed or not, vending medicine set forth in the schedule annexed to the Act without paper covers provided by the commissioners of stamps were made liable to a penalty of 10*l*.

Sect. 4 excepted victuallers, confectioners, pastry-cooks, fruiterers, and other shopkeepers, selling artificial or other waters mentioned in the schedule and drunk on their premises, from taking out a licence for the sale, provided such waters were sold with covers, wrappers, or labels duly stamped.

The schedule referred to set out a number of quack medicines, cosmetics, pills, and other articles, one item being as follows: "Waters, *videlicet*, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters," and at the end, or "tail of the schedule" as the court, for convenience, termed it, followed these general words: And also all other pills, powders . . . tinctures, potions, cordials, &c., medicated herbs and waters, chemical and official preparations, whatsoever, to be used or applied externally or internally as medicines or medicaments for the prevention, cure, or relief of any disorder or complaints incident to or in any wise affecting the human body, made, prepared, uttered, vended, or exposed to sale, by any person or persons whatsoever, wherein the person making, preparing, uttering, vending, or exposing for sale the same hath, or claims to have, any occult secret, or art for the making or preparing the same, or which have at any time heretofore been, now are, or shall hereafter be prepared, uttered, vended, or exposed to sale, under the authorities of any letters patent under the great seal, or which have at any time heretofore been, now are, or shall hereafter be by any public notice or advertisements, or by any written or printed papers or handbills, or by any label or words written or printed, affixed to or delivered with any packet, box, bottle, phial, or other inclosure containing the same, held out or recommended to the public by the makers, vendors, proprietors thereof as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure, or relief of any distemper, malady, ailment, disorder, or complaint incident to or in anywise affecting the human body.

By 3 & 4 Will. 4, c. 97, s. 20, so much of the schedule of 52 Geo. 3, c. 150, as is contained under the head of "waters," was repealed.

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which exempts dealers in such waters from taking out a licence where they are drunk on the premises. That being so, it never was taxable under the item "waters," but was, and is taxable, under the general words at the tail of the schedule as a water recommended as a medicine. But assuming that it might have been taxable under the item "waters," it is also taxable under the general words of the tail; and is so now, for the Act must be read as though that item never existed, and looking at the Act as it now stands, it clearly falls within the general clause. The court cannot go outside the Act to seek for its interpretation, but must read the Act as it now stands in the revised statutes, where this item "waters" does not appear.

Herschell, Q.C. and Cooper for the defendant.—The whole of the schedule to the Act of 52 Geo. 3, c. 150, is applicable to medicines. This is clear when the previous Act of 44 Geo. 3, c. 98, is looked at. The schedule only taxes certain beverages because they are used as medicine. "Waters, &c." therefore applies to medicinal waters. The repealing statute of 3 & 4 Will. 4, c. 97, s. 20, is therefore co-extensive with the enacting Act, and the court must look at the state of the part repealed statute to understand what the repealing statute is meant to repeal. The pyretic saline would clearly have fallen within the item "waters" as an artificial mineral water impregnated with carbonic acid gas. It is said it is not so, because it contains other ingredients, but that cannot affect the express words of the statute. If that contention were right, a man by putting another ingredient into his preparation might escape taxation altogether. The pyretic saline clearly fell within that class, and not within the general words. That item is repealed, and the tax is therefore taken off it.

The Solicitor-General in reply.

Our. adv. vult.

HUDDESTON, B.—This case was tried before *Cleasby, B.*, when, upon the facts proved, the verdict was entered for the Crown. Mr. *Herschell* then moved to set aside the verdict pursuant to leave reserved, and to enter it for the defendant, and the question was whether, with reference to the statute of 52 Geo. 3, c. 150, and 3 & 4 Will. 4, c. 97, s. 20, the pyretic saline was liable to duty. The statute of 52 Geo. 3, c. 150, imposed, in sect. 1, certain duties on articles mentioned in the schedule, and there is in that schedule a list of articles alphabetically arranged, with a general clause at the end. In this alphabetical list was found the following items: "Waters, *videlicet*—all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compoundng or making any of the said waters." And at the end of the schedule came the general clause: "And also all other pills, powders, lozenges . . . and waters . . . to be used or applied externally or internally as medicines or medicaments for the prevention, cure, or relief of any disorder or complaint . . . wherein the person making, preparing, &c., the same have or claims to have, any exclusive right or title to the making the same . . . or which have heretofore been or now are or shall be by any public notice or advertisement, or by any label affixed to . . . any parcel, box, &c., containing the

same, held out or recommended by the makers as nostrums or specifics, or as beneficial to the prevention, cure, or relief of any disorder, complaint, &c." The schedule, therefore, includes a quantity of nostrums, pills, and other things, by name, and all other pills, &c., within the general words at the end. That was the state of things up to the year 1833. It may, however, be mentioned that by sect. 4 of that Act retail vendors were enabled to sell articles therein mentioned, if they were sold on the premises without this duty. Now in 1833 the Act of 3 & 4 Will. 4, c. 97, was passed, sect. 20 of which repealed those words under the heading "waters." The effect of that is to cut out, as it were, of the schedule of 52 Geo. 3, those words, "Waters—*videlicet*, &c." The argument of Mr. *Herschell* was that *Lamplough's Pyretic Saline* was only taxable under those words, and that when those words were repealed the effect would be that the taxability of the pyretic saline would be taken away, and that for the future pyretic saline might be sold without paying duty, or without any stamp on the bottles; and he urged that if the pyretic saline were within those words during the existence of the Act of Geo. 3, it could not be within the general words at the tail of the schedule, and that when those words are cut out from the Act the pyretic saline cannot afterwards be made taxable under the general words. We have, then, to consider the effect of the repealing statute, and I am of opinion that the effect of that is that these words in the schedule to the Act of 52 Geo. 3, are, as it were, taken out of the schedule, and that after 1833 the statute must be read in every respect as if those words were not in it. If that be so, then it is clear that the *Pyretic Saline* would come within the words as they now stand in the tail of the schedule. Am I right in supposing that that is the effect of repealing a statute? Mr. *Herschell* said that, supposing a statute was passed to the effect that one item, for instance, "*Arquebus Waters*," was repealed, that item could not come within the general words. My answer is, if that was the intention of the legislature, they would say so in express words. My opinion as to the effect of repealing a statute is not without authority. See the cases of *Kay v. Goodwin* (6 Bing. 576), *Surtess v. Ellison* (9 B. & C. 752). If, therefore, I look at the present revised statute, I take it these words are clearly out of the statute, and it is obvious that the *Pyretic Saline* comes within the tail of the schedule. But that is assuming, which I have been doing for the purpose of argument, that the *Pyretic Saline* might not have been included in the words "waters, *videlicet*." I think that it really would not come within those words at all, but within the general words at the tail of the schedule, in which case, of course, without any reference to the repealing statute, it would clearly be taxable. I think that "waters" include things such as soda water, Malvern water, Apollinaris water, and those general waters which are popularly used as beverages. It never was intended to mean medicines. On both grounds, therefore, I think that our judgment should be for the Crown.

CLEASBY, B.—I am of the same opinion as my brother *Huddleston*. Taking the Act as it now stands, the part repealed being struck out, and, construing the words in the ordinary way, there

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is no doubt that duty would be chargeable. There is a schedule in the Act enumerating several articles with general words at the tail. The whole argument of the defendant is that we must not take the Act as it now stands, because we must recollect that the statute was formerly different to what it is now. The argument of the Crown is that you must take the Act as it stands, in which case the enumeration in the body of the schedule has nothing to do with pyretic saline, but the tail as it now stands clearly comprehends it as a chemical preparation to be taken internally, and recommended as a medicine for the cure of disease. The defendant's answer to this is that the effect of dealing with the statute in that way would be such that if a specific item, say, asthmatic drops, were repealed, the duty would still be revived by the general words "drops" in the tail. This reasoning is erroneous. It assumes the Legislature to deal with a specific item in this way by repealing it singly; but that ought not to be assumed without more. The particular item "waters" in the body of the schedule, and in the general words or tail are different things. The item "waters" had been dealt with exceptionally in sect. 4, where it was enacted that as regards waters mentioned in the schedule it should not be necessary for any victualler, confectioner, pastry cook, fruiterer, or other shopkeeper who shall only sell any of the artificial or other waters mentioned in the schedule to be drunk in his or her house or shop to take out a licence for that purpose; they were only bound to sell stamped bottles. It is clear that these waters would be beverages. In dealing afterwards with "waters" which only require to be impregnated with soda or mineral alkali, or with carbonic acid gas, and which would be such as could be sold by victuallers, the language of absolute repeal would be appropriate, because the word "other" would still appear to retain the same meaning, and would include curative waters recommended as such as distinguished from waters merely impregnated with soda or mineral alkali, or with carbonic acid gas, and made taxable merely because they are so. The item "waters" in the schedule may be read as an enactment that all waters shall be taxable if impregnated with mineral alkali or carbonic acid gas, and afterwards the enactment is repealed, and "waters" are not taxable if or because so impregnated. This mode of reading it removes all difficulty. The whole argument depends on the Legislature having made use of the word "repeal." That the effect of repeal by the Legislature is to blot out what is repealed as if it never existed, as regards transactions subsequent to the Act, is shown in the strongest manner by *Tindal, C.J.* and *Tenterden, C.J.*, and I only refer to authority in order to show that, *Tindal, C.J.* in *Kny v. Goodwin* (6 Bing. 582) said, "I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law," and in *Surtess v. Ellison* (9 B. & C. 752), *Tenterden, C.J.* said, "It has been long established that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the

general rule, and we must not destroy that by indulging in conjectures as to the intention of the Legislature." In the present case it appears to me that this meaning was intended to be given to the repeal, to obliterate it from the Act as if it had never passed, and it is not a sufficient reason that we should do otherwise, because in a different case which might be put it might be reasonable to depart from the usual rule. There is this apparent difficulty in our reading it in this way, that this reading gives a different meaning to the word "other" from what it had before. There are two answers to this. First, I am by no means satisfied that a different meaning is given, and I am sure that the Legislature have said that a different meaning is to be given to that word by the obliteration of the item "water." I am therefore of opinion that our judgment should be for the Crown.

KELLY, C.B.—I have the misfortune to differ from my learned brothers in this case; were it not for that I should say without any kind of doubt that the preparation called Lamplough's Pyretic Saline is not subject to duty under the Act of Parliament which we are discussing. In my opinion the fallacy in the argument of the Crown consists in confounding two things essentially different, viz., confounding an Act of Parliament with a particular clause in an Act, and in confounding one kind of preparation with a class of preparations. If we keep this distinction well in mind, there is no difficulty in this case. The state of the law in 1833 was this. By 52 Geo. 3, c. 150, a large number of articles, in all about 600, of one kind or another, some undoubtedly medicines, and others other than medicines, such as cosmetics, were made liable to duty. These 600 preparations were by the schedule to that Act expressly and specifically made liable to duty, and then follows the tail or general words of the schedule by which a quantity of other articles not enumerated in the foregoing list of the 600 preparations are also made subject to the same duty. In other words two classes of articles or preparations are made taxable; the one expressly enumerated in an alphabetical list, the other coming under the general words or tail of the schedule. Among the specified articles is this: "waters, *videlicet*—all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters." The first question here then, and one which pervades the whole case, is this—What is the effect of these two clauses, the alphabetical list and the tail, taken together? I cannot, in the first place, entertain a doubt that the articles made taxable by the tail are different from the 600 articles specifically enumerated. Some meaning must be given to the word "other" in the tail, and the only meaning that can be given to it is that the articles in the tail are "other" than those already enumerated. It is clear to me when you look at the two clauses together that this is the meaning to be given to the tail or general words of the schedule. That being so, the question arises as to whether the pyretic saline is taxable under the item "waters" or under the tail. It is said that it never came within the item "waters" at all. But it is impregnated with carbonic acid gas. How, then, in the name of common sense

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can it be said that it is not taxable under the head "waters?" for the words of the schedule are, "waters, *videlicet*, waters impregnated with soda, or with carbolic acid gas." It is said that the pyretic saline is taken out of that description, because one of its ingredients is chlorate of potash. But what has that to do with it; how can that fact alter the express words of the statute? It may be impregnated with a hundred other ingredients, but the fact remains the same that it is impregnated with carbonic acid gas within the definition of the item "waters." I will not depart from the express words of an act to enter into speculations of what might have been added or omitted. I find by the Act that waters impregnated with carbonic acid gas are expressly made liable to duty: what right, then, have I to set aside that enactment simply because there is another ingredient besides that one? I, therefore, hold that this pyretic saline was liable to duty with the other 599 articles expressly mentioned, and was not taxable under the tail of the schedule. Before proceeding to consider the question of repeal, I will say one word as to sect. 4. That may apply to some of these waters, but it only goes to relieve from liability to duty a certain class of dealers in respect of some of the articles included under the head "waters." Well, then, that being the state of the law up to Aug. 1833, we now come to the repealing statute (3 & 4 Will. 4, c. 97), s. 20. The effect of that Act was not to repeal the former Act, but a very small part of it, viz., the words "waters, &c."; and the question is, what is the effect of that repeal? The effect of it is clearly this, if "waters impregnated with soda or carbonic acid gas" were before under the schedule liable to duty, they are to be no longer taxable under that schedule. Assuming, then, that the pyretic saline would have been formerly taxable under that head, by this repealing section that taxability is altogether taken away. The Crown, to make out their case, must contend for this extraordinary proposition, that, although the repealing Act expressly says that waters of this description shall not be taxed as "waters," yet these waters can still be taxed under another clause of the taxing Act. You have only to substitute the word "clause" for "act" or "statute" in the dicta which have been quoted of Tenterden, C.J., and Tindal, C.J., to make them applicable to the present case. Adopting, then, the words of Tindal, C.J., this clause is to be taken as though the item "waters" had never existed. If that be so this pyretic saline, falling as it does within that item, never was subject to taxation. But no one could say that where a particular clause is repealed it is to be taken as though the whole Act had never been enacted; it is to be taken as though this particular clause had never existed. What then results from this? The tail of the schedule has the same effect as it had at the time it was passed; at that time it did not include such a water as this; therefore it does not include it now. I may go on to say that the same fallacy exists in the confounding of one article with a class of articles. In conclusion, then, I think that the liability of these waters was put an end to by the Act of 1833, and that these waters then ceased to be taxable; and on these grounds I am of opinion that our judgment should be for the defendant; but as I am in a minority, the judgment of the Court must be for the Crown.

Judgment for the Crown.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for defendant, *Crouch and Spencer.*

June 13, 14, and 22.

(Before OLESBY AND POLLOCK, BB.)

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Libel—*Calling a man "a convicted felon"—Calling an editor of a newspaper "a felon editor"—Action for—Justification, that he had been previously convicted—Statute 9 Geo. 4, c. 32, sect. 3.*

The calling a man who is the editor of a newspaper "a felon editor" is the same as calling him "a felon," and to call a person who has been at some former time convicted of felony, and has undergone the punishment to which he was sentenced, "a felon," is actionable inasmuch as by sect. 3 of 9 Geo. 4, c. 32, "the punishment so endured hath the like effects and consequences as a pardon under the Great Seal as to the felony whereof the offender was so convicted," and therefore he is thereby restored to his original status, and made "as it were, a new man with a new capacity and credit."

Seemle, that it would be equally actionable to say of such a person, "he is a convicted felon;" for, though reading the words favourably for the defendants, it might be said they only mean that the plaintiff had at some former time been convicted of felony, yet they ought not to be so read, nor should the court "favour idle and injurious words" which attach the infamy of felony, and would import that the man had not been pardoned.

A slanderer should take care to be within the truth; and, had the defendants written of the plaintiff that he had formerly committed a felony, or had been convicted of felony, that would have been strictly true, and could have been justified; and the distinction is not a verbal one merely, for the two statements would have a different effect.

So held by the Enchequer Division (Olesby and Pollock, BB.), on the authority of Cuddington v. Wilkins (Hob. Rep., pp. 67 and 81) and Hawk. P.O., book 2, c. 37, s. 48, and cases there cited.

THIS was an action for libel brought by the plaintiff against the defendants under the circumstances set forth in the following pleadings:

Statement of Claim:

1. The plaintiff resides at Dartmouth, in the county of Devon, and is the proprietor and editor of a newspaper published there, and called the *Dartmouth Advertiser*.

2. The defendants are, and at the time of the publications hereinafter mentioned were, the proprietors, printers, and publishers of a newspaper called the *Western Daily Mercury*, the head publishing office of which is at Plymouth, in the said county of Devon, and which also has branch publishing offices in Devonport, in the said county, and in the city of Exeter.

3. The defendants, or some or one of them, also edit and write for the said newspaper.

4. The defendants in their said paper called the *Western Daily Mercury*, dated on the 24th day of April 1876, wrote, printed, and published certain words, which words (omitting for the sake of brevity certain words appearing in the original at the place marked with asterisks) were as follows:

"The narrative must be deferred till next week. . . . The history of the *Advertiser* too must stand over . . . its present editor is a convicted felon. The case in which a certain John Leyman, printer, was sentenced to twelve months' hard labour for stealing feathers—a case of which Mr. Foster may have heard,

(a) Reported by H. LIND, Esq., Barrister-at-Law.

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since he is so familiar with the chief actor—will be reproduced."

5. The defendants in their said newspaper called the *Western Daily Mercury*, dated the 6th day of May 1870, wrote, printed, and published certain words, which words (omitting for the sake of brevity certain words not personally relating to the plaintiff, and appearing in the original at the places marked with asterisks) were as follows:

"There still remain to be recorded Mr. Foster's controversies with the Town Council of Dartmouth . . . and the facts regarding his newspaper (meaning the plaintiff's said newspaper the *Dartmouth Advertiser*), and its bankrupt and felon 'editor' (meaning the plaintiff). The narrative must be deferred till next week. It is worth the telling."

6. The words set out in paragraphs 4 and 5 were written, printed, and published by the defendants of and concerning the plaintiff, and were so written, printed and published falsely and maliciously, and with a libellous and defamatory sense and meaning.

7. The said words so set forth in paragraphs 4 and 5 were also so falsely and maliciously written, printed, and published of and concerning the plaintiff in his business and calling of a printer and newspaper editor, and his said occupation as proprietor and editor of the said *Dartmouth Advertiser* newspaper.

8. In consequence of the publications set forth in the fourth and fifth paragraphs, the circulation of the plaintiff's said newspaper, the *Dartmouth Advertiser*, has already been greatly injured and has much decreased, and will be still further injured and decreased. The plaintiff has also already experienced difficulty in getting supplied with news and obtaining persons to be his correspondents, and will experience still further difficulty in getting supplied with news and obtaining persons to correspond with him. In particular, one Mr. Robt. Dart, of Cherriton Ferrers, in the county of Devon, and one Mr. Robt. Harris, of Totnes, also in the county of Devon, who both had respectively supplied the plaintiff and his said newspaper with news and acted as correspondents to the plaintiff's said newspaper, in consequence of the said publications refused and declined any longer so to act. The value of the goodwill of the plaintiff's said newspaper has, in consequence of the matters hereinbefore appearing, become and is greatly lessened.

The plaintiff claims:

1. 1000*l.* damages.
2. An injunction to restrain the defendants from similar publications in future.
3. Such further or other relief as the nature of the case may require.

Statement of Defence:

1. The defendants do not admit that the plaintiff is the proprietor and editor of the *Dartmouth Advertiser* newspaper.

2. The defendants do not admit the allegations in paragraphs 6, 7, and 8 of the statement of claim.

3. The defendants deny that the word "bankrupt" in the quotation from their said newspaper, in the 5th paragraph of the statement of claim set out was intended to or did refer to the plaintiff.

4. And the defendants further say that the plaintiff has been convicted of felony, and was sentenced to twelve months' hard labour for stealing feathers.

5. The words in the fourth and fifth paragraphs of the statement of claim complained of were and are part of certain articles printed and published in the defendants said newspaper, each of which articles was and is a fair and *bona fide* comment upon the conduct of the plaintiff in his public character and as the nominal editor and proprietor of the *Dartmouth Advertiser*, a public newspaper, and was printed and published by the defendants as and for such comment, and without any malicious motive or intent whatever.

Reply and Demurrer:

1. The plaintiff joins issue upon the first, second, and fifth paragraphs of the defendants' statement of defence.

2. As to the third paragraph of the statement of defence, the plaintiff admits the allegations in such third paragraph contained.

3. As to the fourth paragraph of the said statement of defence, the plaintiff (so that such admission be not in

any way extended or taken to mean that he ever was, in fact, guilty of the offence referred to) admits the allegations contained in such fourth paragraph. But the plaintiff further says that he has never been convicted of felony save on that one occasion, which is the occasion mentioned in the said third paragraph of the statement of defence. On that occasion he was convicted of the supposed felony by a court duly having jurisdiction in that behalf, the Court of Quarter Sessions for the county of Cornwall; and the said court, having jurisdiction as aforesaid, in the exercise of such jurisdiction, adjudged that, as a punishment for the said supposed felony, the plaintiff should be imprisoned and kept to hard labour for twelve calendar months. The said conviction took place several years ago, and the plaintiff, as the defendants well knew, duly endured the punishment to which he was so adjudged as aforesaid, for the said supposed felony, and thereby became, and was, and has ever since been, and is, in the same situation as if a pardon under the Great Seal had been granted to him as to the said supposed felony whereof he was convicted as aforesaid.

4. The plaintiff demurs to the said fourth paragraph of the statement of defence, on the ground that, while the statement of defence admits the publication of the whole of the libels alleged in the statement of claim, and the said paragraph is pleaded to the whole of the said libels, and a part of the libel charges that the plaintiff is a convicted felon, nevertheless the said fourth paragraph contains nothing which justifies or is otherwise a defence to that portion of the said libel; and the plaintiff also demurs upon other grounds sufficient in law to sustain this demurrer.

Demurrer by the defendants to the third paragraph of the plaintiff's reply.

Upon the action coming on for trial before Blackburn, J., at the summer assizes for Devonshire in 1876, at Exeter, a jury could not be procured, and his Lordship, after a short argument of counsel on both sides, and without any evidence being taken, expressed his opinion to be in favour of the defendants, on the ground that the statement in the alleged libel that the plaintiff had been convicted of felony was strictly true, and that the plaintiff therefore was incapacitated from maintaining his action; but his Lordship postponed giving judgment with costs for the defendant until the fourth day of the next Michaelmas sittings. In November last the plaintiff moved for and obtained an order in the Exchequer Division that the defendants should show cause why the decision of the learned judge at the trial in favour of the defendants that the action was not maintainable should not be set aside and a new trial had, on the grounds that, on the facts stated in the pleadings and taken as admitted, the decision of the learned judge ought to have been in favour of the plaintiff, and that the action was maintainable; and by which it was also ordered that the demurrers in the action should be argued together with the above rule.

June 13 and 14. — Cole Q.C. and Bullen appeared to show cause, and contended that the judgment of the learned judge was right. The defendants had only stated of the plaintiff what was strictly true, viz., that "he was a convicted felon," and no action could be maintained against them for so doing. *Alexander v. The North-Eastern Railway Company* (34 L. J. 152, Q.B.; 6 B. & S. 340) was an authority in favour of the defendants. It was not contended in that case that if the statement were true it would be a libel. [POLLOCK, B.—Suppose you call a man a bankrupt, and it turns out only that he was one twenty years ago?] The principle, or rule, "Once a felon, always a felon," was in point and applicable here, and the statute of 9 Geo. 4, c. 32, on which the plaintiff relied, was not applicable to

the case, the sole object and purport of that statute being to remove certain disabilities attaching to persons convicted of felonies, which prevented their evidence being receivable in a court of justice, and to render them capable witnesses. The plaintiff will cite, probably, in his own favour the cases of *Gwynne v. The South-Eastern Railway Company* (18 L. T. Rep. N. S. 738) and *Biggs v. The Great Eastern Railway Company* (Ib. p. 482); but the charge in each of those cases was one of misdemeanour, and not, as here, of felony. [CLEASBY, B. referred to *Ouddington v. Wilkins* (Hob. Rep. 67) as an authority favourable to the plaintiff, but observed that in that case there had been no conviction.]

Oollins, Q.C. and *Pitt-Lewis* for the plaintiff, *contra*, submitted first, that the statements contained in the alleged libels were not strictly true or accurate, and on that ground, therefore, the plaintiff was entitled to have judgment in his favour. To say of the plaintiff at the time in question, "he is a convicted felon" and "is a felon editor," were utterly untrue and inaccurate statements. Had it been said that he "was, or had been, a convicted felon," it might have been different; and, again, the plaintiff never was a "felon" and an "editor" contemporaneously. The libel, therefore, was not true, the plaintiff not being a felon; for by the operation of the statute 9 Geo. 4, c. 32, s. 3, he became, after having endured the punishment, in the same position as if he had been pardoned under the Great Seal; and there is express authority that to say of one who had been so pardoned "he is a felon" would be actionable (see *Ouddington v. Wilkins*, Hob. Rep. 67 and 81; Owen, 150; Moore, 869); and as to the distinction alluded to by Cleasby, B., that in that case there had been no conviction, it is said in *Hawkins' P.C.*, book 2, c. 37, s. 48, that a pardon even after conviction so far clears the party that he may have an action for a scandal in calling him "felon" after the pardon, and be a good witness notwithstanding the conviction, "the pardon making him a new man and giving him a new credit and capacity." So in *Rees v. Crosby* (2 Salk. 689; 1 Lord Raym. 39) where on trial at bar for high treason the prisoners excepted to the evidence of one Smith, who had stood in the pillory for libel, it was argued for the Crown, in support of the witness's evidence, that the infamy flowed from the crime and not from the punishment, and that Smith's crime was not infamous nor deserving of such punishment; and Holt, C.J., without determining that point, held that Smith was restored by the general pardon of 2 Will. & M. which operated by way of restoration, and made him "a new creature." Again in *Boston's case* (Litch. 22) a parson was deprived of his benefice by the Ecclesiastical Court for adultery, and, a general pardon coming afterwards which pardoned the adultery, it was held that the parson was thereby, *ipso facto*, restored to his benefice without suit in the Ecclesiastical Courts. *Celier's case*, too (Sir T. Raym. Rep. 369), is a strong case in favour of the plaintiff. The learned judge and reporter there says: "It was debated, admit a witness be convicted of felony and afterwards pardoned, whether he shall thereby be restored to be a good witness? And my Lord Chief Justice Scroggs and myself were of opinion that he could not, because the pardon doth take away the punishment due to the offence, but

cannot restore the person to his reputation; and of that opinion was Justice Nichols in *Ouddington v. Wilkins' case* (Moore 872, pl. 1213); but my brothers Jones and Dolben *contra*. And so afterwards did I conceive, for in the case of *Ouddington v. Wilkins*, as it is reported in Hobart, it is said that the pardon takes away not only *penam* but *reatum*." See also *Vaughan's case* (5 Co. Rep. 49). All these authorities show that a pardon clears the man and makes him a "new creature," and that all the consequences of the crime fall with and are washed away by it; and then the stat. 9 Geo. 4, c. 32, s. 3, enacts that the suffering the punishment shall have the same effect as a pardon. But even if the statement were true in one sense, they went far beyond the truth, and were so inaccurate as to make them libellous. In *Gwynne v. The South-Eastern Railway Company* (18 L. T. Rep. N. S. 738) the plaintiff had been convicted before a magistrate of travelling on the defendants' line without a ticket, and was sentenced to a fine of 1s. and costs, or in default to three days' imprisonment. The defendants published placards stating he had been convicted, &c., and describing the alternative as "imprisonment with hard labour;" and in an action for libel, the defendants having pleaded the truth of the statement in their placard, Cockburn, C. J. said the first question for the jury was whether the defendants' account of the conviction was substantially correct; and in summing up to the jury he said: "If you are called to account for a libel, you can say, I have said no more than the truth; but if you go beyond the truth and state what you cannot prove, then you are liable, and it is for the jury to say what you will have to pay to the man of whom you have chosen to say something defamatory which you cannot make good." So here it was "beyond the truth" to say of the plaintiff "he is a convicted felon," and "he is a bankrupt and felon editor." It was a libel to write and publish the words "he is a bankrupt" of a person who, though he were a bankrupt twenty years ago, had since fully paid all his liabilities and was now solvent; and as to the "felony," that had been purged by his enduring the punishment to which he was sentenced, and so he was restored to his original status and condition. They cited also *Biggs v. The Great Eastern Railway Company* (18 L. T. Rep. N. S. 482; 16 W. R. 902); and *Hawk. P. C.*, book 2, c. 46, s. 26.

Our. adv. vult.

June 22.—The judgment of the Court was delivered by CLEASBY, B.—In this case the question appears to be well raised upon the demurrer in the pleadings. It is an action for libel, and two libels are complained of, contained in a newspaper called the *Western Daily Mercury*, under the dates of the 24th April 1876 and 1st May 1876. If the paper of the 24th April is considered, a different question might arise from that which does arise upon the paper of the 1st May. It seems quite clear that the defendants are bound by what they wrote on the 1st May without reference to what was written on the 24th April; unless, to get at the meaning of what was written on the 1st May, it is necessary to refer to what was written on the 24th April. In the present case the article of the 1st May has by itself a clear meaning, and a person buying that newspaper on the 1st May, without having seen the paper of the previous week, would necessarily give the article that meaning. The

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facts of the present case, as they appear upon the pleadings, may, for the purpose of raising the question, be stated as follows: By the statement of claim the plaintiff states that he was the editor of a paper called the *Dartmouth Advertiser*, and he complains that on the 1st May the defendants in their newspaper referred to the plaintiff as the "felon editor." By the statement of defence the defendants justify this reference by alleging that the plaintiff had been convicted of felony, and was sentenced to twelve months' hard labour for stealing feathers. In his reply the plaintiff alleges that after his conviction, which took place some years ago, the plaintiff underwent his sentence of twelve months' imprisonment and hard labour, and so became as cleared from the crime and its consequences as if he had received the Queen's pardon under the Great Seal. To this there is a demurrer, and so the question is raised. In the statement of defence there was also a paragraph that the alleged libel complained of was a fair comment upon the conduct of the plaintiff in his public character as editor of the *Advertiser*, and to this there was also a demurrer in the reply. This was not argued before us, it being clear that such a justification could not be upheld in law, and upon that demurrer there must, of course, be judgment for the plaintiff. But the other question is one of some difficulty, that question being whether a man, who has been convicted of felony and undergone his sentence, can afterwards be called a "felon" without making the person calling him so liable to an action. We cannot doubt that calling a man, who is the editor of a newspaper, a "felon editor," is the same as calling him a "felon." The question could not have been raised before the passing of the 9 Geo. 4, c. 32. By the 3rd section of that Act, it is enacted as follows: "And whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged. Be it therefore enacted, that where any offender hath been, or shall be, convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the Great Seal as to the felony whereof the offender was so convicted: provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony." The general title of the Act relates to evidence, but the particular recital to this section introduces a new question, the civil status of particular persons. The question therefore becomes this, whether a person who has committed a felony, and received the Queen's pardon, can be called a "felon." Upon this question the authorities are clear. The case of *Cuddington v. Wilkins* (reported in Hobart's Reports, p. 67), is as follows: "Cuddington brought an action on the case against Wilkins for calling him 'thief.' The defendant justified, because before time he had stolen somewhat. The plaintiff replied, that since the supposed felony the general pardon in the seventh year of the King was made, and makes the usual averment

to bring himself within the pardon. Whereupon the defendant demurs. See Staundford Plac. Coronæ, lib. 3, 180, that if a man arrested for felony break prison, he shall lose his battail; but yet, if the King pardon him that, it is restored. F. Coronæ, 281, 1 & 2 E. 3; F. Coronæ, 154; so here, the felony is by pardon extinct. And in the end this case was adjudged for the plaintiff, though, it may be, he knew him not to be within the pardon; for there is no cause to favour idle and injurious words. But perhaps, if he had arrested him for the felony after pardon, it might have been excused if he knew it not, because it is an act of justice," *vide residuum infra*, fol. 81. The case is afterwards stated more fully at p. 81, when, I suppose, judgment was given, and, after stating the facts, it is said that it was adjudged for the plaintiff, "for the whole Court were of opinion that, though he were a thief once, yet when the pardon came it took away not only *penam*, but *realum*, for felony is *contra coronam et dignitatem regis*," and, it proceeds: "Now, when the King had discharged it and pardoned him of it, he hath cleared the person of the crime and infamy, wherein no private person is interested but the commonwealth whereof he is the head, and in whom all general wrongs reside, and to whom the reformation of all general wrongs belongs." And there is much more to the same effect. The case is again referred to in a late part of the same reports, four years afterwards, at p. 293, in a case of *Searle v. Williams*, where in the judgment it is said: "And therefore I hold that if a man shall call him 'felon' or 'thief,' he may have his action as upon any other pardon, which we resolved in the case of *Cuddington v. Wilkins*." Now, the word "felon" was there made use of, which makes it the same as the present case. It is unnecessary to refer to the other authorities cited in the argument in support of so clear and unquestioned a decision, and one so reasonable and so just. One text book may be cited (Hawkins' Pleas of the Crown, book 2, c. 37, s. 48, title "Pardon"), where, in the margin, the authorities are collected. He says: "As to the second great point, viz., what is the effect of a pardon? I take it to be settled at this day that the pardon of a treason or felony, even after a conviction or attainder, does so far clear the party from the infamy and all other consequences of his crime that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness notwithstanding the attainder or conviction; because the pardon makes him, as it were, a new man, and gives him a new capacity and credit." The conclusion therefore is inevitable that, if calling the plaintiff a "felon editor" involves calling him a felon, the plaintiff is entitled to his action, and there must be judgment for the plaintiff upon the demurrer to the reply. It is not necessary to decide what would have been the result if the defendants had only said of the plaintiff, as they do in the first paper, of the 24th April, "he is a convicted felon." In that case there would be more doubt, in the absence of any decided case, as to the effect of these words; and it might be said, if you choose to read the words favourably for the defendants, that they only mean that he has been at some former time convicted of felony. But it rather seems to us that they ought not to be read so favourably, and that the

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result ought to be the same. It is not true to say of the plaintiff that "he is a convicted felon." He is a convicted felon who has been pardoned, and is a pardoned felon, and the felony is at the time extinguished. The calling him a felon and attaching the infamy of felony to him would import that he had not been pardoned. It would have been a different matter if the defendants had written of the plaintiff that he had previously committed a felony, or had been convicted of felony. That would have been strictly true, and could have been justified, although the fact of the sentence having been suffered was withheld. At least, such is our opinion; and the distinction is taken in the case of *Cuddington v. Wilkins*, at page 82 of the report. The distinction is not a verbal one merely; but the two statements would have a different effect. A man stating that another was a felon would be listened to as informing his hearers that the individual was infamous and to be shunned; but a man who stated that another man (perhaps the editor of a newspaper and in a respectable position) had been convicted of felony twenty or thirty years ago would probably himself be more condemned than the man he spoke of. But, however small the distinction may be, a slanderer should take care to be within the truth. The Court says, in the case of *Cuddington v. Wilkins* (Hob. p. 82), where the distinction is taken, "and it was held no great difference, though this had been a special pardon and not known to the defendant, for he must take heed at his peril that he do no man wrong, and there is no necessity nor use of slanderous words to be allowed to ignorants." The cases are numerous in which the injurious statement has gone beyond the truth and has been rendered actionable. Having regard to the authorities referred to, we cannot think that the learned judge was correct in saying that the statement should be read as a statement that the plaintiff had been convicted and was literally true. It appears to us that judgment ought to be given for the plaintiff on the demurrer, and that there should be a new trial for the purpose of assessing the damages, which the plaintiff might take, as he shall be advised, on the two libels, or on that of the 1st May.

*Judgment for the plaintiff on the demurrer—
Order for a new trial.*

Solicitors for the plaintiff, Cooke, Kingdon, and Cotton, agents for John Daw and Son, Exeter.
Solicitors for the defendants, Surr, Gribble, and Bunton, agents for J. W. Wilson, Plymouth.

(Before POLLOCK and HUDDLESTON, BB.)

May 29 and June 7.

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Local board—Power of to make bye-laws—Power of to pull down buildings erected in contravention of bye-laws—Action against for so doing—"New streets"—Definition and meaning of—Local Government Act 1858 (21 & 22 Vict. c. 98) s. 34—Validity of bye-laws made in pursuance of—Ultra vires—Excess of force in pulling down—Damages for—Costs—New trial.

A local board of health made bye-laws under sect. 34 of the Local Management Act 1858 (21 & 22 Vict. c. 98), the 3rd of which bye-laws provided

that "no building should be erected by the side of any new street or proposed new street, or to which any new street would form the only carriage approach, until such street had been constructed to the approval of the local board." By the 32nd bye law it was provided that "every person who intends to erect any new building should give twenty-one days' notice to the local board of such intention, to be delivered to the local surveyor or left at his office, and should at the same time leave or cause to be left at the said office, for the use of the local board, detail plans and sections of such intended new building and its appurtenances, and a description of the materials of which the building is proposed to be constructed, of the intended mode of drainage, and means of water supply." And the 37th bye-law provided that "if the person intending to lay out any new street or construct any new building fail to give the notices therein required, or should construct or cause to be constructed any works or buildings, or do any act or omit to do any act or comply with any requirement of the local board, contrary to the provisions of any or either of the hereinbefore contained bye-laws, he shall be liable for each offence to a penalty not exceeding 5l. and a continuing penalty of 40s. a day. And the local board may at any time after the expiration of forty-eight hours from the service of a notice in writing on such person, expressing their intention so to do, in default of his showing good cause to the contrary in the meantime, cause any work begun or done in contravention of any or either of such bye-laws to be removed, altered, or pulled down as the case may require.

The plaintiff erected new houses by the side of a proposed new street before the new street had been constructed according to the approval of the local board, as required by the 3rd bye-law, and without having first given the notice or left the plans and sections required by the 32nd bye-law, and having failed to show good cause to the contrary within forty-eight hours after notice to him by the local board of their intention to pull his houses down, the local board caused the said houses to be pulled down, and in an action against them by the plaintiff for so doing justified their conduct under their 37th bye-law, and it was

Held by the Exchequer Division (Gleasby and Pollock, BB.), giving judgment on demurrer for the defendants (the local board), that the 37th bye-law was not ultra vires, but was a valid bye-law, properly made under sect. 34 of the Local Management Act 1858, and within the power of the authority that made it; and that the defendants were thereby justified, so far as they exercised their power in so doing with reasonable care, in pulling down the plaintiff's houses.

The words "new street" in the Local Government Act 1858, and in these bye-laws, mean and include not only the roadway or thoroughfare for passengers and vehicles, but also the houses on both sides of it.

The jury having, in answer to a question by Blackburn, J., found that, assuming the bye-law to be good and the defendants to be justified in pulling down the houses, they used more force than was necessary, assessed the plaintiff's damages in that respect at 18l.; and on a motion by the defendants for a new trial, on the ground of that finding being against the weight of evidence,

(a) Reported by HENRY LEXER, Esq., Barrister-at-Law.

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The Court, having consulted Lord Blackburn on the point, were of opinion with him that unless the plaintiff accepted the defendants' offer to let the verdict for 18l. stand, without costs, there must be a new trial, and judgment was given to that effect accordingly.

THIS was an action which was tried before Blackburn, J. and a special jury, at the summer assizes for Hampshire, 1876, at Winchester, the main facts in which are contained in the following pleadings:

Statement of claim:

1. The plaintiff is a builder, carrying on business at Landport, in the borough of Portsmouth, and is lessee and occupier of certain land, situate in Tipmore street, Stanmahaw, in the said borough. The defendants, the Mayor and Corporation of Portsmouth, are the urban sanitary authority for the said borough.

2. In or about July 1875, plans were duly deposited with the defendants, in pursuance of a bye-law made by the defendants, as the urban sanitary authority for the said borough, for the construction of a street or road over the said land of the plaintiff. The said plans were submitted to and duly approved by the defendants.

3. In or about Aug. 1875, the plaintiff commenced to build sixteen houses on the said land, being eight on either side of the said street or road, and continued to build them until the month of November 1875, when eight of the said houses were roofed in, and the others were chamber-floor high, with joists on. Plaintiff admits that he had not before commencing the said houses deposited plans thereof, although he conditionally believed that his surveyor had done so, and the plans were in possession of the board before the houses were demolished, as hereinafter mentioned; but the defendants allowed the plaintiff to commence and to proceed with the erection of the said houses as hereinbefore mentioned without complaint or interference down to the month of November 1875, and the said houses were in all respects constructed in accordance with the bye-laws of the defendants, the said Mayor and Corporation, relating to the construction of buildings.

4. On the 22nd Nov. 1875 the defendants charged the plaintiff before the magistrates for the said borough with having built the said houses without having first deposited the plans for the same in accordance with the bye-laws of the defendants, the Mayor and Corporation. The plaintiff thereupon pleaded guilty, and was ordered to pay a fine of 1l. and costs.

5. On or about the 9th Dec. 1875, the defendants sent a large number of workmen to the said place, and the said workmen by their orders pulled down twelve of the said houses, eight of which had been roofed in, and totally demolished the same, and in doing so used so much violence that the materials thereof were rendered almost valueless for use at any future time for building or any other purpose.

6. Notice of this action was, on the 24th March 1876, duly given to the defendants.

The plaintiff claimed £1500.

Statement of defence:

1. The defendants deny the allegations in paragraph 3 of the statement of claim, save in as far as the plaintiff admits that he had not, before he commenced the said houses, deposited plans thereof.

2. Certain bye-laws have been duly made by the defendants, as the urban sanitary authority of the borough of Portsmouth, under and by virtue of the statutes in such case made and provided.

3. By the 3rd of the said bye-laws it is provided that no building shall be erected by the side of any new street or proposed new street, or to which any new street will form the only carriage approach, until such street has been constructed to the approval of such urban sanitary authority.

4. By the 32nd of the said bye-laws it is provided that every person who shall intend to erect any new building shall give twenty-one days' notice to the urban authority of such intention, to be delivered to the local surveyor, or left at his office, and shall at the same time leave or cause to be left at the said office, for the use of the urban

sanitary authority, detail plans and sections, and a block plan of such intended new building and its appurtenances, and a description of the materials of which the building is proposed to be constructed, and of the intended mode of drainage and water supply.

5. Bye-law 37 is as follows: "The urban sanitary authority shall by resolution or order approve or disapprove of proposed new works or buildings within the times severally specified herein for the deposit of notices; but if the owner or person intending to lay out any new street or construct any new building fail to give the notices herein required, or if any owner or person shall construct or cause to be constructed any works or buildings, or do any act, or omit to do any act, or comply with any requirement of the urban sanitary authority, contrary to the provisions of any or either of the hereinbefore contained bye-laws, he shall be liable for each offence to a penalty not exceeding 5l., and he shall pay a further sum not exceeding 40s. for each and every day during which any such works or buildings shall continue or remain contrary to the said provisions; and the urban sanitary authority may, if they shall think fit, at any time after the expiration of forty-eight hours from the time of service of a notice in writing, addressed to such owner or person, signed by the local surveyor or the clerk to the urban sanitary authority, expressing their intention so to do, in default of such owner or person showing good cause to the contrary, in the meantime cause any work begun or done in contravention of any or either of the said bye-laws to be removed, altered, or pulled down, as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner, as provided by the Public Health Act 1848; and any such notice may be served either personally or by leaving the same with some person either at the actual or last known place of abode or business of such owner or person, or at or upon the works or buildings referred to therein."

6. The plaintiff erected the houses named in paragraph 3 of the statement of claim in contravention of bye-laws 3 and 32. The said street was a new street, and the said houses were erected before the said street had been constructed according to the approval of the defendants as such urban sanitary authority as aforesaid. The plaintiff did not first give to the defendants, as such urban sanitary authority, such notice as by the said 32nd bye-law is required to be given, and did not leave or cause to be left at the office of the defendants, as such urban sanitary authority, for their use, detail plans or sections, or any block plan of the said houses, or any description of the materials of which the said houses were proposed to be constructed, or of the intended mode of drainage or means of water supply.

7. The defendants, upon receiving a report from their local surveyor, gave the plaintiff notice, in pursuance of bye-law 37, that the defendants would, after the expiration of forty-eight hours from the time of the service of the said notice, in default of the plaintiff showing good cause to the contrary, cause the said houses to be pulled down, as being erected by the plaintiff in contravention of the said bye-laws.

8. The plaintiff did not, within the said forty-eight hours, or before the removal of the said houses as hereinbefore mentioned, show good cause why the said houses should not be pulled down; and the defendants accordingly, in pursuance of bye-law 37 and of their said notice, and after the expiration of the said forty-eight hours, namely on the 9th and 10th December, 1875, caused the said houses to be pulled down, as they lawfully might. The defendants deny that in so doing any unnecessary violence was used, or that the said materials were rendered almost valueless, as is alleged in the fifth paragraph of the statement of claim.

Reply and demurrer:

1. The plaintiff joins issue on the defendants' statement of defence.

2. The plaintiff demurs to the second, third, fourth, fifth, sixth, seventh, and eighth paragraphs of the statement of defence as bad in law, on the ground that the defendants have no power to make bye-laws authorising them to pull down buildings, except in cases where such buildings are erected in contravention of some bye-law relating to mode of construction, and on other grounds sufficient in law to sustain this demurrer.

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The plaintiff's points for argument :

1. That the third bye-law is not authorised by the Local Government Act. That that Act authorises the local board to make bye-laws to regulate the level, width, construction, and sewerage of new streets, but does not authorise them to make a bye-law that no building shall be erected by the side of any new street until such street has been constructed to the approval of the local board, and does not make them judges as to whether the bye-laws have been complied with ; still less does it authorise the local board to make a bye-law enabling them to pull down such buildings. The only power the local board could have would be to make a bye-law imposing a penalty for not constructing the new street in conformity with the prescribed rules. 2. The Local Government Act 1858 and bye-law 37, purporting to be made thereunder, do not give power to the local board to pull down buildings in case of a default to give notices or deposit plans. For such default a penalty is imposed, and has been inflicted in this case. The power to pull down buildings is, on a true construction of the Act and the bye-law, only given where the buildings contravene the requirements of the Act and the bye-laws as regards the structural condition of the buildings, which, according to the evidence of the plaintiff, the present buildings did not.

3. If the site of the buildings was unhealthy, as contended by the defendants, the defendants have mistaken their remedy, and should have proceeded under the 29th bye-law, there being no bye-law regulating the nature of the soil to be built upon.

4. That the notice of the 23rd Nov. 1875, in pursuance of which the buildings were pulled down, is invalid, the specific bye-law alleged to have been contravened not being therein mentioned.

Points for argument on the part of the defendants :

1. That the paragraphs of the statement of defence demurred to are good in law.

2. That the bye-laws relied on by the defendants were within the scope of their authority, and authorised them to pull down the buildings in question, under the circumstances set forth in statements of claim and defence.

The Local Government Act 1858 (21 & 22 Vict. c. 98), under the authority of which the bye-laws in question here were made, enacts as follows, by :

Sect. 14. Every local board may make bye-laws with respect to the following matters, that is to say :

- (1.) With regard to the level, width, and construction of new streets, and the provisions for the sewerage thereof.
- (2.) With respect to the structure of walls of new buildings, for securing stability and the prevention of fires.
- (3.) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings.
- (4.) With respect to the drainage of buildings, to water closets, privies, ash pits, and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation.

And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets, or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws, provided always that no such bye-laws shall affect any buildings erected before the date of the constitution of the district.

The plaintiff obtained an order, which was unopposed, for the trial of the issues of facts before the demurrer was argued, and such issue came on for trial at Winchester before Lord Blackburn (then Blackburn, J.) and a special jury as above mentioned, and at the close of the summing-up that learned judge submitted the following note to the jury for their guidance :

"It is agreed that the buildings were commenced without any plan being deposited, and without any formal approval of the construction of the road.

I shall ask the jury,

1. If the ground was in such a state when the buildings were begun as to make it impossible to build dwellings on it without previous precautions.

2. Whether (if that is not proved) the sanitary officers believed, and had reasonable grounds for believing, the ground to have been in such a state (I am inclined to think that neither of them is material, but as to them if the court should think them material, notice of action was given.)

3. Then I tell the jury that, supposing the bye-law bad, the plaintiff is entitled to the value of the buildings as they stood, less the value of the materials as they were handed over to the plaintiff, and I ask them to assess the value.

4. That even if the bye-law is good, and the defendants were justified in pulling down the houses, the plaintiff has a right to have it done with reasonable care and skill, and so as not to charge the plaintiff with unnecessary expense, and on the other hand not to damage the plaintiff's materials more than was necessary, and I ask the jury :

4. Was there neglect of duty in this respect ; and, if so, what is the damage ?

I shall leave it to the court on "the findings" and the demurrer to enter judgment as the court think proper.

1. To the first question the jury returned the answer, "Yes."

2. That that answer rendered it unnecessary to answer the second question.

3. To the third question, "Damages, 500*l.*"

4. And to the fourth question, "Damages, 18*l.*"

To these findings the jury added the following memorandum or rider : "The jury are of opinion that remedies might have been applied which would have rendered the pulling down the houses unnecessary."

On the following day application was made by the defendants' counsel to the court to exercise its discretion with regard to the costs of the trial after the verdict of the jury, when the court made the following order : "Costs to be reserved for the opinion of the Exchequer Division to give or withhold them, as they may think proper. Either party to have liberty to move for a new trial within the first four days of next sittings."

The case now came on for argument upon the demurrer, and upon the plaintiff's motion to enter judgment, and the defendants' motion for a new trial on the ground that the finding of the jury with respect to the 18*l.* damages was against the weight of evidence.

Cole, Q.C., Kingdon, Q.C., and Petheram appeared for the plaintiff, and contended that the 37th bye-law, under which the houses were pulled down, was, so far as it professed to give power to pull down buildings in consequence of breaches of the 3rd and 32nd bye-laws, entirely *ultra vires*, as being in excess of the powers given by the Act of Parliament 21 & 22 Vict. c. 98, s. 5 (the Public Health Act 1858). The proviso which followed the 4th sub-section was not a separate power, but a means only of enforcing the other bye-laws. The first three sub-sections of the Act of Parliament authorised bye-laws relating to the construction, and the 4th

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related to the habitation of buildings after they were constructed; and the concluding provision was to compel observance of the bye-laws relating to the construction, and there was no power enabling the board to make a bye-law for pulling down buildings except in cases of a breach of a bye-law relating to construction. The 3rd and 32nd bye-laws, on a breach of which the defendants relied, had no reference to the mode in which a street should be constructed, but only the 3rd to the mode in which the board's approval should be obtained, and the 32nd only to the depositing of notices and plans; in fact, they related to what might be termed practice only, and not to construction at all, and for a breach of them a penalty no doubt might be inflicted; but the statute gave no power to make a bye-law enabling houses to be pulled down which were built in accordance with the structural bye-laws, and as to which the only default had been the non-deposit of plans. [POLLOCK, B.—Surely, if depositing a plan be a condition precedent to the right to build, it must be a building begun in contravention of a bye-law?] Not in contravention of the bye-law as to structure. The last portion of the bye-law was a mere form of practice by which the performance of the others was to be enforced. [POLLOCK, B.—By sub-sect. 4 they may further provide for the observance of the same by enacting therein such penalties as they think necessary.] Exactly; "the same" meant there the bye-laws which went before, none of which related to depositing of plans and giving notices, &c., but to "structure" only, and the words "the same" must refer to what went before, and should have no reference to what came after.

Brown and others v. The Local Board of Holyhead, 7 L. T. Rep. N. S. 332; 32 L. J. 25, Ex; 1 H. & C. 601;

Young v. Edwards, 11 L. T. Rep. N. S. 424; 33 L. J. 227, M.C;

Hattersley and others v. Burr, 14 L. T. Rep. N. S. 565; 4 H. & C. 523;

Hall v. Nison, 32 L. T. Rep. N. S. 87; 44 L. J. 140, M.C; L. Rep. 10 Q. B. 152;

Waite v. The Garston Board of Health, 17 L. T. Rep. N. S. 201; 37 L. J. 10, M.C.; L. Rep. 3 Q. B. 5,

were all authorities in favour of the plaintiff. [POLLOCK, B.—I am much caught by your argument; but the section further on says they may provide for pulling down any work begun or done in contravention of "such bye-laws." Then, if the bye-law requires plans to be deposited, it would be a legal bye-law, and a house built without such deposit would surely be built in contravention of that bye-law?] It would not be in contravention of one of the bye-laws to which this related. They may pull down where the bye-laws relating to construction have been contravened, but cannot provide for pulling down where only plans have not been delivered; nor did the Act empower the making of bye-laws relating to the construction of houses by the side of new streets, but only those relating to the level, width, and construction of the "new street" or roadway and the sewerage thereof. "Street" did not mean or include houses or buildings, but only the roadway. The bye-law under which the defendants professed to act was illegal and bad, and the plaintiff therefore was entitled to judgment in his favour for the amount of damages (500*l.*) found by the jury; and, secondly, if the bye-law should be

held to be good, then the plaintiff was entitled to a verdict in his favour for 18*l.* with respect to the excess of force used by the defendants in pulling down the houses, and to costs.

Thesiger, Q.C. and *Charles, Q.C.*, for the defendants, argued *contra*, and submitted that the verdict should be entered for the defendants, and then there was the subsidiary question as to the right and justification of the finding of the jury for 18*l.* The power of the defendants depended on the Local Government Act 1858. Now, in order to enable a local authority to carry out the sanitary duties imposed upon them, there were two matters with respect to buildings which ought to be taken into consideration and provided for; first, that the land to be built upon was in a fit and proper condition for the purpose; and, secondly, that the buildings themselves were properly constructed as regarded sanitary considerations. Reasoning, *a priori*, it was to be expected that a power to make bye-laws would be found under which the local authorities, having to guard the health of their district, would be enabled to effect and insure that great object; and both these matters were considered by the Legislature, as was shown by the language of sect. 34 and its various sub-sections. Obviously the words "the same" at the latter part of that section referred to and meant all the previous four sub-divisions. "They may provide for the observance of the same by enacting therein," &c.; that is to say, by putting into the bye-laws, and so making them a part of the bye-laws, such provisions as they shall think necessary," &c.—a wide power, no doubt, but not more so than the importance of the matter demanded. Then all these things being placed there would be themselves bye-laws, and were intended to be so by the words "they may provide for the observance of the same by enacting therein." If that be so, inasmuch as all the preceding things were, if the board thought proper, and to the extent they thought necessary, to be put into the bye-laws, then when afterwards a power is found "to remove, alter, or pull down" any work done in contravention of "such bye-laws," it must include all the parts and all the things which the board had power to put into and make part of the bye-laws, and amongst other things, therefore, the power to pull down works begun or done without such previous notices or plans as the board from time to time might require. Therefore, taking "street" either in its widest and most popular sense as a roadway *plus* the buildings, or in the narrower sense of the plaintiff's contention, it would in either way come within the powers of the board to "pull down" works done in contravention of a bye-law which required that, before a man built, the board must approve of the "street" (using the word in its narrow sense); and secondly, that plans and sections of the buildings should be deposited. Two things were provided for: first, the making of a proper street for the erection of buildings; and next, that the houses to be built should be fit for human habitations. As to these points the 3rd, 5th, and 6th bye-laws were important. The laying out streets and constructing new buildings were the two things forming the complement of "street" in the popular sense, and throw light upon the meaning of that word in sub-sect. 1 of sect. 34, and the decisions on the statute showed that it was used in the wider and popular sense of the roadway and the houses at each side. *Pond*

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v. The Plumstead Board of Works, and Lord Northbrook v. The same (25 L. T. Rep. N. S. 461; L. Rep. 7 Q. B. 183; 41 L. J. 51, M. C.) [HUDDLESTON, B. referred to *Reg. v. Fullford* (10 L. T. Rep. N. S. 346; 83 L. J. 122, M. C.)] *Galloway v. The Mayor and Commonalty of London* in the House of Lords (14 L. T. Rep. N. S. 865; 35 L. J. 477, Ch.; L. Rep. 1 E. & L. App. 34). As was correctly defined by Rolt, Q.C., in his argument in that case, "street" meant not "the mere roadway, but a thoroughfare with houses on both sides." The section of the statute and the power thus given included everything connected with the level, width, construction, and general sanitary condition of the street and the houses to be erected there. As to the cases cited on the part of the plaintiff, *Waite v. The Local Board of Garston (ubi sup.)* did not touch or apply to the present case. The *ratio decidendi* in *Brown v. The Holyhead Board (ubi sup.)* was seemingly that the bye-law was bad for including existing as well as future buildings, and gave no compensation for any act the board might do in carrying out their powers. The cases of *Hatherley v. Burr (ubi sup.)* and *Young v. Edwards (ubi sup.)* involved other questions as to the mode of enforcing the penalty for disobedience to the bye-laws and were not applicable; but if they were, it was contended that they were practically overridden by the last case cited by the plaintiff, viz., *Hall v. Nixon (ubi sup.)*. Buildings had been pulled down there on precisely the same grounds as here. Then with respect to the 18l. damages, looking at the evidence in the case and assuming that the board acted properly, this was a case in which the verdict was unsatisfactory, and there would be a new trial, or at all events, the plaintiff not having succeeded in his main contention that the defendants acted in excess of their powers, ought not to have the costs of the litigation. They referred also to the interpretation clauses of the Metropolitan Management Act 1855 (18 & 19 Vict. c. 120) s. 250, and of the Metropolitan Management Amendment Act 1862 (25 & 26 Vict. c. 102) s. 112.

Kingdon, Q.C. was heard in reply.

POLLOCK, B.—This matter has been very fully and ably argued, and every possible assistance has been given to us by the learned counsel on both sides. So far as the point with respect to the new trial is concerned, it is impossible that we should decide it without first consulting Lord Blackburn as to the view which he has taken as to the verdict of the jury with regard to the damages for the excess of violence. The action was brought by the plaintiff, the owner, and practically the builder, of certain houses in the borough of Portsmouth, against the defendants, the mayor and corporation of the borough, who, in their capacity of "urban sanitary authority" of that borough, had pulled down the plaintiff's said houses. The real damage, as alleged in the 5th paragraph of the statement of claim, is this, that in the pulling the houses down the defendants used so much unnecessary violence that the materials of the buildings were rendered almost valueless for use at any future time either for building or any other purpose. Now, it needs no argument to show that, where a power of so stringent a kind is given to the local board of health, it is incumbent upon them to exercise that power in a reasonable and proper manner, doing as little damage as would be necessary to effect the purpose which they were undertaking,

in pursuance of the Act of Parliament and the bye-laws. With regard to this, evidence was given on both sides, and it appears that at the conclusion of the case, a suggestion was thrown out by the learned judge with regard to the course that might be adopted, supposing that the plaintiff was willing to consent to it, with regard to the verdict of 18l. damages being allowed to stand, and the plaintiff being deprived of his costs. Now, this is a matter of so grave a character, and so very important, so far as the functions of the local board are concerned, that I do not think it would be right for us to say, at any rate at present, that we would enforce upon the parties any arrangement of that kind which they were not willing to accept. The matter of strict right turns upon whether or not the verdict of the jury which found that there was such unnecessary violence as that in the result the plaintiff was damaged to the extent of 18l., should be upheld or not. With regard to that we will consult Lord Blackburn, and hear what he has to say before giving our opinion upon it. And now arises what is a much more important, and much more general question, and one that is raised both upon the evidence at the trial and also upon demurrer, and it arises in this way; the plaintiff, in his statement of claim, states the building of these houses, and that a summons was issued by the local board requiring him to justify their construction, and that afterwards the defendants charged him before the borough magistrates with having built the houses without having first deposited the plans for the same in accordance with the bye-laws of the local board. Thereupon the plaintiff pleaded guilty, and was ordered to pay a fine of 1l. and costs. Then after that, the defendants sent a considerable body of workmen to destroy these houses, and so did him damage. The jury have found, assuming the bye-law to be an illegal bye-law, damages amounting to 500l.; and whether that verdict will stand or not depends upon the proper construction to be put upon the statute under which these bye-laws were made, and upon the bye-laws themselves. Before, however, I go to that, I ought to add that the jury found that the ground upon which the plaintiff had built was unfit for building upon. I do not know, so far as I am concerned, that that much affects the present question; but they also found that remedies might have been applied other than the actual pulling down of the buildings, which would have made it unnecessary to pull them down. I do not see, on this part of the case, if that is to be taken as the substantial finding of the jury of what in their view they were justified in finding upon the facts, that that affects the real question between the parties, and for this reason: they do not say how and in what manner other remedies might have been applied, but we can understand what they meant; they had had a demonstration of this great power given to the local board, and they could see no way of rectifying that which was complained of in the structure of the houses without pulling them down. On that part of the case it is unnecessary to say more than that that is a power given to the board by the Legislature, and is no doubt a matter of the highest importance to all Her Majesty's subjects who build houses within any borough where the local board has parliamentary power; but still we must suppose that they exercise that discretion rightly when they bring a house within

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the mischief which is intended by the statute to be remedied, and that then the mode in which they shall pull down the houses, or what they shall do, is for them, provided they exercise their power in a reasonable and proper manner. Therefore the discretion vested in them is to see whether it is necessary or not to pull the houses down, and they are not to be told, "You might by having underpinned this house, or altered the foundation of it, or done something to the drains, or a great many other things with regard to the superstructure, and you might perchance have done all these other things in such a manner as that it would not have been necessary to pull the houses down." That I think is not for the jury, but is to be determined by the local board, always assuming that they exercise their discretion *bona fide*, and that nothing to the contrary is found. We may entertain that view, and still uphold the finding of the jury that the defendants did unnecessary damage in pulling down the houses. The one finding relates to the manner of pulling down, the other finding relates to the question whether the houses should have been pulled down at all, and whether certain remedies could have been applied which would have obviated the necessity of pulling them down. And now comes the great question between these parties, and no doubt the question that it was intended to try when this action was brought, and it is this: whether the bye-law under which the defendants justify is a bye-law which is good, or whether it is a bye-law which is bad, as being beyond the power which is given to the defendants by the statute. I do not know that there is any occasion at this period of time to allude to the history of the law relating to bye-laws. There has been, and I am sure always will be, a great jealousy on the part of the common law of England with regard to bye-laws that are made by corporations from time to time, enforcing rights and penalties and other matters, all of which, of course, are of a purely local character; and it is right that there should be that jealousy, because the bye-law has, in truth, locally the same effect as an Act of Parliament. But I shall not, in considering this case, import into it all that has been said in olden days, from Lord Coke, which will be found collected in Kyd's Book on Corporations, and in other books of that kind, where bye-laws are made to restrain the liberty of the subject in small local matters, and which help to fill the coffers of the corporation; whereas, in the present case, the bye-law is made in pursuance of an Act of Parliament, which is one of a series of Acts which it was found necessary to pass, in order to give to certain local bodies authority, and power to preserve the health of the inhabitants in the different districts over which these bodies are constituted the governing sanitary authorities. That being so, we find that the Public Health Act, having been passed in 1848, was followed by the Local Government Act of 1858, and it is only by taking the clauses of those two Acts together that we can find what is the full scope and intention of the Legislature with regard to the healthy character and proper construction of houses in the district over which the different local boards have jurisdiction. Now, the bye-laws in question were made by the Local Government Act 1858, and these very bye-laws set forth what are the

powers, and the only powers, under which such bye-laws have been made. These are contained in the different sub-sections to sect. 34 of the Local Government Act 1858, the first of which is in these words: "with respect to the level, width, and construction of new streets and provisions for the sewerage thereof;" next, "with respect to the structure of walls of new buildings for securing stability and the prevention of fires;" thirdly, "with respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings." Then with respect to drainage and other matters such as water-closets, privies, and so forth; and then comes this general provision: "and they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws." It is quite clear that the local authority in the present case, acting on the statute in making their bye-laws, assumed two things: one is that, when they made their bye-laws with reference to "the level, width, and construction of new streets," that did not merely mean that they were limited to the mode in which a new road should be laid down, showing the width of the road, the proper course of the roadway, the paths on either side, the drains beneath, and matters of that kind; but they clearly supposed that they were entitled, when dealing with the words "new streets," to take the popular and wide sense of the word "street," as meaning not only a roadway over which passengers and vehicles might pass, but also that which, in popular language, is part of the street, namely, the houses on both sides. It certainly seems to me that there is a great deal to be said for that construction as a matter of ordinary experience and common sense; because otherwise, as was said in the course of the argument, a street might be limited to 40ft. in width, and the buildings which are at either side of that street might be of such a height and size as to make it, as regards proportion, a worse street than the streets in London were before the Great Fire. That cannot be the intention of the Act of Parliament, and so far as one can gather, it seems to me that they used those words properly when they used the words "new streets." There are a great many cases of this kind, principally under the Metropolitan Buildings Acts. I happen to have been engaged in a great many of them myself, but we are here not without authority, for we have the highest authority, viz., that of the House of Lords in *Galloway v. The Mayor, &c., of London* (*ubi sup.*), where the Lord Chancellor, on motion for judgment, put that construction on those words which I have adopted in the present case. But then there is another and a very material matter, which arises with regard to the houses themselves; and there again the local board assumed that they were entitled to deal with the construction of the houses, not merely with regard to the actual construction when they are finished or partly finished, but that they were entitled to deal with that portion of the Local Government Act 1858 which requires that any person who constructs buildings must deposit plans

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and sections—that is to say, the local board requires any persons constructing a building to deposit plans and sections, and that, as to that, the local board have the power of making bye-laws. Now, that is a matter, no doubt, very different from the actual construction of the building itself. All the arguments used on the part of the plaintiff are very clear, very legal, and very consistent. It is one thing to say you must build a building, a certain structure, but another thing to say, as a condition precedent to that, you must deposit certain plans and give a certain section. But when we come to look at the matter, it is most reasonable to say you must, before you begin or commence your building, deposit a plan and section. It is a simple matter, known to all architects and builders, and far more reasonable to ask for that deposit to be made, than to say that the building should be built, and then afterwards, if it did not fall in with certain regulations *a priori*, that it should then be pulled down and destroyed. It is quite true that in many cases it shifts the onus on to the builder, and in many cases it may be that the local board may not be able to justify their acts with regard to the structural character of the building, because in some respects it may be that they cannot define exactly whether they are things that can be made good or not. But the decision in point of law is a clear one when they assert, “You have not deposited notices of plans and sections which ought to have been deposited by you who intend to construct certain buildings.” Therefore it seems to me, as far as the reason and spirit of the Act of Parliament are concerned, to come within it; but then, does it come within the strict words? I listened with very great attention to the argument of Mr. Petheram, who said that the whole of it is to be governed by these words, “And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings,” and so on. But it does not seem to my mind that that is so at all, because the power is really and substantially a power to make bye-laws, and having made them, this section says they may make bye-laws “as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws.” Therefore it seems to me that the power exists of making a bye-law which enables them to “pull down any work begun or done in contravention of the bye-laws,” whether that contravention be a building built contrary to the structural requirements, or whether built without a proper plan having been first deposited. Practically it is for the relief of the builder, because a man would have notice, “You are building when you ought not to be, you have not deposited your plans;” and then probably the building would be pulled down at an earlier period than it would otherwise be. Well, then, in accordance with that, the 37th bye-law is made, and, for the reason which I have given, that is a perfectly good bye-law, and that which was done by the corporation in the present instance was done properly, and was within the powers given to them by their bye-laws. I will only say one word more with regard to the construction of the bye-law. It seems to me that we should deal with this case on a wrong principle if we dealt with it differently from the way

in which we should deal with the construction of a conveyance or an Act of Parliament. This is a case in which we should look to the general spirit and intention of the bye-laws, in the same way as we should look at the general spirit of an Act of Parliament, in both cases giving to it its proper and reasonable effect, and not being guided by any arguments of hardship on the one side or the other, and trying to give the words used a meaning and intention according to the spirit which appears in other parts of the bye-laws, and in the statute on which they are founded. Now, several authorities were cited in the course of the argument. I do not know that they afford us very much assistance, but it is only right perhaps that we should allude to them. With regard to the cases of *Young v. Edwards* (*ubi sup.*) and *Hattersley v. Burr* (*ubi sup.*) I do not see that they at all hamper us or give us any difficulty in the conclusion at which we have arrived; but if they did we have the late case of *Hall v. Nixon* (*ubi sup.*), in the Queen’s Bench, where the matter was very fully considered, and I would adopt every word used by the learned judges in giving judgment in that case. It seems to me, therefore, that this 37th bye-law is properly made, and within the power of the authority that made it, and that in the present case, in what the board did, so far as they were exercising their power with reasonable prudence, caution, and care, they were exercising it legally and within that power given to them. As regards the other point as to the new trial, as I have before said, it will be dealt with hereafter; but with respect to the validity of the bye-law, as both my brother Huddleston and myself are clear on the subject, we thought it far better that we should express our opinion upon that point at once, and we will deal with the other matters when we have consulted Lord Blackburn.

HUDDLESTON, B.—The 8th paragraph of the statement of defence justifies the act done by the defendants on the ground that, within forty-eight hours before the removal of the houses, the plaintiff did not show good cause “why the houses should not be pulled down, and the defendant accordingly, in pursuance of bye-law 37, and of their said notice, and after the expiration of the said forty-eight hours, namely on the 9th Dec. 1875, caused the said houses to be pulled down, as they lawfully might.” They “deny that in so doing any unnecessary violence was used, or that the said materials were rendered almost valueless as is alleged.” That means, “what we did we did adopting the formalities which are required under the 37th bye-law, and by virtue of that bye-law, and we did no more damage than was necessary.” With reference to the latter part of that statement of defence, it is said that the jury have found the plaintiff entitled to 18*l.* damages, and a new trial is asked for by the defendants on the ground that that finding is against the weight of evidence. I agree with my brother Pollock that we must consult my Lord Blackburn on this point before we give any opinion as to how we shall deal with that portion of the case, either by directing the verdict to stand, saying what shall be done with reference to costs, or by directing a new trial generally. But, of course, the main and real question is as to the power to make this 37th bye-law. It is said by the 6th paragraph of the defence that the houses

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were built in contravention of the bye-laws, viz., the 3rd and the 32nd: of the 3rd bye-law which provides that "no building shall be erected by the side of any new street or proposed new street, or to which any new street will form the only carriage approach, until such street has been constructed to the approval of the local board," and of the 32nd bye-law, for not having delivered the notices which were thereby required to be delivered. Now that, of course, involves the proposition or question, had the Corporation of Portsmouth power to make these bye-laws? Now the only power which they have to make bye-laws is by virtue, as they themselves say, of the Public Health Act 1848, the Local Government Act 1858, and the Local Government Supplemental Act 1864, No. 2., and the section that applies and gives them the power particularly is sect. 34 of the Local Government Act 1858. Now it is contended on the part of the plaintiff that the powers there given are only with respect to roadways and streets and the external construction of the buildings, and a sufficient space round the buildings and the works underground, and that they have no reference to the construction of the buildings themselves, and that therefore the 3rd bye-law, which deals with the erection of buildings in the streets, and the 32nd bye-law, which deals with the plans with reference to those buildings, are *ultra vires*. Now, the whole of the question turns on what interpretation we shall give to the words "new street" in the 34th section of the Local Management Act 1858, and the bye-law of the defendants. Is the word "street" there to be confined to the narrow interpretation of "roadway" merely; or are we to take it in the popular and full meaning of the word, namely, "street" consisting of the "roadway" and the houses on each side of the street? And we must look to the interpretation clause, and see whether that will assist us; there is no such clause in the Local Government Act 1858, as applicable to "streets;" but the Public Health Act 1848, is incorporated with the Local Government Act 1858, and there is an interpretation clause in that earlier Act which says, the word "street" shall apply to and include "any highway (not being a turnpike road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, or passage within the limits of any district." What is the meaning of "shall apply to and include" unless "street" means something more than the roadway—that is, that "street" shall mean the street with the houses, and shall include the roadway? And there is authority that the word "street" in Acts of Parliament analogous to this are indeed used in that sense, and in a case with reference to this very Act of Parliament, Pollock, C.B. said, "the word 'street' includes the houses on each side of the road." That really seems the reasonable and proper interpretation of the word "street." The object of this Public Health Act is to secure not only proper roads, proper ventilation, and proper means of transit through the street, but also the comfort, and also I have no doubt the comeliness, of the buildings and of the town itself; and using the word "street" in the ordinary, I do not say popular sense, but strict natural interpretation of the Act itself, it provides by the first sub-section that the board may make

bye-laws with reference to "the level, and the width, and the construction of the new streets;" that is, not merely the construction of the roadway, but the construction of the roadway *plus* the buildings on each side. They would therefore have the power to make bye-laws, with reference, amongst other things, to the time when the buildings should be erected, and the character of them, and also with reference to the structure of the walls of the building, and to the sufficiency of the space about the buildings, so that a free circulation of air might be secured, and also, which no doubt is most important, the proper drainage of water-closets, and privies, and so on. Having that power, "they may further provide for the observance of the same by enacting therein," that is in the bye-law, "such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings;" and the words used are worthy of observation: they have power to require "notice as to the plans and sections"—now "plans and sections" would apply more naturally to the "buildings" than to the construction of the roadway—"as to plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws." The local board have the power to require notices to be given, and in default of such notices being given, to pull down the work begun or done in contravention of these bye-laws; and I may add that there is a proviso in the 34th section of the Local Management Act 1858, that "no such bye-law shall affect any building erected before the date of the constitution of the district." One would thence infer that the bye-laws may deal with all buildings built after that date; and if that interpretation be right, the corporation clearly has power to make the 3rd bye-law, which provides that "no building shall be erected by the side of any new street, or proposed new street, or to which any new street will form the only carriage approach, until such street has been constructed to the approval of the local board;" and to make the 32nd bye-law, which requires the deposit of the plans, and to provide for these plans being carried out, providing penalties in the 37th bye-law, and availing themselves of the 34th section to direct the houses to be pulled down where built in contravention of any of the bye-laws, and that the corporation have shown, under the 6th, 7th, and 8th paragraphs of their statement of defence, a justification for the acts done, with the exception of that which they did with more violence than was necessary. That matter we will decide hereafter when we have heard Lord Blackburn's view of the evidence.

June 7.—The COURT intimated that they had communicated with Lord Blackburn, and that he was of opinion, in which the court concurred, that there ought to be a new trial unless the plaintiff consented to accept the offer which had been made by the defendants that the verdict should stand for 18l. without costs.

Judgment for the defendants on the demurrer, and the plaintiff's motion to sign judgment, and rule absolute for new trial, unless the plaintiff consents to accept the 18l. without costs.

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RAWLENCE AND OTHERS v. THE GUARDIANS OF HURSLEY UNION.

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Solicitors for the plaintiff, *Saunders, Hawkford, and Bennett.*

Solicitors for the defendants, *Gregory, Rowcliffe, Rowcliffe, and Rawle*, agents for *Howard*, Town Clerk, Portsmouth.

Monday, Nov. 26.

(Before KELLY, C.B. and CLEASBY, B.)

RAWLENCE AND OTHERS v. THE GUARDIANS OF HURSLEY UNION. (a)

Poor Rate Assessment Act—Valuation list—Particulars of each hereditament—Sufficiency of particulars—27 & 28 Vict. c. 39, s. 4—37 & 38 Vict., c. 54.

Valuers employed by an assessment committee under the 27 & 28 Vict. c. 39, s. 4, to value a farm, furnished a valuation list giving the estimated acreage of each of the several fields comprising the farm, but not the gross estimated rental or the rateable value of each or any of the fields separately, but giving these two last-named amounts in lump sums in the proper columns at the end of the several items comprising the entire farm.

Held, that such a list was sufficient, and in conformity with the requirements of the Act of Parliament, and that it was unnecessary to give the value of each individual field of the farm separately.

SPECIAL CASE.

1. This is an action to recover the sum of 350*l.* 1*s.* 2*d.* for work done by the plaintiffs, who are land surveyors and valuers at Salisbury, for the defendants, at their request, in valuing the rateable hereditaments (except railways) comprised in the Hursley Unions, in the county of Hants, and of which sum full particulars have been submitted by the plaintiffs to the defendants.

2. In the month of March 1875, it having become necessary, under 37 & 38 Vict. c. 54, and the other Acts in force relating to the relief of the poor, that a new assessment and valuation list should be made of the Hursley Union, the defendants, who were the assessment committee of the said union, employed the plaintiffs to make

such an assessment and valuation list of the said union at an agreed scale of remuneration.

3. The plaintiffs entered upon the work of the said assessment and valuation, and completed it upon the 27th Dec. 1875, on which day they sent their valuation list to the defendants.

4. The said valuation list showed such particulars of the several hereditaments and occupations comprised within the said union and the amounts at which the same were valued respectively, as are shown by the portion of such valuation list relating to the parish of Farley Chamberlayne, and which is set out in the appendix herewith, which is a fair sample of the whole.

5. The defendants received the said valuation list, and made use of the same by making the then rate of the said union on the basis thereof; but this is not to be taken, for the purposes of this case, as an admission that the said valuation list was such as the defendants were entitled to have.

6. The plaintiffs affirm, and the defendants deny, that the plaintiff's valuation list, delivered to defendants, sufficiently showed the particulars of the said hereditaments and occupations comprised in the said union, and the amounts at which the plaintiffs valued the same respectively, within the meaning of the Union Assessment Act 1864 (27 & 28 Vict. c. 39), s. 4.

7. The question for the opinion of the court is, whether the valuation list furnished by plaintiffs to defendants, as judged by the sample set out in the schedule, is a sufficient valuation under the provisions of 27 & 28 Vict. c. 39, s. 4, or whether the defendants are entitled to have a separate valuation of each field in the said several occupations.

8. If the court be of opinion that the valuation list as delivered was sufficient, as aforesaid, plaintiffs are to have judgment for 350*l.* 1*s.* 2*d.* and costs.

9. If the court be of opinion that the valuation list as delivered was not sufficient, then plaintiffs are to furnish defendants with a field valuation of the said union, and are then to be paid by defendants the sum of 350*l.* 1*s.* 2*d.*; the defendants' costs being paid by plaintiffs.

APPENDIX TO CASE.

Valuation List for the Parish of Farley Chamberlayne, in the County of Hants.

No. on Ordinance Map.	Name of Occupier.	Name of Owner.	Description of Property.	Name or Situation of Property.	Estimated extent.	Gross estimated Rental.	Rateable value.
58	Bath, William	Woodham, Rev. T. F.	House, garden, stable, and pasture	Farley Church	A. R. P. 0 3 25	£ s. d. 6 0 0	£ s. d. 4 10 0
Pt. 10	Brown James	Ditto	Cottage and garden	Parnholt Wood	0 1 32	2 10 0	1 17 6
Pt. 138	Blacklock, William	Godwin, Thos. (late)	Tenement and garden	Slackstead	—	3 0 0	2 5 0
107	Bodwin, Wm. John	Ditto	Wood	Ditto	7 3 11		
108	Ditto	Ditto	Ditto	Ditto	1 1 34		
109	Ditto	Ditto	Arable	Ditto	140 2 29		
110	Ditto	Ditto	Wood	Ditto	8 3 13		

The above portion of the valuation list was continued in the same manner, and contained eighteen other items of property described as in the occu-

pation of "the said William John Bodwin," and as owned by "the said Thomas Godwin (late)," and as being of a certain description, and as situated in "Slackstead," and as being severally of a certain estimated extent. Neither the "gross estimated

(a) Reported by H. LUNN and R. RINGWOOD, Esqs., Barristers-at-Law.

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rental" nor the "rateable value" of any of the several parcels or portions was, however, given; but at the end the acreage of the several items was added together, making a total of 411a. 3r. 16p., and their aggregated gross estimated rental was put down as 476*l.*, and their aggregated rateable value as 428*l.* 8s.

The 27 & 28 Vict. c. 39, s. 4 (under which the valuers acted), enacts that, "Where a valuer is appointed by the assessment committee, he shall make his valuation in writing, showing the particulars of the several hereditaments comprised therein, and the amounts at which he has valued the same respectively, and shall sign such valuation, which shall be open to inspection in like manner and with the same incidents with respect to the taking of copies and extracts as the minute books of the committee."

Charles, Q.C. (with whom was *Bromley*), for the plaintiffs, was contending that it was sufficient within the requirement of the statute that the valuers should, as they had done in this case, value the "hereditament" of a ratepayer as a whole, and that it was not necessary that each particular or individual field or portion of the holding or "hereditament" should be valued separately, when he was stopped by the Court, who called on

Lumley Smith (with him was *Meadows White, Q.C.*), for the defendants.—The valuers ought to have put a distinct and separate value upon each individual parcel of which they have given in other respects a full description. A "hereditament" does not by any means necessarily mean the whole of a farm. The plaintiffs have themselves shown what particulars the Act in their opinion requires, by cutting a farm up into several fields or portions, and giving the description and acreage of each separate field or portion, and aggregating the acreage of the several portions into one whole sum at the end, and they should, in order to have carried out the intention and requirements of the Act of Parliament, have gone on and added to the description and acreage of each individual field, its gross estimated rental, and the rateable value, and have added the several items of value together at the end. This however they did not do. The valuation list would be required for future rating purposes, and would be, if made as the defendants contend it ought to have been, most useful on such occasions, and especially if a farm were to be subsequently divided into two or more holdings amongst several persons. He referred also to the following statutes: 25 & 26 Vict. c. 103, s. 28; 37 & 38 Vict. c. 54.

KELLY, C.B.—I think the valuation list made by the plaintiffs is in strict conformity with the Act of Parliament, and complies with the requirements of the 4th section, by which the valuer is required to give the particulars of the several hereditaments, and the amount at which they have been valued for rating purposes. This the valuers have done here, for each farm is one separate and complete "hereditament," and it cannot, I think, be successfully contended that the value of each separate field of a farm must be given. It was said that a more minute valuation would be of advantage in case a farm were subsequently divided, and there is no doubt that that might be of some use; but, on the other hand, it is a mere speculation that any particular farm would be afterwards divided; and

further, a field might be of one value in 1877, and of a very different value three years hence. It is infinitely more convenient that the valuation list should be in strict conformity with the statute, that each hereditament—that is, each farm—should be valued, and not a portion of it. No doubt a field might be considered a "hereditament," but it is unnecessary and inconvenient, and going, I think, beyond the statutory requirements to give these minute descriptions of separate portions of the same farm. On these grounds I think the plaintiffs are entitled to the judgment of the court in their favour.

CLEASBY, B.—I am of the same opinion. The assessment in one parish may be fifty times as large as that in another. If a parish were of great extent the size of the valuation list would be enormous, supposing a value were to be put upon each particular field. Such an inconvenient practice should not be adopted unless it is rendered incumbent upon the valuer so to do by the Act of Parliament. But, in my opinion, the Act does not require it, and when the section says that the list is to "show the particulars of the several hereditaments," it does not mean every small field comprising the farm, but rather each "hereditament" or farm in particular.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Gregory, Rowcliffe, Rowcliffe, and Rawle*, agents for *Whitman*, Salisbury.

Solicitors for the defendants, *Clarks, Rawlins, and Clarke*.

Friday, Nov. 23.

(Before *KELLY, C.B.* and *CLEASBY, B.*)

YOUNG (app.) v. COOK (resp.) (a)

APPEAL FROM INFERIOR COURT.

Inland revenue—Jeweller—Dealer in gold and silver—Goldsmiths' licence—Articles alleged to be gold or silver—Higher or lower scale—Inland Revenue Act (30 & 31 Vict. c. 90), ss. 1, 3, 5—meaning of word "gold" in sects. 1 & 5.

*By the Inland Revenue Act (30 & 31 Vict. c. 90), s. 1, persons selling articles "composed wholly or in part of gold" are charged, where the gold is of the weight of 2oz. or upwards, the sum of 5*l.* 15s. for a licence, and when under 2oz. in weight and above 2dwts. the sum of 2*l.* 6s.; and by sect. 5 articles "alleged to be composed wholly or in part of gold" are for the purposes of the Act deemed to be composed of gold as alleged, and if upon "the hearing of any information for any offence against the Act any question shall arise touching the quantity of gold in any article, the proof of such quantity shall lie upon the defendant."*

Held (by Kelly, C.B. and Cleasby, B.), on the construction of the above sections, first, that the word "gold" in sects. 1 and 5 of the Inland Revenue Act (30 & 31 Vict. c. 90) did not relate to or mean pure gold as obtained by alchemists or chemical analysts, but the ordinary "gold" of commerce, using the word as understood in common parlance; and secondly, that a goldsmith selling a chain as and for "a gold chain" weighing more than 2oz. must hold a licence on the higher scale of duty entitling him to trade in articles "composed wholly or in part of gold where the gold

(a) Reported by *HENRY LUSH and B. RUSWOOD, Esqrs.*, Barristers-at-Law

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shall be of the weight of 2oz. or upwards," and is liable to the penalty of 50l. imposed by the 3rd section for selling the chain in question whilst holding a licence on the lower scale of duty only, notwithstanding proof was given by him that the chain contained less than 2oz. of pure gold.

CASE stated by me, the undersigned metropolitan police magistrate sitting at Stepney, under 20 & 21 Vict. c. 43, upon the application of the appellant:

1. Upon the hearing of an application by the appellant against the respondent, under 30 & 31 Vict. c. 90, s. 3 that the respondent did, on 14th Dec. 1876, at Stepney, deal in plate without a proper licence in that behalf . . . whereby the respondent has forfeited 50l., I acquitted the respondent by dismissing the information.

2. The following facts were either found before me or admitted by both parties:

3. That the appellant was an officer of excise, and the said information was commenced and prosecuted by order of the Commissioners of Inland Revenue.

That on the 14th Dec. the appellant went to the shop of the respondent, who carried on business as a jeweller, at 565, Commercial-road, Stepney, where the appellant bought a guard chain, which was offered for sale and sold to him as a gold chain, for 14l., weighing 2oz. 11dwt. 10 grains, respondent having in force a licence to deal in plate, taken out by him under the said Act (30 & 31 Vict. c. 90), in respect of his said shop, for which he paid 2l. 6s.

4. The amount of pure gold contained in the said chain was less than 2oz.

5. On the part of the appellant, it was contended that, inasmuch as the chain in question, as offered for sale and sold, was alleged to be a gold chain, it must, under sect. 5 of the said Act, be taken to be composed of gold as alleged; that no question could arise under the said section touching the quantity of gold contained in an article alleged to be gold; and that, as the weight of the gold chain was proved to be 2oz. or upwards, the sale thereof was not authorised by the licence granted to the respondent at the lower rate of duty; and that the respondent, not having in force a licence at the higher rate of duty, had, by the sale of the said chain, incurred the penalty of 50l. named in the 3rd section of the Act.

6. On the part of the respondent it was contended that, as the article in question contained less than 2oz. of gold, he was properly licensed.

7. I, being of opinion that the respondent was right in his contention, dismissed the information.

8. The question of law upon which the case is stated for the opinion of the court therefore is, whether, under the said Act, the actual weight of the article, or the weight of the pure gold contained therein, is to be taken as the proper test for assessing the licence duty.

The points raised by the appellant were, first, that the chain was alleged to be a gold chain, and must be taken to be composed of gold under 30 & 31 Vict. c. 90, s. 5; and, secondly, that the weight of the chain was proved to be 2oz. or upwards, and the sale thereof was not authorised by the licence granted to the respondent at the lower rate of duty.

The respondent's points were, first, that the fact that the chain was sold as a gold chain did not estop the respondent from showing the quan-

tity of gold actually contained in it; and, secondly, that the quantity of gold contained in the chain being less than 2oz., the respondent was authorised to sell it under the licence held by him.

The following sections are material to this report. 30 & 31 Vict. c. 90, s. 1, enacts (*inter alia*);

In lieu of the duties now payable in Great Britain on licences to persons trading in, vending, or selling gold or silver plate, and in Ireland on licences to persons to sell or make gold or silver plate, there shall from and after the 5th July 1867 be charged and paid the following excise duties on licences to deal in plate, to be taken out yearly in the United Kingdom by the persons hereinafter mentioned (that is to say): by every person who shall trade in or sell any article composed wholly or in part of gold or silver, in respect of every house, shop, or place in which his trade or business shall be carried on, where the gold shall be above 2dwts. and under 2oz. in weight, or the silver above 5dwts. and under 30oz. in weight, the sum of two pounds six shillings.

Where the gold shall be of the weight of 2oz. or upwards, or the silver of the weight of 30oz. or upwards, the sum of five pounds fifteen shillings.

Sect. 3:

Every person who shall do any act or carry on any trade or business for which a licence to deal in plate is required by this Act without having in force a proper licence authorising him so to do, shall for every offence forfeit the sum of fifty pounds; and in any proceeding for the recovery of such penalty it shall be sufficient to allege that the defendant did deal in plate without a proper licence in that behalf, and it shall not be necessary further or otherwise to describe the offence.

Sect. 5:

All articles sold or offered for sale or taken in pawn, or delivered out of pawn, and alleged to be composed wholly or in part of gold or silver, shall, for the purposes of this Act, be deemed and taken to be composed of gold and silver respectively as alleged; and if upon the hearing of any information for any offence against the Act, any question shall arise touching the quantity of gold or silver contained in any article, the proof of such quantity shall lie upon the defendant.

O. Bowen for the appellant.—Though the amount of pure gold was under 2oz., the chain weighed over 2oz., and the respondent should have obtained a licence on the higher scale. If an article is sold as gold, it must, for the purposes of this Act, be taken to be gold, and the respondent having sold the chain in question, which exceeded 2oz. in weight, as and for a gold chain, he is now bound thereby, and is estopped from showing the precise quantity of pure gold actually contained in it so as to escape the penalty for not having obtained the licence on the higher scale, which the appellant contends the respondent ought to have obtained. The word "alleged" in sect. 5 refers to an allegation made at the time of sale. The latter part of the same section throws upon the seller the onus of showing the quantity of gold in the particular article. He also referred to the following Acts:

31 Geo. 2, c. 32, s. 6; 32 Geo. 2, c. 24;

43 Geo. 3, c. 69; 6 Geo. 4, c. 118.

Anstie for the respondent, *contra*.—The word "gold" in the section in question means *pure* gold, and not a mixture of gold and alloy. The pure gold in the chain sold did not amount to 2oz., and therefore a licence on the lower scale was sufficient. The chain would be, and must be assumed to have been, Hall marked, and there would be no difficulty in estimating the exact amount of pure gold in it. Since the 17 & 18 Vict. c. 96, gold wares may be wrought of a lower standard than was formerly allowed, provided such standard is not less than one-third in the whole of fine gold; and by the regulations that have been issued in pursuance of the said Act, gold articles may be made

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and Hall marked containing 22, 18, 15, or 9 carat gold, out of a total of 24. In addition to the statutes already mentioned he referred to the following:

12 Geo. 2, c. 26; 38 Geo. 3, c. 69;
53 Geo. 3, c. 80; 59 Geo. 3, c. 32,

and contended that, as this was a question arising on a statute imposing a tax upon the subject, the construction to be put upon it, if there was the least doubt upon the point, should be in favour of the subject and against the Crown.

Bowen was not called on to reply.

KELLY, C.B.—In this case I think that the respondent is subject to the higher duty on the licence under which he has carried on his business. The respondent is a jeweller, dealing amongst other articles in gold chains, and on the day in question the appellant went to the respondent's shop and asked for a gold chain, and a chain was accordingly produced and described by the respondent as a gold chain, and the price asked for it being paid, the chain was delivered to the appellant as a gold chain. The weight of the chain, or in other words, the quantity of gold in it, was upwards of 2oz. in weight. If therefore the respondent then dealt in an article of gold exceeding in weight or containing more than 2oz. of gold, he is liable to the higher duty on his licence, and the question is whether, it appearing beyond all doubt that the chain, if analysed, would be found to contain less than 2oz. of pure gold, the respondent is liable to the higher duty, or whether the licence on the lower scale applicable to the dealing in gold articles where the gold contained in them is less in quantity than 2oz. is a sufficient licence. The question arises entirely on the 5th section of the Act, taken together with the 1st section. The first part of the 5th section provides that "all articles sold or offered for sale . . . and alleged to be composed wholly or in part of gold or silver, shall, for the purposes of this Act, be deemed to be made and taken to be composed of gold or silver respectively as alleged." Now what is the meaning of that word "alleged," which undoubtedly is an unfortunate word, and tends rather to mislead? It is not pretended that when the purchase and sale took place the respondent, on handing the chain to the purchaser said, "I allege this to be gold;" but it must be taken to mean (if it has any meaning at all in this important provision in the Act) what would have been more properly expressed by the word "described." As where, upon the purchase or sale of an article, the goldsmith, as between himself and his customer, describes or represents the article which he is selling to be gold, and if he does that, the article must be taken as against him to be gold. Referring to the article in question here, it was alleged—or, I would rather say, represented or described—by the respondent to be a "gold chain," and therefore it must be taken to be composed of gold, and if composed of gold, as there was more than 2oz. of gold in it, he is liable to the higher licence. That undoubtedly is the effect of the Act of Parliament, if we go no further than that particular provision. But the learned counsel for the respondent has referred to a separate and independent provision in the latter part of the same section that, "If, on the hearing of any information

for any offence against this Act, any question shall arise touching the quantity of gold or silver contained in any article, the proof of such quantity shall lie upon the defendant;" and he has contended, with reference to what is contained in the 1st section of the Act, that that latter provision means the quantity of pure gold, and that this case comes within that provision, and that the question arose in this case whether the quantity of pure gold contained in the chain was or was not less than 2oz., and he referred to the 1st section of the Act as supporting that view of the matter. [His Lordship here read sect. 1, and then proceeded as follows:] It is said that the words, "any article composed wholly or in part of gold," in the 1st and 5th sections, really mean "any article composed wholly or in part of pure gold only," and that the other part may be of alloy. But that is not so. The meaning is quite obvious. Every article of commerce which is bought or sold in a goldsmith's or jeweller's shop, whether it is represented or sold as gold or silver, is known to be composed in part only of pure gold or silver, and in part of alloy. Let me take, for example, some article of silver, a metal which is more frequently dealt in probably than gold. No article is more common in a gold and silversmith's or jeweller's shop than silver candlesticks, and it often happens that besides the silver candlesticks and forming part of them, there are a pair of branches for extra lights, which are generally plated and not silver, and thus there is an article not wholly, but in part, silver. Now if a customer went into the shop and said, "I wish to buy a pair of silver candlesticks with the branches," and they were represented as being all of silver, I think that would be an allegation that they were all of silver within the meaning of the 5th section; and although it might turn out that in fact the branches were plated only, still the seller would be bound by what he had alleged or described the article to be, and would be liable to the higher duty if the whole article together amounted to more than 2oz. in weight. But if the tradesman had said, "The candlesticks are of silver, but the branches are plated," and on the sale of the article any question afterwards arose what amount of duty the seller was liable to, then, under the latter part of the 5th section, the proof of the quantity of silver contained in the candlesticks would lie upon him, and if he could show that though it was true the candlesticks were of silver, yet that the quantity of silver contained in them did not exceed 2oz. in weight, he would be liable to the lesser scale of duty only. The meaning is not that the use of the word "gold" or of the word "silver" in any part of the Act means pure gold or pure silver, but merely what is ordinarily called, or what is alleged by the seller to be, gold or silver; and the evidence in the case, whenever a question arises, is not as to what is pure gold or pure silver, but what in common parlance and commercially speaking is called gold or silver. Under these circumstances, therefore, in the case before us no question, I think, arises as to how much pure gold there is in the chain in question. It is merely what is the weight of gold in the article, using the word gold in its ordinary sense and acceptation in common parlance. I am of opinion, therefore, that we must determine that the defendant or the respondent in this case was

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liable to the higher amount of duty, and that the information must be corrected for that purpose.

CLARKE, B.—I am clearly of the same opinion. This Act, or rather the part of it referred to, relates to persons carrying on a trade in gold and silver plate, and to the granting to such persons licences for carrying on such trade, and to the imposition of certain duties payable by them for such licences. It relates, therefore, to persons dealing in gold and silver plate, in the ordinary sense and meaning of those words. It has no relation to alchemists or chemical analysts who are engaged in procuring *pure* gold or silver from the ore, or to any persons of that description. Now, the first section of the Act, after the enacting part of it, provides with regard to persons dealing in gold plate, which includes plate composed wholly or in part of gold, "that a duty is to be paid by such persons for a licence amounting to 5*l.* 15*s.* if the gold is of the weight of 20*z.* or upwards. Now, what is the meaning of the words "gold of the weight of 20*z.* or upwards?" Undoubtedly I think that, taken by themselves, these words signify not *pure* gold, which is commercially unknown, but gold with whatever alloy there is in it, whether it be 22, 18, 15, or 9 carat gold, or of any other standard. But the 5th section is introduced for the purpose of removing the difficulty of proof that might exist as to an article which was of gold "wholly or in part." As the Lord Chief Baron has said, if the article is described as consisting wholly or in part of gold, it is to be taken to be gold for the purposes of this Act as alleged. No doubt the higher duty in an article sold as gold is imposed upon persons dealing in that article, where it contains more than 20*z.* Now that was not, and could not be, disputed by the learned counsel for the defendant, reading the Act of Parliament only up to the middle of the 5th section; but he said that the necessary effect of the subsequent part of the 5th section was to give a different meaning, and to show that in estimating the quantity of gold for the purposes of this Act, which deals entirely with a commercial matter, the quantity of *pure* gold, difficult as it is to get at must be taken. Nothing could be more inconvenient, and it would be next to impossible, and would lead to the pulling to pieces and destroying of almost every manufactured article to attempt to get at it; but still those words cannot be rejected if any effect whatever can be given to them by reading the word "gold" in that particular clause to mean anything more than *pure* gold. If an article composed partly of gold and partly of silver—as for instance a silver racing cup with a gold horse on the top—is sold there is a duty payable in respect of the gold and in respect of the silver; but upon coming to consider whether there are 20*z.* of gold or not in it, how is that to be ascertained? The Revenue officers insist that there is more than 20*z.* of gold in the horse at the top, and the tradesman says there is less. You cannot break the cup to pieces, and weigh and analyse the particular parts separately; and therefore it is provided that upon the seller, who generally will have the means of knowing and proving the amount of gold in the article, shall be the burden of proof. That seems to me to be pretty clearly the sort of case to which that part of the section applies, where the article is alleged to be partly of gold, and the

question is, how much? It is not necessary for the Crown to give any evidence of that. Being partly of gold, it may be taken to be of more than 20*z.* for the purposes of the Act, unless the contrary is shown by the tradesman. I do not find the difficulty which the learned counsel so strongly insisted upon as arising on the question which he raised entirely upon that part of the section; and unless there be that difficulty, I think it is as clear as any case can be. I agree, therefore, that the case must be sent back, with the intimation that the respondent must pay the higher duty.

Judgment for the appellant.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Layton and Jaques.*

CROWN CASES RESERVED.

Saturday, Nov. 17.

(Before KELLY, C.B., FIELD, J., HUDDLESTON, B., LINDLEY and MANIST, JJ.)

REG. v. ROGERS. (a)

Jurisdiction—Venue—Embezzlement—Receipt of money in one county—Fraudulent representation of non-receipt made by letter posted to and received in another county.

It was the prisoner's duty as a country traveller to collect moneys and remit them at once to his employers. On the 18th April he received money in county Y.; on the 19th and 20th he wrote to his employers from Y., not mentioning that he had received the money; on the 21st April he wrote to them again from Y., thereby intending them to believe that he had not received the money. The letters were addressed to and received by his employers in county M., and written and posted in county Y.

Held (Huddleston, B. dissentiente), that the prisoner might be tried in county M. for the offence of embezzling the money.

CASE stated for the opinion of this Court by the Assistant Judge of the Middlesex Sessions.

At a general session of the peace for the county of Middlesex held at the Guildhall, Westminster, on the 7th June 1877, the prisoner was tried on an indictment which charged him with having, when he was employed in the capacity of clerk or servant to Middleton Chapman and another, embezzled the sum of 10*l.* 17*s.* 6*d.* received by him on their account.

The prisoner was employed by the prosecutors, who carry on business under the style of Chapman, Son, and Co., at Charterhouse-buildings, London, as their country traveller. It was part of his duty to collect outstanding accounts; and as to all moneys he might receive, to remit them "at once" to his employers in London either by post-office orders or bankers' drafts.

On the 12th April 1877, when he was starting on his first journey, a "list," of which the following is a copy, was handed to him, and he was requested to collect the accounts therein specified:

List of accounts received from customers on account of Chapman, Son and Co., for week ending April 14, 1877, by Mr. E. G. Rogers:

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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	£	s.	d.
(1.) James Wood and Co., York	2	7	6
(2.) T. and H. Chapman, York.....	11	3	6
(3.) Thomas Kidd, Hull	6	18	0
(4.) T. W. Carr, Scarborough	1	3	6

At the foot of this list there was a printed note as follows :

All moneys received as above must be remitted to the firm at once, and this list returned with the balance in hand at the end of each week.

Mr. M. Chapman, one of the prosecutors, drew the prisoner's attention to this note, and desired him under no circumstances to mix up moneys collected from customers with his expenses. Ten pounds were then paid him in advance for his travelling expenses.

On Wednesday, the 18th April, the prisoner, being then at York, received there from Messrs. T. and H. Chapman 10*l.* 17*s.* 6*d.* cash in discharge of the account No. 2 in the above list. He never accounted to his masters for this money, nor informed them that he had received it; and under the present indictment he was charged with having embezzled it.

It appeared that on the same day that he was paid this account he received from the prosecutors a second sum of 10*l.* towards his travelling expenses, and a third sum of 10*l.* was remitted to him for these purposes on the 24th April. On the 19th and 20th April he was at Hull, and while there he wrote three letters to his employers, but he remitted no moneys, and in neither of these letters is there any reference to the account which had been paid to him by Messrs. Chapman, of York. On Saturday, the 21st April, the prisoner was at Doncaster, and there he wrote again to the prosecutors. All these letters were addressed to them at Charterhouse-buildings, in the county of Middlesex, and were there received by them through the post-office.

In his letter from Doncaster of the 21st April, after referring to Kidd's account (No. 3 in the above list), as to which he said Kidd had promised to remit the amount, the prisoner wrote as follows : "I have only two other accounts with which I have been furnished with statements to collect before I arrive at Scarborough, which, as I shall have to go through York, will attend to and remit you in due course."

The above list of accounts being the only statement that had been furnished to him, and the account due from Kidd having been specially mentioned in a former part of this letter, it is obvious that one of the only two other accounts, to which the prisoner here referred was T. and H. Chapman's account (No. 2), which in point of fact he had already received.

Other letters and telegrams passed between the prisoner and the prosecutors, to which it is unnecessary for the present purpose to advert.

On the 2nd May the prisoner was arrested at Newcastle. He was brought thence to London, and committed at Bow-street for trial upon the present charge at the Middlesex Sessions. When arrested he had only 4*l.* 6*s.* 7*d.* in money in his possession.

Upon the above facts it was contended, on behalf of the prisoner, that the indictment failed of proof; the embezzlement, if embezzlement there was, having been committed in the county of York, where the money was received and appropriated by him, and not in the county of Middlesex;

it having been the prisoner's duty to account and remit the amount "at once." On the other hand, the counsel for the Crown contended that the venue was well laid in Middlesex, inasmuch as the prisoner's letter of the 21st April amounted virtually to a denial in this county of the receipt of the money, that letter having been addressed by him to Charterhouse-buildings, London, and there received by his employers through the post-office.

Having doubts upon the question thus raised, I refused to direct an acquittal, and said I would reserve the question of venue for the Court of Appeal. I therefore left the question of embezzlement to the jury irrespective of venue; but with regard to the alleged denial in Middlesex, I requested them to say whether in their opinion the prisoner intended that the prosecutors should understand, from the aforesaid statements contained in his said letter of the 21st April, that he had not yet received the amount due from Chapmans of York, and had thus in effect rendered a wilfully false account.

The jury found the prisoner guilty, and answered these questions in the affirmative.

I postponed sentence pending the decision of this case.

The question reserved is whether, under the circumstances above disclosed, the venue was well laid in Middlesex. If the Court should be of opinion that it was, the conviction to stand; if of the contrary opinion, to be quashed.

I beg to refer to *Reg. v. Murdock* (2 Den. C.C. 298, 5 Cox C. C. 360), and to the observations thereupon of Alderson, B., in *Reg. v. Davison* (7 Cox C. C. 159.)

P. H. EDLIN.

No counsel appeared to argue on behalf of the prisoner.

Besley for the prosecution.—The venue was properly laid in the county of Middlesex. As soon as the prisoner received the money charged in the indictment to have been embezzled it became his masters' property, and it was his duty to have remitted it at once to the prosecutors. The letter of the 21st April, as found by the jury, conveyed the false representation that he had not received the money. This letter was addressed to and received by the prosecutors in Middlesex, and the prisoner's false statement therein was, when the letter arrived, a false representation made by the prisoner in Middlesex; that is an act done by him in Middlesex. In *Reg. v. Leech* (7 Cox C. C. 100) a letter containing a false pretence was received by the prosecutor through the post in the borough of C., but it was written and posted out of the borough. In consequence of the letter the prosecutor sent through the post to the writer a post-office order for 2*l.*, which sum was received by the writer out of the borough; and it was held that the writer might be indicted for false pretences in C. In the present case there was no false representation to the prosecutors that the money had not been received until the receipt of the letter of the 21st April in London. The mere posting of the letter was not a false representation to them. The non-delivery of the money over to the master *per se* was not embezzlement. There was no complete embezzlement in Yorkshire. Up to the moment of the false representation made to the prosecutor in

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Middlesex by the letter of the 21st April there was no complete embezzlement.

Res v. Taylor, 3 Bos. & Pul. 506; *Res. & Ry.* 68;
Reg. v. Murdock, 2 Den. 298; 21 L. J. 22, M. C.; 5
 Cox Crim. Cas. 360;
Res v. Hobson, *Res. & Ry.* 56;
Res v. Burdett, 4 B. & Ald. 95.

KELLY, O.B.—I am clearly of opinion that the conviction ought to be affirmed. The prisoner is charged with having, while he was employed in the capacity of clerk or servant to the prosecutors, embezzled the moneys of his employers. It was part of the prisoner's duty to collect outstanding accounts; and as to all moneys he might receive it was clearly his duty to remit them at once to his employers from the place where he received them to his employers in the county of Middlesex. On the 18th April the prisoner received the money embezzled at York, but did not account to his employers for the money, or inform them that he had received it. If the case had stopped there, and there had been no other evidence, or if it had merely appeared that he did not remit the money on the same or next day after he had received it, there would have been no evidence of the crime of embezzlement in Middlesex. But on the 18th April, the day of the receipt (and it does not appear in what form he received the money, or at what time of the day) he received 10*l.* from his employers for travelling expenses. Then on the 19th and 20th April he was at Hull, and while there he wrote two letters to his employers, but he remitted no moneys, and did not refer to the receipt of this money in either of the letters. It may well be that he had no time or means for remitting the money which he had received on the 18th, but it was clearly his duty to have remitted it within a reasonable time after his arrival at Hull. On the 21st April the prisoner wrote again from Doncaster to his employers in London; and although in that letter he does not expressly state that he had not received the money, yet it may fairly be implied from the contents of that letter, that he wished his employers to infer that he had not received it. This letter was received by his employers in Middlesex, and it is the same as if he said to them in Middlesex that he had not received the money. The question is, was the offence of embezzlement complete on the writing of that letter in the county of York. I am not prepared to say that on the writing of that letter there was not evidence of a complete embezzlement, and that the prisoner might not have been indicted for it in Yorkshire; but the fact that the letter was received by the employers in due course of post in Middlesex, and until its delivery the false statement that the money had not been received by the prisoner was never made to or reached them, in my opinion. *Res v. Burdett* and several other cases, shows that the offence of embezzlement was complete in the county of Middlesex. The cases of *Reg. v. Taylor*, and *Reg. v. Murdock*, are authorities in affirmance of the same principle. In *Reg. v. Murdock*, it was the prisoner's duty to go into Derbyshire every Monday and to sell goods and receive money for them there, and to return with it to his master in Nottingham on the Saturday. Having received two sums in Derbyshire, he did not return on the following Saturday, nor at all to his master, but appropriated them to his own

use. About two months afterwards the master met the prisoner in Nottingham, and asked him what he had done with the money. He said he was sorry for what he had done, he had spent it. The court held that that was evidence of an admission of the offence in the county of Nottingham, for which the prisoner could be indicted in the county of Nottingham. Under these circumstances I am of opinion that the conviction should be affirmed.

FIELD, J.—I am also of opinion that this conviction should be affirmed, and I have come to this conclusion on the ground that a material part of the offence was committed in the county of Middlesex. It was not the duty of the prisoner to remit the specific money which he had received, but it was his duty to remit that money or its equivalent at once to his employers, i.e., in the course of the week in which he received it. On the 18th of April the prisoner received the money in question at York, and on the 19th and 20th the prisoner was at Hull, and wrote letters to his employers in London, saying nothing about the receipt of the money at York. And on the 21st, when at Doncaster, he wrote a letter to his employers in London; and, in answer to a question left to them, the jury say that the prisoner intended that the prosecutors should understand from the statements in that letter that he had not then received the amount in question; and the prisoner had thus in effect rendered a wilfully false account. Upon these facts the question arises whether any material part of this offence was committed in the county of Middlesex? Starting with this, that the law presumes every man to be innocent till he is proved to be guilty, I am at a loss to find any evidence of the complete offence of embezzlement in Yorkshire, except the writing and posting there of the letters addressed to the prisoner's employers in Middlesex. On the authority of *Evans v. Nicholson* (45 L. J. 111, C. P., n. 4) which decided that a letter, in which the defendant admitted a debt and promised to pay it, addressed to and received by the plaintiff in the City of London, was evidence of an account stated in the City of London, I think that the letter of the 21st of April addressed to and received by the prosecutors, and intended to act on their minds, in Middlesex, was in effect an act done by the prisoner in Middlesex. The case to my mind is the same as if a man standing in one county with a long spear or a pistol kills a man in the adjoining county, or as if a man with one leg in one county and one in another does a criminal act. In *Res v. Burdett* (4 B. & Ald. 95), which has been followed universally, the libel was contained in a letter written in county L., but received in county M., and it was held that the defendant might be indicted in either county. The case of *Res v. Taylor* (3 Bos. & Pul. 596) also makes the matter very plain. In that case the prosecutor's servant received 10*s.* for him in the county of Surrey, after which the same evening he returned to his master, in the county of Middlesex, who asked him if he had brought the money and the prisoner said he had not, and that it had not been paid to him; and it was held that he was properly indicted in the county of Middlesex. Lord Alvanley, O.J., said: "The receipt of the money was perfectly legal, and there was no evidence that he ever came to the determination

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of appropriating the money to his own use until after he had returned into the county of Middlesex. It was not proved that the money ever was embezzled until the prisoner was in the county of Middlesex. . . . In such a case as this, even if there had been evidence of the prisoner having spent the money in Surrey, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute until he was called upon by his master to account." The act of non-accounting is a continuing act, and extended in this case to the time of the receipt of the prisoner's letter of the 21st April in the county of Middlesex. Manle, J. put the matter in much the same way in *Reg. v. Murdock*. "It appears to me that there was evidence to go to the jury that the offence was committed when the prisoner met his master in Nottingham, and, being asked by him for the money, did not pay over the amount." I think, therefore, that the conviction should be affirmed.

HUDDESTON, B.—I have the misfortune to differ from the other judges of the court. I think that the conviction was not right for the following reasons: First, let us consider what the offence of embezzlement is. It is thus defined by the 24 & 25 Vict. c. 96, s. 68: "Whoever being a clerk or servant, or being employed for the purpose, or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to, or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer." The act of embezzlement is therefore a stealing of the master's money. The evidence of the act of embezzlement is the receipt of the money by the servant, and the appropriation of it to his own use; and the non-accounting or refusal to account for the money received is evidence merely to show that the servant has stolen it. In the present case the facts show that it was the prisoner's duty to have remitted the moneys received at once to his masters. By that I do not understand to remit in the course of the week, but by the next post, or within a reasonable time. The prisoner received the money on the 18th April at York, and he wrote two letters from Hull on the 19th and 20th April, by each of which he ought, in the course of his duty, to have remitted the money, and his not having done so was very good evidence that he had then appropriated to his own use the money which he had received at York on the 18th. Then again, on the 21st April, when at Doncaster, he wrote a letter to his masters, by which, as the jury have found, the prisoner intended his masters to believe that he had not then received that money, and he had thus, in effect, rendered a wilfully false account. That is strong evidence to show that the prisoner had embezzled the money before the 19th or 20th April in Yorkshire; and I think therefore that the stealing of the money took place in Yorkshire, and that there was strong evidence of that on receipt of the letter in Middlesex. The offence was a complete offence in Yorkshire when the false statement in the letter that he had not received it was written. When it reached the masters' mind, in my opinion, is not material. When the letter

containing the false statement was put in the post it could not be recalled, and if the letter had not reached its destination the offence would have still been complete in Yorkshire. So far as regards principle. Then how stands the case as to the authorities? As to the cases of libel and false pretences: in libel the main ingredient is the uttering or publication of the libel, and in *Rees v. Burdett* the libel was published where the letter was received in the county of Middlesex. So, as to the crime of false pretences, the offence is not complete until the false pretences reach or are made to the person intended to be defrauded. As to the cases of embezzlement. In *Rees v. Hobson* the prisoner received the money in Shropshire, his orders being to take it to his master in Staffordshire the same night. He did not take it, but on the following evening told his master in Staffordshire that he had not received it; and the majority of the Judges were of opinion that the indictment might be tried in Shropshire, where the prisoner received the money, "the statute having made the receiving property and embezzling it amount to a larceny, made the offence a felony where the property was first taken, and the offender might therefore be indicted in that or in any other county into which he carried the property." In the case of *Rees v. Taylor* the prisoner, after receiving the money in Surrey, returned to his master in Middlesex, and told him he had not received it, and that was held to be good evidence of the offence having been committed in Middlesex, because there was nothing to show that the prisoner had appropriated the money to his own use in Surrey. Lord Alvanley, C.J., in delivering the judgment of the Court, said: "In the present case no doubt can be entertained. The prisoner, being sent over Blackfriars Bridge into the county of Surrey, there received 10s. for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. It was not proved that the money ever was embezzled until the prisoner was in the county of Middlesex. In cases of this sort the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by showing an intention in the receiver to appropriate the thing to his own use. Thus, if a servant receive a horse for his master, and sell it before he gets out of the county where he first received it, it might be said that he is guilty of the whole offence in the county." In the present case the receipt of the money was in Yorkshire, and the three letters written in Yorkshire were evidence of the prisoner's intention to appropriate the money in Yorkshire, and therefore the whole offence was complete in Yorkshire. Lord Alvanley, C.J. then proceeds: "But, with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars Bridge, it would not neces-

sarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. In this case there was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty, within the statute until he refused to account to his master. We are, therefore, of opinion that the prisoner was properly indicted in the county of Middlesex." Here the first act—the receipt of the money—was in Yorkshire, and all the three letters, evidencing the intent to appropriate the money, were written in Yorkshire. The offence therefore, in my opinion, was complete in Yorkshire. This opinion is supported by the judgment of Maule, J. in *Reg. v. Murdock*. Lord Campbell, C.J. there said: "The jury may have thought that the story which the prisoner told of having spent the money was false, or that he had spent it in the town of Nottingham." Parke, B. said: "I think on consideration that there was evidence for the jury of an embezzlement in Nottingham by reason of the prisoner's not returning and accounting to his master in Nottingham as he ought to have done. The fact of his spending the money is not of itself a sufficient embezzlement." Maule, J. said: "I agree in the conclusion at which my Lord Campbell and my brother Parke have arrived; but I do not agree in the view which the latter has taken of the matter. It appears to me that there was evidence to go to the jury that the offence was committed when the prisoner met his master in Nottingham, and, being asked by him for the money, did not pay over the amount. The mere omission to account, if the prisoner never had returned to the town of Nottingham, would not in my view of the law have rendered him liable to be tried in Nottingham. Suppose that he had gone to Derbyshire and spent the money there, and stayed there six months, and had never returned to Nottingham, but had been afterwards apprehended in Derbyshire, according to my brother Parke's view the prisoner would have been indictable in Nottingham. But I cannot think that that can be the case. The man, when he went into Derbyshire, went upon a lawful errand: it was his duty to receive the money. If he never afterwards returned into Nottingham, he could not, I think, be guilty of embezzlement in Nottingham. The cases which say that non-accounting is sufficient evidence of embezzlement have all this fact, that the man is in the county in which he refuses to account." Martin, B. took the same view as Maule, J. in that case. In my opinion, therefore, the crime of embezzlement is complete the moment the servant intends to steal his master's money, and here that was shown to be in Yorkshire. In *Reg. v. Davison* it was held, and as I think correctly, that the non-accounting was no part of the crime of embezzlement. I think, therefore, that there was no jurisdiction in the county of Middlesex, and that the conviction cannot be sustained.

LINDLEY, J.—I am of opinion that this con-

viction should be affirmed on the ground that a material part of the offence, that is, the fraudulently non-accounting for the money, was committed in the county of Middlesex by the posting at Doncaster of the letter of the 21st April addressed to and received by and intended to reach the prosecutors in Middlesex. In that letter there was a fraudulent representation made in Doncaster, which continued until it reached the master of the prisoner in Middlesex. That was a fraudulent act, and a continuing act; and I am therefore of opinion that there was jurisdiction to try this indictment in the county of Middlesex.

MANISTY, J.—I am also of opinion that the conviction should be affirmed. The consequences would be very serious if we were to hold that a prisoner could only be indicted in the county in which the offence was first committed. Take the present case. The prisoner was arrested on the 2nd May in Newcastle; and there was evidence that he had then appropriated the money, and there was evidence of the embezzlement therefore in Newcastle. If he had been indicted there, could the prisoner have said, I committed the offence in the county of Middlesex by fraudulently stating I had not received the money, and therefore I ought to be tried there? Here he wrote from Yorkshire to his masters in Middlesex, which is just the same as if he in person had said it in the county of Middlesex.

Conviction affirmed.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Thursday, Nov. 22.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

GOODHEW v. WILLIAMS. (a)

Qualification of vestryman—Acting without qualification—Action for penalty—Metropolitan Management Acts, 18 & 19 Vict. c. 120, ss. 6, 54; 19 & 20 Vict. c. 112, s. 4.

By 18 & 19 Vict. c. 120, s. 6, no person can be elected or act as vestryman unless he be occupier of a house, &c., and rated or assessed at a certain rental.

By sect. 18, if there is a poll at an election of vestrymen, the inspectors of votes are to decide upon the persons duly qualified to fill the office.

By sect. 54, any person acting as vestryman without being qualified by rating and occupation as required by the Act, is liable to a penalty.

By 19 & 20 Vict. c. 112, s. 4, occupiers who claim to be rated, and pay or tender the rate, are entitled to have their names put on the rate, and if the overseers neglect to put the names on, the occupiers shall be deemed to have been rated from the period at which the rate was made.

Defendant occupied premises jointly with his father. A rate was made on the father only. Defendant asked to have his name put on the rate, which was not done. Afterwards defendant was nominated as vestryman. The inspectors declared him elected, and he sat and voted. Subsequently defendant demanded that his name should be

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.

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put on the rate, which was done, and the rate was paid by defendant and his father jointly.

In an action for a penalty for acting as vestryman without being qualified;

Held (affirming the judgment of Manisty, J.) that defendant was not qualified when he acted, and was not to be deemed to have been rated under 19 & 20 Vict. c. 112, s. 4; that the decision of the inspectors that he was duly elected was not final, and therefore that defendant was liable to the penalty.

APPEAL by the defendant from the judgment of Manisty, J. in an action in the Common Pleas Division.

The action was brought under 18 & 19 Vict. c. 120, s. 54, to recover a penalty from the defendant for having acted as a member of the vestry of the parish of Rotherhithe without being qualified by rating and occupation as required by that Act.

The defendant and his father and brother became, in the year 1874, joint occupiers of certain premises in the parish, where they carried on business in partnership in the name of Williams and Son. The value of the premises was sufficient to qualify both the defendant and his father as joint occupiers under 18 & 19 Vict. c. 120, s. 6.

On the 11th of April a rate was made on the defendant's father, the defendant's name not being then on the rate. Afterwards the defendant wrote to the churchwardens and overseers of the parish, requesting that his name should be placed upon the rate book as partner in the firm of Williams and Son.

On the 16th of May he was elected a member of the vestry. He was objected to, and the inspectors decided that he was duly qualified, and, on 17th May, made a return declaring him elected. In the same month (May) a demand of the rate was made on the defendant's father only. On the 6th June the defendant sat and voted as a member of the vestry. The defendant wrote to the churchwardens on the 5th July, and again on the 26th July, requiring the demand note to be altered. It was altered by the insertion of the words "and Son;" and in October the rate was paid by the defendant and his father jointly. The learned judge decided that the defendant was not qualified, under 18 & 19 Vict. c. 120, s. 6, to act as a vestryman, and was therefore liable to the penalty under sect. 54, and gave judgment for the plaintiff. The defendant appealed.

The following are the statutory provisions on which the decision of the case turned:—18 & 19 Vict. c. 120 (an Act for the better local management of the Metropolis), s. 6:

The vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than 40*l.* per annum; and no person shall be capable of acting or being elected as one of such vestry for any parish unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish. Provided always, that in any parish in which the number of poor-rate assessments at 40*l.* or upwards does not exceed one-sixth of the whole number of such assessments, it shall not be necessary, in order to qualify a person to be a vestryman, that the amount of rental upon which he is rated or assessed as aforesaid exceed 25*l.* Provided also that the joint occupation of any such premises as aforesaid, and a joint rating in respect thereof, shall be sufficient to qualify each joint occupier in case the amount of rental on which all such occupiers are jointly rated will, when divided by the number of occupiers, give for each

such occupier a sum not less than the amount hereinbefore required.

Sect. 15:

The rate collectors, or persons appointed by them, shall attend the churchwardens and persons presiding at elections under this Act, and inspectors of votes, to assist in ascertaining that the persons presenting themselves to vote are parishioners rated to the relief of the poor in the parish, or the respective wards thereof, and duly qualified to vote at the election.

Sect. 16:

On the day of election of vestrymen and auditors in any parish under this Act the parishioners then rated to the relief of the poor in the parish, or, where the parish is divided into wards under this Act, in the ward thereof for which the election is holden, and who are desirous of voting, shall meet at the place appointed for such election, and shall then and there nominate two ratepayers of the parish, or (if the parish be divided into wards) of the ward for which the election is holden, as fit and proper persons to be inspectors of votes; and the churchwardens, or, in the case of a ward election, such one of the churchwardens as is present thereat, or, where one of the churchwardens is not present, the person appointed by them to preside thereat, shall immediately after such nomination as aforesaid by the parishioners nominate two other such ratepayers to be such inspectors; and, after such nominations, the said parishioners shall elect such persons duly qualified as may be there proposed for the offices of vestrymen and auditors or auditor; and the chairman at such meeting shall declare the names of the parishioners who have been elected by a majority of votes at such meeting. . . .

Sect. 17:

Provided always that any five ratepayers may then and there, in writing or otherwise, demand a poll, which shall be taken by ballot. . . .

Sect. 18:

The inspectors for the parish or ward (as the case may be) shall forthwith meet together, and proceed to examine the said votes; and, if necessary, shall continue the examination by adjournments from day to day, not exceeding two days (Sunday excepted) until they have decided upon the persons duly qualified according to the provisions of this Act who may have been chosen to fill the aforesaid offices.

Sect. 19:

In case an equality of votes appear to the aforesaid inspectors to be given for any two or more persons to fill either of the said offices, the inspectors shall decide by lot upon the person to be chosen.

Sect. 22:

The inspectors shall, immediately after they have decided upon whom the aforesaid elections have fallen, deliver to the churchwardens, or to one of them, or other the person presiding at the election, a list of the persons chosen by the parishioners to act as vestrymen . . . and the said list, or a copy thereof, shall be published in the parish as herein provided.

Sect. 54:

. . . Any person who acts as a member of any such vestry as aforesaid, without being qualified by rating and occupation as required by this Act, shall for every such offence be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same in any of the superior courts of law, with full costs of suit . . .

19 & 20 Vict. c. 112 (an Act to amend the last-mentioned Act), sect. 4:

It shall be lawful for any person occupying any tenement within any parish to claim to be rated to the relief of the poor in respect thereof in the rate for the time being, and in all rates to be thereafter made in respect of such tenement, whether the landlord be or be not liable to be rated to the relief of the poor in respect thereof; and upon such occupier so claiming by notice in writing left at the office or place of residence of the overseers of the poor of the parish, or one of them, and actually paying or tendering at such office or place of residence the full amount of the last-made rate then payable in respect of such premises, such overseers are hereby required to put the name of such occupier on the rate for the time being, and also, without further claim, to

put his name upon every subsequent rate made during the time such occupier continues in the occupation of the same premises; and, in case the said overseers neglect or refuse so to do, such occupier shall nevertheless for the purposes of the said Act be deemed to have been rated to the said rate in respect of such premises from the period at which the rate for the time being in respect of which he so claimed to be rated as aforesaid was made, and thenceforth so long as he continues in the occupation of the same premises, provided always that every person so claiming as aforesaid shall in respect of every rate for the relief of the poor made after such claim as aforesaid, while he continues to occupy the same premises, be liable to the same extent and in the same manner as if his name had been put on such rate.

Philbrick, Q.C. and J. B. Wright for the defendant.—The defendant is not liable to the penalty, for he was qualified by assessment. Even if he was not in fact rated or assessed within the meaning of 18 & 19 Vict. c. 120, s. 6, he was entitled to be deemed to have been rated by 19 & 20 Vict. c. 112, s. 4, and therefore this latter section has the effect of exempting him from liability to the penalty. Further the inspectors of votes are to decide on the qualification of candidates by 18 & 19 Vict. c. 120, s. 18. They have given their decision in favour of the defendant, and that decision is final, and cannot be questioned in this action. They cited

Reg. v. Inhabitants of Hulme, 4 Q. B. 538;
Moss v. Overseers of St. Michael, Lichfield, 7 M. & G. 72;
Ex parte Ross; *re The Vestry of St. Pancras*, 26 L. J. 812, Q. B.

Joseph Brown, Q.C. for the plaintiff.—The defendant is liable under 18 & 19 Vict. c. 120, s. 54. There is no mention of assessment in that section, and assessed in sect. 6 only means the same as rated. There is nothing in the Act to give power to the inspectors to pronounce a final judgment on the question of qualification. It can never have been the intention of the Legislature that a person who had once incurred a penalty by voting when he was not qualified should be able to get rid of that liability by anything that he might do afterwards.

Philbrick, Q.C. in reply.

BRAMWELL, L. J.—I am of opinion that this judgment ought to be affirmed. I think it is clear that the defendant was neither rated nor assessed to the relief of the poor when he acted as vestryman, and therefore was not capable of acting or of being elected. It seems to me that it is immaterial whether there is any difference between rating and assessing or not, but I think there is none. The words of the penalty clause (18 & 19 Vict. c. 120, s. 54) are remarkable. They are these: "Any person who acts as a member of any such vestry as aforesaid without being qualified by rating and occupation as required by this Act shall for every such offence be liable," &c. One might infer from these words that a person acting without election, if he were duly qualified by rating and occupation, would be exempt from the penalty; but it seems that the defendant was not properly elected, because he was not qualified by rating and occupation when he acted as a vestryman. Then it is said that by sect. 4 of 19 & 20 Vict. c. 112 the defendant may be deemed to have been rated for the purposes of the earlier Act (18 & 19 Vict. c. 120), and that if the events there mentioned took place after the defendant had been elected, after he had acted, and after the action had been brought—if he then did what is provided by sect. 4, he procured a pardon. I am not sure that the

section means that the rate must actually be paid or tendered at the office of the overseer at the exact time of making the claim; but it is not necessary to decide this. Suppose the name of the occupier were put on the rate, no consequence is stated as following from his name being put on; and unless we are to suppose that he was to have some extra benefit from the overseers not doing their duty, he would only be in the same position, if he had done what is required by the section, and his name had not been put on the rate, as he would have been in if they had put his name on. If we look at the words of the different sections the defendant is liable to a penalty after he acts, and the clause in sect. 4 is not retrospective, but only enabling. Then, as to the other point, it is contended that the decision of the inspectors was final; but I cannot think it was. Whether they have power to inquire into the matter of qualification at all or not, I do not decide: but I am satisfied that their decision is not final. Their decision would only come in where there is a demand for a poll. By the words of sect. 16 it is manifest that there is no judgment without appeal to be given by them. There is no provision as to how the inspectors are to get information and adjudicate. The words of sect. 15 almost negative the contention put forward on behalf of the defendant. I think the judgment is right, and it ought to be affirmed.

BRETT, L.J.—It seems to me that the question as to the construction of 18 & 19 Vict. c. 120, s. 54, is the principal question in this case, and I think the proper construction is, that if the person who acts as vestryman is not qualified at the time when he acts the penalty arises. But it is said that the defendant was qualified because he was assessed, and that raises the question whether the word "rated" and the word "assessed" in sect. 6 are different from one another in their meaning. The word "assessed" is left out in sect. 54, which is a strong circumstance to show that the two words mean the same in sect. 6. But this defendant was never assessed, because his name was never brought before the overseers. The only persons who can assess are the overseers, and therefore he was not, in fact, qualified. But it is said that he may be deemed to have been qualified, and this depends upon the meaning of sect. 4 of the second Act (19 & 20 Vict. c. 112). I should be sorry to doubt that it is sufficient if a person claims to be rated, and afterwards tenders or pays the rate, or to suggest that this would not be within the section. But, assuming that payment or tender at a different time from the time when the claim is made is within sect. 4, a person is not in a position equivalent to being rated before he has either paid or tendered the amount of the rate. Under the Registration Acts the time fixed is the 31st July, and the question is whether the person claiming to be entitled to vote is qualified at that date. The inquiry usually takes place in September or October, but it has never been suggested that a claim and payment after the 31st July would show that the person claiming was properly qualified. A claim made before acting, followed by a payment made after acting, does not qualify, and therefore the defendant in the present case was not duly qualified, nor is he to be deemed to have been qualified at the time when he acted as vestryman. The question then remains

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whether the decision of the inspectors is final or not. I have great doubt whether the inspectors have power to inquire into the question of qualification at all. I rather think that they have only power to inquire as to whether the necessary formalities have been complied with; but, if they have power to inquire into the matter of qualification, I cannot see that their decision is final. They are not a court of exclusive jurisdiction on the status of individuals.

COTTON, L.J.—I am of the same opinion. I think the inspectors had not power to determine finally. There should be very clear words to exempt the defendant from the penalty, to which he would otherwise be liable under the Act. I think sect. 4 of the later Act does not exempt him. The judgment which has been given for the plaintiff must therefore be affirmed.

Judgment affirmed.

Solicitors for plaintiff, *Bridger and Collins.*

Solicitor for defendant, *Chipperrfield.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, Nov. 29.

(Before MALINS, V.C.)

ASHWORTH v. HEBDEN BRIDGE LOCAL BOARD. (a)

Local board — Execution of arbitrary powers —

Injunction to restrain.

In July 1877 the justices of the peace made orders against the plaintiff and others, one of whom was L., for payment to the defendants of the expense of repairing a street. It was agreed that the order should not be enforced for three months, in order to abide the decision on a case to be presented by L. to the Queen's Bench upon a point of law. L. appealed to the Quarter Sessions, and, the order against him having been quashed on the ground of a technical error, he did not take a case to the Queen's Bench.

The plaintiff was not told of what had taken place, and in November following, her time for appealing having gone by, an order to levy the amount against her was obtained from the justices.

On motion by the plaintiff, and on her undertaking to assent to the statement of a case to the Queen's Bench on the point of law, and on her bringing the amount claimed into court,

The Court, considering the plaintiff had been misled by the defendants, restrained them from levying, unless or until she should have an opportunity of stating a case to the Queen's Bench.

This was a motion to restrain the defendants from levying a distress upon the goods of the plaintiff, or from taking any other proceedings, contrary to an alleged agreement, to enforce a certain order made by the justices of the peace of the West Riding of Yorkshire, at Halifax, against the plaintiff, or unless or until the plaintiff should have an opportunity of appealing, or should be held entitled to appeal against such orders.

In the month of May 1875 the defendants gave notice to the owners of certain houses fronting a street called Albert-street within their district, and among others to James Lister and the plaintiff, to sewer, level, pave, flag, and channel Albert-

*street within one month from the date thereof. These notices being disregarded, the defendants themselves executed the work, and on the 6th Nov. 1876 gave notice to the plaintiff that they had executed the works, the expenses of which amounted to 883*l.* 16*s.* 10*d.*, and that in pursuance of sect. 257 of the Public Health Act 1875 they thereby apportioned the sum of 229*l.* 18*s.* 5*d.* as the proportion of such expenses to be paid by the plaintiff, and that the aforesaid apportionment would be binding and conclusive upon her unless within three months from the date of the notice she should by written notice dispute the same. The said James Lister was also assessed at the sum of 367*l.* 15*s.* 11*d.* in respect of his apportionment of such expenses. Several other of the owners of the contiguous property were also assessed in various sums. No notice of objection within the statutory three months having been given, summonses were issued against the various parties in respect thereof.*

*Several of the summonses were heard before the magistrates on the 3rd July 1877, including those against the plaintiff and James Lister, but in many of the cases there was no dispute as to the amount of the apportionment, and there was no dispute on this account in the case of the plaintiff. The case of James Lister was taken first, when it was especially submitted on his behalf, as a point of law, that Albert-street, having been opened to the public eighteen or twenty years ago by the owners, and having been lighted and scavenged by the defendants, had become a highway reparable by the inhabitants at large, although there had been no formal adoption of the street. The justices, however, overruled the objection, and found that the street was not reparable by the inhabitants at large, and made an order against James Lister for payment of the 367*l.* 15*s.* 11*d.**

After the justices had given their decision against Lister, his solicitor applied to them to grant him a case to the Court of Queen's Bench in order to determine the point of law whether or not Albert-street had become a highway reparable by the inhabitants at large, and the justices agreed to grant a case, and, as appeared by the affidavit of the clerk of the defendants, the justices agreed with the consent of the defendants to postpone the execution of the order for three months from that date, to abide the decision (if any obtained within that time) of the Court of Queen's Bench on that question.

*Subsequently the case of the plaintiff was called on, and an order was made against her for payment of the 229*l.* 18*s.* 5*d.*, and, as appeared by the affidavit of the clerk of the defendants, it was agreed in her case also that the order should not be enforced against her for three months, to abide the decision (if any obtained within that time) of the Court of Queen's Bench on the point of law raised by Lister.*

There was some conflict of evidence as to the time during which the justices had agreed to postpone the execution of the order, it being alleged by affidavit on the plaintiff's behalf that the order against her was suspended generally to abide the decision of the Court of Queen's Bench.

On the 16th July 1877 Lister gave notice of appeal against the magistrates' order to the quarter sessions on various grounds, one of which (the 8th) was, that Albert-street was a public highway reparable by the inhabitants at large. The

(a) Reported by F. GOULD, Esq., Barrister-at-Law.

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appeal to the quarter sessions was heard at Wakefield on the 17th Oct. 1877, when the order against Lister was quashed on the technical ground that it adjudged him to be imprisoned with "hard labour" in default of payment, instead of adjudging imprisonment only. Lister having succeeded on the technical ground, did not take the case to the Queen's Bench.

On the 2nd Nov. 1877 the clerk to the defendants gave notice to the plaintiff that he should apply to the magistrates on the following day for an order to enforce the order of the 3rd July, whereupon the plaintiff immediately instructed her solicitor to protest against such an order being made against her, on the ground that it had been decided that her case was to be governed by the decision of the Court of Queen's Bench in Lister's case.

The plaintiff by her solicitor attended before the magistrates on the following day, when they decided, "If the parties can agree upon any mode in which the opinion of the Court of Queen's Bench can be taken on the point of law on which the case was granted on the hearing, without prejudice to the local board as regards time, the bench will be glad; but in the absence of any agreement to this effect the order will be enforced." They also stated that the distress warrant would be dated as of the 3rd Nov., and handed over to their clerk, who would adopt such steps as he should think fit in the matter.

The plaintiff by her affidavit alleged that, although the clerk of the defendants knew in July 1877 that Lister was appealing to the Court of Quarter Sessions instead of the Queen's Bench, it was not until after the appeal had been heard on the 17th Oct. 1877 that the defendant's clerk notified to her any objection to the course Lister was taking in going before the Court of Quarter Sessions instead of to the Court of Queen's Bench, and that she had no knowledge that this was the fact until the 20th Oct. 1877, and that in consequence her opportunity of appealing against the order of the 3rd July 1877 had passed by, and she was unable to get a case stated to the Court of Queen's Bench, and that had she not been so misled she should have either appealed to the Court of Quarter Sessions against the order, or have taken a case to the Court of Queen's Bench, it being upon the faith of the arrangement made on the 3rd July 1877 that she had taken no steps either in stating a case to the Court of Queen's Bench or in appealing to the quarter sessions.

The writ in the action was issued on the 5th Nov. 1877, and on the day following the plaintiff obtained an interim order restraining the enforcement of the distress-warrant.

On the 12th Nov. 1877 the defendants' solicitor wrote to Messrs. Holroyd and Smith, the plaintiff's solicitors, as follows:

Todmorden, Nov. 12, 1877.

Dear Sirs,—Local Board of Hebden Bridge, against Ashworth. I beg to inquire whether your client is willing to abide a case to be stated for the opinion of the Court of Queen's Bench, on the question whether the street in question is a highway repairable by the inhabitants at large, as was suggested by the magistrates at Halifax. An early reply will oblige, yours truly,
Messrs. Holroyd and Smith. JOHN E. CRAVEN.

On the 13th Nov. the following reply was written by Messrs. Holroyd and Smith:

Halifax, 13th Nov. 1877.

Dear Sir,—Ashworth v. The Hebden Bridge Local Board.—We beg to acknowledge the receipt of your

letter of the 12th inst. Before replying to it we must ask you to give us distinct answers in writing to the following questions, so that there can be no misunderstanding what you and the board really do mean.

First, if the necessary courts can and will consent to it, is the board prepared at their cost to place Miss Ashworth in precisely the same position as Mr. Lister was, the order being made upon him on the 3rd July last, both as regards appealing to the quarter sessions and applying for a case to be stated to the Court of Queen's Bench?

Secondly, is the board prepared to pay the plaintiff's costs of the present Chancery proceedings?

Awaiting your reply, we are yours truly,

HOLROYD AND SMITH.

John E. Craven, Esq., Clerk to the Hebden Bridge Local Board, Todmorden.

On the 14th Nov. the defendants' solicitor wrote to the plaintiff's solicitors:

I am instructed by the defendants to agree to the magistrates who made the order stating a case for the opinion of the Court of Queen's Bench upon the point upon which they granted a case on the 3rd July last. Both sides to abide the result of such case. Costs of this action, of stating such case, and of obtaining the opinion of the court thereon, to abide the event. Your client to pay into court, or otherwise deposit as may be agreed upon, the amount ordered by the magistrates to be paid by her, and such further sum as V. C. Malins's chief clerk shall name to cover the probable costs.—Yours truly,

JOHN E. CRAVEN.

To which the plaintiff's solicitors replied on the 14th Nov. 1877:

What Miss Ashworth requires is that she should be placed in precisely the same position in every respect as she was on the 3rd July last, and that the defendants' pay the costs of the present action. Is the board willing to do this?—Yours truly,

HOLROYD AND SMITH.

J. E. Craven, Esq.

No arrangement having been come to, the case now came on, on motion for injunction.

Glassey, Q.C. and Everitt for the plaintiff.—We ask that the defendants may be restrained from executing the order to distrain, on the ground that it was made subject to an agreement that it should abide the result of the decision by the Court of Queen's Bench on the point of law to be submitted by Lister. The plaintiff has been completely misled by what has taken place, and has been prevented from appealing against the order herself. The case is similar in principle to *Paul's case* (20 L. T. Rep. N. S. 589; L. Rep. 4 Ch. 497), where, eleven shareholders in a company, having repudiated their shares, and actions being brought against them, one of them filed a bill to be relieved of his shares, and it was agreed that the other ten should not be prejudiced by their not taking proceedings during Ross's suit. A decree was made in favour of Ross, and affirmed on appeal (see *Ross v. Estates Investment Company*, L. Rep. 3 Ch. 682). Pending the appeal, and while the names of the ten shareholders remained on the register, a winding-up order was made against the company, and it was held that Pawle, one of the ten, was not liable as a contributory.

Tinkler v. The Wandsworth Board of Works, 30 L. T. Rep. O. S. 146; 31 Id. 27; 1 Giff. 412; 2 De G. & Jo. 261; and

Slee v. Corporation of Bradford, 8 L. T. Rep. N. S. 491; 4 Giff. 262,

show how the court will restrain local boards in the exercise of their arbitrary powers.

Higgins, Q.C. and Brett for the defendants.

—We submit, in the first place, that there was no binding agreement as alleged; that the order for enforcing the apportionment against the plaintiff should be postponed to abide a decision to be

given by the Court of Queen's Bench. [MALINS, V.C.—The plaintiff's case was to abide the result of Lister's case in the Queen's Bench.] There was no binding agreement to that effect. But we say also that the court has no jurisdiction. *Tinkler v. Wandsworth Board of Works* (*ubi sup.*) was a case where the board were exceeding their statutory powers, but the defendants in the present case are strictly within their powers. There is no case in which a magistrate's order for the enforcement of rates has been interfered with by this court. In *Pavle's case* (*ubi sup.*) there had been a binding agreement; but in *Ashley's case* in the same winding-up, Ashley, not having repudiated his shares before V.C. Wood's decision, was held a contributory:

Ashley's case, 22 L. T. Rep. N. S. 63; L. Rep. 9 Eq. 263. They referred also to

Buckley on the Companies Acts, p. 109, 2nd edit.

Glasse, Q.C. was not called upon to reply,

MALINS, V.C.—Mr. Glasse, upon the whole I am inclined to give you relief to a certain extent. It appears that this local board has certain powers over property in Hebden Bridge, and in pursuance of those powers vested in them they made a rate, the amount of which, payable by the plaintiff (Miss Ashworth) in respect of houses she owns in that district, amounted to the sum now in question of about 230l. Amongst the persons rated was also Mr. Lister, who was rated for the sum of 360l. When the defendants were properly pursuing their powers, no complaint was made, nor could one be made, as to the course they adopted. Then an objection was made by Mr. Lister as to the validity of the rate. He, and as I understand the plaintiff, as well as the others, at the same time raised the question that this property was not rateable by the Hebden Bridge Local Board, on this ground, that the property was in a street or highway which had been opened to and dedicated to the public for eighteen or twenty years. They therefore said, as I understand, that it was a public highway which the public at large or the public in that district was bound to keep in repair, and that they were consequently not liable to be rated by the local board at all. Then Mr. Lister being the largest proprietor upon whom the rate had been levied, there was an understanding, if not a positive agreement, that proceedings should be suspended until he could take the opinion of the Court of Queen's Bench. Now, although there was possibly no formal agreement—and I think Mr. Higgins is possibly right in saying there was no formal agreement—yet I think it is perfectly plain upon the whole of the evidence that there was a sort of understanding that Mr. Lister's case was to decide, certainly Miss Ashworth's case, and I think all the rest, and the point on which they wanted to take the opinion of the Court of Queen's Bench was, whether the property was, for the reasons I have stated, rateable by the local board or not. This was in the month of July. There was no very formal agreement I admit, but there certainly was, in my opinion, an understanding among all parties, on the part of the magistrates, as well as of the persons represented, that this course was to be adopted. It then turned out that Mr. Lister found that he had a fatal objection to this order upon him without going to the Court of Queen's Bench, and

that he had only to go to the quarter sessions, which was a much more rapid tribunal. He goes to the quarter sessions to quash the order. The merits of the case, as all parties agree, were not tried, and it had the go-by given to it, although nothing was decided. That having taken place on the 17th Oct., early in November proceedings were taken by the clerk of the board, Mr. Craven, to bring the parties before the magistrates, and the objection was then raised on behalf of Miss Ashworth: "I have not had any opportunity of appealing; I have been misled; I wanted to know through Mr. Lister, and Mr. Lister's case was to decide mine, whether this property is rateable or not." Miss Ashworth says she was misled by the magistrates or their clerk not telling her what was the course adopted by Mr. Lister, which I think they might with great propriety have done, because unquestionably I am satisfied there was that understanding in July last that this question as to the rate was to be raised. I think they might have told Miss Ashworth that Mr. Lister's case had gone before the quarter sessions, and the grounds on which it had failed, so as to give her an opportunity of doing something. This they did not do, but they persisted that the rate was now binding upon her, and accordingly said that within a limited time the rate would be enforced. Now, if there was, as I am satisfied there was, this sort of understanding that the opinion of the Court of Queen's Bench was to be taken as to the validity of this rate, then, when Mr. Lister's case had failed upon this quibble about the order for hard labour, not upon the merits of the case, I think they ought to have given Miss Ashworth the opportunity of doing that which Mr. Lister had failed to do. I am bound to say that it appears that the justices took, as gentlemen of position might be expected to do, a reasonable view of the case before them, and said, "If you can agree upon any mode by which this question can be decided, we shall be perfectly ready to accede to it; but if you cannot agree, the order will be enforced." Then, perhaps with some precipitation, the lady, being alarmed that the justices were about to enforce the order, this being the result of the meeting of the 3rd Nov., comes to this court. The writ was issued on the 5th Nov. [After referring to the correspondence since the issuing of the writ, his Lordship proceeded:] It seems to me that, although Mr. Higgins may be right in stating that there is no agreement between these parties, there has been a course adopted on both sides which was calculated to mislead and has misled the plaintiff. If, then, she has been misled, and in consequence of having been misled is in this situation, that she is completely at the mercy of those by whom she has been practically misled,—that is, the board—if I refuse to interfere, this rate can be enforced; they can distrain upon her, and, if she cannot pay, put her in prison, and she is entirely without remedy. Now then, under these circumstances, the magistrates having suggested on the 3rd Nov. that this question should be decided, and the clerk of the board having suggested the same thing, that it should be decided by a case, what is the most reasonable thing under the circumstances to do? It appears to me that the reasonable course is to protect the lady, and not leave her at the mercy of the board, who, as far as I can see, intend to enforce

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their rigid rights against her according to their view, if I do not interfere or stay their hands, on the terms of having in court the amount of the rate in dispute, so that, if she fails, they will have their remedy like all other litigants in this court. But then it was strenuously contended by Mr. Higgins that the court has no jurisdiction. He says that not one of the cases cited on the other side has the slightest application. I cannot help thinking that the case of *Tinkler v. The Wandsworth Board of Works* has a very material application. That was a case which was considered of great public importance at the time, for it introduced a somewhat new principle. It was a case in which the local board of Wandsworth had a general power of abolishing privies, and substituting water-closets in all cases in which they might think it proper. Instead of investigating each particular case, they made a general order that there should be nothing but water-closets in the whole district. The plaintiff, who I think was the owner of a row of small houses down the Wandsworth-road, felt himself aggrieved by this, and said this general order was beyond their powers; that they ought to have investigated each case; and that, if they had investigated the case in his houses, they would have found such an order unnecessary. The result was that Vice-Chancellor Stuart, and afterwards the Court of Appeal, consisting of Lord Justice Knight Bruce and Lord Justice Turner, came to the conclusion that the general order was beyond their powers, and the Court of Appeal said, "This court must protect the plaintiff against the arbitrary acts of the board." Therefore I think that is a case which shows that this court will in a proper case interfere to prevent a local board, whether it consists of magistrates or of others, from acting in an arbitrary and unjustifiable manner, or doing anything which can in the slightest degree militate against or go beyond their authority. Then another case was cited by Mr. Everitt, which has also, I think, considerable application, namely, *Slee v. The Corporation of Bradford*. The point was that the corporation of Bradford—having great powers where buildings were to be thrown back and so on—had agreed with the plaintiff that a certain thing was to be done. He had submitted his plans to them, and they had agreed that if he pulled down he might rebuild according to those plans. When he had pulled down his buildings, they said, "Now, we will exercise our strict powers, and you must throw back your building a certain distance, or you will not build at all." What was the decision? That, inasmuch as they had misled him, they could not take advantage of their conduct and of their powers; and, therefore, the court granted an injunction to prevent them from interfering with the buildings according to those plans which they had originally approved. Now, there was no absolute agreement there, but there was an understanding by which the plaintiff had been misled, and the court would not allow the parties who had misled him to take advantage of having done so. In this case, therefore, if this lady has been lulled into security, and the result of all this is that she has been lulled into security by a course which she was warranted in believing the magistrates had agreed to take, I think it is impossible that the defendants should be permitted to exercise their extreme rights against her

without her having the opportunity of doing that which the magistrates said they were perfectly willing should be done, and, I think, were desirous of having done, if the parties could find some mode of doing it. In this case, if the parties cannot for themselves find a mode of taking the opinion of the Court of Queen's Bench, I think I can find a mode for them. I will find a mode of doing that for them which the magistrates themselves on the 3rd Nov. said they were willing should be done; which the clerk who instructs Mr. Higgins to raise this contest to-day himself said he proposed should be done. I think the justice of the case will be met by securing that the opinion of the Court of Queen's Bench shall be taken, and if they cannot settle the case themselves, I will endeavour to settle it for them. Therefore, the plaintiff must undertake, within a time agreed upon, to bring the amount of the rate into court, and upon her doing that I will grant an injunction.

The order was: [The plaintiff by her counsel undertaking to assent to the statement of a case for the opinion of the Court of Queen's Bench on the point raised by the eighth objection of Mr. Lister's appeal to the Court of Quarter Sessions, and to concur in any application to the justices for that purpose] to restrain the defendants from levying the distress or continuing any other proceedings to enforce the order of the 3rd July against the plaintiff unless or until she should have an opportunity of appealing against the order, until the hearing of the cause, or until further order, with liberty to apply. The plaintiff undertaking to pay into court within fourteen days the amount of the rate. If not paid, the motion to stand dismissed with costs.

Solicitors for the plaintiff, *Layton and Jaques*, for *Holroyd and Smith*, Halifax.

Solicitor for the defendants, *Bromley*, for *Craven*, Todmorden.

QUEEN'S BENCH DIVISION.

Monday, Nov. 19.

HUDSON v. TOOTH. (a)

Prohibition—Arches Court—Requisition of archbishop—Place of hearing—37 & 38 Vict. c. 85, s. 9—Appendix to rules, No. 13.

The respondent, the incumbent of a parish in the diocese of Rochester, was represented by three parishioners to the bishop under the Public Worship Regulation Act 1874, s. 8, for breach of the provisions of that section. Proceedings were taken under sect. 9 in the Arches Court of Canterbury, and the respondent was adjudged guilty, condemned in costs, admonished, inhibited, pronounced contumacious, imprisoned for contempt, and released, without either appearing or answering at any stage of the proceedings. He afterwards discovered that the requisition of the archbishop to the judge to hear the matter of the representation under sect. 9 was in the form contained in the Appendix to the Rules (No. 13) under the Act, and mentioned for the place of hearing only London or Westminster or the diocese of Rochester. The hearing actually took place at Lambeth, in the diocese of Canterbury, and the respondent applied for a prohibition to stay further proceedings.

(a) Reported by M. W. McKellar, Esq., Barrister-at-Law.

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Held, that this Act created a new jurisdiction; that the conditions precedent must be strictly carried out; that, in consequence of disobedience to the requisition, the proceedings were coram non iudice; and that the respondent was entitled to have the rule for prohibition made absolute.

This was a rule nisi, obtained on behalf of the Rev. Arthur Tooth, clerk, calling upon the Right Honorable James Plaisted, Baron Penzance, the official principal of the Arches Court of Canterbury, and Robert Hudson, Samuel Gardiner, and Robert Gunston, complainants in a cause or matter in the said court, entitled *Hudson and others v. Tooth*, to show cause why a writ of prohibition should not issue to the Arches Court of Canterbury to prohibit the said court from further proceedings in relation to the said cause or matter, being one over which there was no jurisdiction.

It appeared from the affidavit of the Rev. Arthur Tooth, the respondent in the ecclesiastical suit, and the applicant for the rule, that he was and had been for some years incumbent of the new parish of St. James, Hatcham, which parish is partly in the county of Surrey and partly in the county of Kent, and wholly in the diocese of Rochester.

Some time in the month of March 1876 the applicant received a document purporting to be a representation made under the provisions of the Public Worship Regulation Act 1874 (37 & 38 Vict. c. 85), by Robert Hudson, Samuel Gardiner, and Robert Gunston, to the Lord Bishop of Rochester, with several declarations annexed.

At the same time also he received documents purporting to be a requisition from the Lord Bishop, requiring him to state whether he would submit to his directions without appeal, a form of such statement, and a form of acknowledgement of the receipt of documents.

Some time after that he received a document purporting to be a notice from Cyrus Waddilove, the Deputy Registrar of the Arches Court of Canterbury, that he had appointed a certain day for fixing what security for costs should be given by the said Robert Hudson, Samuel Gardiner, and Robert Gunston.

On or about the 15th June 1876 he received a document purporting to be a notice from the said deputy registrar, that the judge had appointed eleven o'clock in the forenoon of the 13th July then following, in the public library at Lambeth Palace, to hear the matter of the above-mentioned representation.

The applicant was informed, and believed, that the matter of the above-mentioned representation was heard on the 13th July 1876 in the public library at Lambeth Palace, and that the judge was attended by the said Cyrus Waddilove, Deputy Registrar of the Arches Court of Canterbury, and that the Diocesan Registrar of Rochester was not present, and did not attend the judge.

The applicant was not present at the hearing. He did not then, either personally or by any person on his behalf, appear; nor has he before or since, either personally or otherwise, appeared or entered an appearance in the court.

Lambeth Palace, as he was informed and believed, is situate in the county of Surrey, and is not within either of the cities of London or Westminster. It is, as he was informed and believed,

situate within the diocese of Canterbury, and is not within the diocese of Rochester.

On or about the 30th July 1876 the applicant was served with a document purporting to be a monition, or copy of a monition, by the Right Hon. James Plaisted, Baron Penzance, Official Principal of the Arches Court of Canterbury, reciting the hearing of the matter of the above-mentioned representation, and admonishing him to abstain from certain practices, acts, matters, and things, and to remove certain articles condemned at the said hearing.

On or about the 25th Nov. he was served with documents purporting to be a summons to show cause why an inhibition should not issue to enforce obedience to the said monition, and copies of three affidavits showing that he had not obeyed the said monition.

On or about the 17th Dec. 1876 he was served with a document purporting to be an inhibition or copy of an inhibition.

On or about the 12th Jan. 1877 he was served with documents, one purporting to be a summons or notice of motion to pronounce him contumacious and in contempt for not obeying the said inhibition, and to signify the same in the manner heretofore used by ecclesiastical courts, and the others purporting to be copies of three affidavits showing that he had not obeyed the said inhibition.

On the 22nd Jan. 1877 the applicant was arrested under a warrant issued by the sheriff of Surrey, reciting a *significavit* from the said Right Hon. James Plaisted, Baron Penzance. He was on the same day lodged in Horsemonger-lane Gaol, where he remained till the 17th Feb. 1877, when he was released in virtue of an order made, he believed, on the application of the said Robert Hudson, Samuel Gardiner, and Robert Gunston. He made no application for his own release. He was released before the return day of the writ, which was, he believed, the 16th April 1877.

The applicant had not yet received a document purporting to be a bill of costs incurred in the matter of the said representation on behalf of the said Robert Hudson, Samuel Gardiner, and Robert Gunston, nor a notice fixing the time for taxing this bill of costs, but he anticipated being called on to attend such taxation forthwith.

The said inhibition is still in force, and the applicant is kept out of the church of St. James, Hatcham, and other clerks in holy orders have officiated, and are now officiating therein, against his will, and he anticipated the profits of his benefice would shortly be sequestered to raise a stipend or stipends for such other clerks, in alleged accordance with the provisions of the Public Worship Regulation Act 1874.

About the end of June or beginning of July 1877 he was informed that the Rev. Thomas Pelham Dale, a clerk beneficed in the diocese of London, against whom a representation under the Public Worship Regulation Act 1874 had been preferred, and who had been admonished and inhibited in the course of the proceedings upon that representation, had upon the 29th June 1877 obtained a prohibition to the Right Hon. James Plaisted, Baron Penzance, on the ground of want of jurisdiction, and that one of the grounds on which such jurisdiction had been impugned had been that the said Lord Penzance had heard the matter of the representation at

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Lambeth Palace aforesaid, and that Lambeth Palace was not within either of the cities of London or Westminster, or within the diocese of the said Rev. Thomas Pelham Dale, within one of which places the said Lord Penzance had been required by the Lord Archbishop of Canterbury to hear it. He was also informed that the learned judges of the Queen's Bench Division who granted the prohibition, while granting it on the ground of another defect in the jurisdiction, and therefore deemed unnecessary to decide upon this ground, had expressed their opinion that the point was one deserving of serious consideration. He thereupon caused his solicitors, Messrs. Brooks, Jenkins, and Co., to search among the papers in the Registry of the Court of Arches for the requisition from the Lord Archbishop of Canterbury to the said Lord Penzance to hear the representation against him, which requisition neither he nor any person on his behalf had till then seen. On the 9th July 1877 he was for the first time informed by his said solicitors, and he believed it to be the fact, that the said requisition had been seen by them, and that it required the said Lord Penzance to hear the matter of the said representation at some place in London or Westminster, or in the diocese of Rochester.

A. J. Stephen, Q.C. showed cause against the rule on behalf of the complainants.—The requisition of the archbishop, provided for in sect. 9 of the Public Worship Act 1874, was here admittedly in the form contained in the appendix to the rules authorised by the Order in Council relating to that Act; the words of the last paragraph of the form of the requisition (No. 13) are: "Now we, the archbishop aforesaid, do hereby require you, the judge aforesaid, to hear and determine the matter of the said representation at any place in London or Westminster, or within the said diocese of B., as you may deem fit;" but the words of the 9th section of the statute relating thereto are, "and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster." The representation in this case was heard within the province according to the statute; but not according to the Order in Council, unless London may be taken to include Lambeth. This is, no doubt, the popular meaning of London, and it has been so adopted in a court of law, and also by the Legislature. In *Wallace v. Attorney-General* (38 Beav. 384), Romilly, M.R. had to define the London hospitals included in a bequest "*aux hospices de Paris et de Londres*," and he adopted as the principle of his decision (p. 392) an expression of Sir William Petty in his "*Essay on Political Arithmetic*" of the time of James II., "What is meant by London? By the City of London we mean the housing within the walls of the old city, with the liberties thereof, Westminster, the borough of Southwark, and so much of the built ground in Middlesex and Surrey, whose houses are contiguous unto or within call of those aforementioned." So the Bishopric of St. Albans Act 1875 (38 & 39 Vict. c. 34) treats expressly of South London and the district situate to the south of the Thames, thereby including Lambeth in London. [LUSH, J.—But here London and Westminster are coupled together; how can either mean anything but the city so named?] If that be so, it may be contended that the form of the

requisition is not essential to the validity of these proceedings; it was intended evidently by the statute to extend the power to sue beneficed clerks, which was limited by the Citations Act to their own respective dioceses; the form, by omitting the word province is contrary to the intention of the Act, and is invalid. The word "forthwith" in the 9th section shows that the duty of the archbishop with respect to the requisition is merely ministerial, and therefore, as there was no breach of the statute, the sitting of the Court at Lambeth was a mere irregularity which could not destroy the court's jurisdiction: (*Reg v. Castro*, L. Rep. 9 Q.B. 350, 356.) At all events there is a remedy by appeal, and this court may exercise its discretion by discharging the rule for prohibition.

Benjamin, Q.C. followed on behalf of Lord Penzance.—This was an Act of Parliament dealing with procedure only, as appears from the title and preamble, and the express provision of sect. 5. The appointment of Lord Penzance to be Official Principal of the Arches Court under sect. 7 had taken place before this case came on to be heard, and in that capacity he exercised the jurisdiction previously vested in that office. The only alteration in the procedure under sect. 9 is that, whereas before this Act similar cases came before the Dean of Arches only upon appeal or by letters of request from the bishop of a diocese (if in the province of Canterbury), now they come immediately before that court with the bishop's consent. This requisition of the archbishop amounts only to a choice of venue for trial, and is no condition precedent to the judge's jurisdiction; the 9th section and the form together cannot have any greater effect than the statutory requirement that judges shall hold assizes at the principal town of each county. Hale says, in *Pleas of the Crown*, part II., chap. 5, § 23 (vol. 2, p. 39): "By the statute of 6 R. 2, c. 5, they are to hold their sessions in the principal towns, where the county court is held; but this is but directive, not coercive, for the judges may, and usually have, appointed their sessions at their pleasure in other places." Suppose a respondent under these circumstances had pleaded to the jurisdiction, he must have proceeded to point out the court which had jurisdiction. [LUSH, J.—It would be sufficient if he said that jurisdiction existed in Westminster.] If so, the objection is not to the jurisdiction, but to the place of trial only. Lord Campbell said, in *Liverpool Borough Bank v. Turner* (30 L. J. 370, Ch.): "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed." It cannot be contended here that the Legislature has intended to make the place of trial an important condition to the application of this Act of Parliament. So it was held in *Margate Pier Company v. Hannam* (3 B. & Ald. 266) that the swearing in of a justice of the peace is not essential to the validity of his acts.

Charles, Q.C. and Phillimore supported the rule.—The Public Worship Regulation Act 1874 created an entirely new jurisdiction from any

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which previously existed, and, if any condition precedent of that jurisdiction be omitted, the whole proceedings must be *coram non judice*. Under the previous Act for the better enforcing church discipline (3 & 4 Vict. c. 86), proceedings could be initiated only by a person authorised by the bishop, and after a preliminary inquiry the bishop had to hear and determine the matter, or send it to the Arches Court by letters of request. It was only by that means, or by appeal from the bishop, that before this Act the Dean of the Arches could have had jurisdiction. Now, besides some new preliminaries, the matter is heard by the judge of the new court in the first instance upon requisition of the archbishop. If the judge holds his court in a place not authorised by the statute, he cannot exercise this new jurisdiction. As to the other points, whatever may be the popular meaning of London, when coupled with Westminster, it can refer only to the city, just as the words London and Middlesex together can only mean the two counties. Also it has been held that a right of appeal does not bar a prohibition:

Christie v. Unwin, 11 A. & E. 373;
Burder v. Veley, 12 A. & E. 233;
Reg. v. Archbishop of Canterbury, 6 E. & B. 546;
White v. Steele, 12 C. B., N. S., 383;
Chesterton v. Farlar, 7 A. & E. 713;
Darby v. Osense, 1 T. Rep. 553;
Vaus v. Vollans, 4 B. & Ad. 525.

COCKBURN, C.J.—I have arrived at the conclusion that there must be a prohibition, but I arrive at that conclusion with extreme regret; for it is clear that it is an objection of the most technical character, which has nothing to do with the merits of the case, which are of essential importance as regards the functions of the clergy and the administration of the worship of the Church of England. The merits of the case have not, however, come into question, the objection taken being of the most technical character, which might have been obviated in a few minutes if it had been taken before the hearing, simply by having the case heard on the other side of the water. But no objection being taken, it was assumed that the proceedings were regular, and thus an opportunity was afforded of undoing the whole of the proceedings. Nevertheless, though we see that it is a matter of the purest technicality, if it goes to the root of the jurisdiction we are bound to act upon it. The form of the archbishop's requisition to the judge was to hear the case in any place in the diocese of Rochester or in London or Westminster; but the case was heard at Lambeth, which is not within the diocese of Rochester, nor in London or Westminster, though it is within the province of Canterbury. It was contended, in the first place, that London must be understood in its popular sense, in which it would include Lambeth, with all the precincts or suburbs, which, though not forming any part of London, are included in it in the popular acceptation of the word. But it is impossible for us to give such a construction to the requisition. Even if the word had been London simply, I doubt very much whether it would not have been going too far to say that London could be taken in that large popular sense in which it is sometimes understood. But when I find that London is used in contradistinction to Westminster—which, according to Dr. Stephen's argument, would be included in London—this

contention utterly fails. My own conviction is, considering all the circumstances, that it was intended that the archbishop in giving his authority to the judge should exercise his discretion as to the place in which the matter should be heard. It might in his judgment be inexpedient that the matter should be heard in the diocese, on account of some prejudice existing, and therefore he might think it desirable to take it into the larger sphere of the province, or it might be desirable to send it into the diocese where all the parties resided, in order that it might be heard with the least possible expense and with the greatest possible facilities for the ascertainment of the truth. Or it might be indifferent whether it was heard in the diocese, and it might be convenient that it should be heard in the metropolis, and in such a case the words "London or Westminster" are used, probably because the Dean of the Arches sat at one time in the City of London and might on the removal of the courts sit there again, though he has in recent times sat at Westminster; and therefore both the words, "London or Westminster," are used. But both words having been used, and in contradistinction to each other, it is impossible that we can understand "London" as including Westminster, nor as including any place beyond London itself in its strict and proper sense. Then, it is said, that the case having, in fact, been heard within the province of Canterbury, that is sufficient. But as to this I quite concur with the argument of the counsel for the applicant, that the statute created a new jurisdiction, and the mere fact that the Dean of the Arches, as connected with the province of Canterbury, existed long before the Act, does not touch the question. It is not as Dean of the Arches that the judge exercises this jurisdiction. It is a mere accident that the judge happens to be the Dean of the Arches. The jurisdiction is the creation of the statute, and when the statute was passed it was to be vested in some barrister of a certain standing, with this proviso—possibly to induce a most distinguished person, Lord Penzance, to accept an office which otherwise might have appeared offensive and derogatory to one who had already filled such high judicial offices—that is, that as soon as the office of Dean of the Arches should be vacated, it should be vested in him—a most satisfactory bargain for the public, as it insured the acquisition of a most distinguished man to execute the delicate and difficult duties of this office. But it is undoubtedly to my mind an entirely new office, and one with which no former Dean of the Arches had anything to do. It is a new function in the Archbishop of Canterbury and a new jurisdiction and authority vested in him. Before the Act was passed the complaint was to the bishop, who, no doubt, might refer it to the archbishop, but might hear it subject to appeal; and now a new jurisdiction is created under which, unless the parties accept the bishop's decision as absolute and without appeal, the case must go to the archbishop. That is an entirely new authority and jurisdiction, and it must be exercised entirely in accordance with the statute which creates it. The archbishop is to exercise it by referring the matter to the judge, not generally leaving it to his discretion where the case shall be heard, but requiring the judge to hear it "at any place within the diocese or province, or in London

or Westminster." There was a faint attempt to argue that it was not necessary that the archbishop should require the judge to hear the matter, but that he might leave it to the discretion of the judge. But that is a most erroneous reading of the Act, for it is not that the archbishop shall require the judge to hear the case, but that he shall require him to hear it in a particular place—that is, at such place as the archbishop thinks most convenient. That being so, it is essential to the jurisdiction, and it is not competent to the judge to substitute for the place specified any other. It is part of the conditions of the jurisdiction that the place shall be appointed, and it is an essential part of the exercise of the archbishop's authority. It is said, indeed, that the word "province" was meant to be inserted in the form given in the rules; that its omission was a mere accident—a mere blunder; that it ought to be there, and that it is to be read as though it were there, and that it is sufficient that the judge has, in fact, exercised his jurisdiction in the province. But this argument is shattered by the facts. The only jurisdiction which the judge could exercise is the jurisdiction given by the archbishop's requisition; and the archbishop, in his requisition, omits the word "province." It is not for me to say that it was a mere accident or blunder, or that it was not done intentionally. Suppose it was done intentionally—suppose the archbishop thought that it was fitting that the case should be heard either within the diocese of Rochester or in London or Westminster—can we say that it was not so intended? To do so surely would be to speculate on a mere suggestion without any satisfactory foundation. The omission of the word "province" therefore is fatal to the exercise of jurisdiction within the province of Canterbury, and the jurisdiction has been exercised at Lambeth without any lawful authority. Then the question is whether this is a mere irregularity, or whether this objection goes to the jurisdiction. I am of opinion that it is more than a mere irregularity and that it goes to the root of the jurisdiction. It was intended that the archbishop should direct the place where the case should be heard. That is an essential condition of the exercise of jurisdiction, and therefore, though I regret to be obliged to give effect to such an objection, it is one which goes to the root of the jurisdiction, and is an absolute bar to its exercise.

MELLOR, J.—I have had the advantage of hearing the question twice discussed, and I confess that the advantage has been considerable in enabling me to come very clearly and conclusively to the same opinion. When we reflect how this Act came to be passed and the circumstances under which it went through Parliament, the criticisms it was exposed to, and the safeguards by which it was supposed to be accompanied, I cannot doubt that this, among others, was one of the protective provisions which were engrafted on the Act. The Act was for improving the administration of the law as regarded public worship. We know it was passed with reference to certain practices which had been supposed to have crept into the services of the Church, and we know the sort of feeling which prevailed throughout the country at the time, and I cannot doubt that it had occurred to Parliament that the existing law and tribunals were not

sufficient to meet the exigencies of the case, and that what was to be done was not merely to improve and extend the jurisdiction of the Dean of the Arches, but to erect an entirely new tribunal, which has no relation at all to the office of Dean of the Arches. It is only a question of procedure so far as the procedure regulates the practice of the new court which is constituted by the Act of Parliament, and which prescribes the way in which the jurisdiction is to be exercised. The provisions in the Act take away from the bishop the old mode of proceeding. For it is provided that, unless the parties agree to accept the decision of the bishop as final and without appeal, the case is to be sent to the archbishop, who is invested with authority to send it to the judge, but with a requisition prescribing the place where it is to be heard. And this requisition is by the statute made the condition of the exercise of the jurisdiction. In this case by the requisition the hearing was to be in London or Westminster or the diocese of Rochester. London in any such statute, as in the Judicature Act, has always been understood to mean the City of London, and certainly when it is named as contradistinguished from Westminster, there are reasons why it should not be allowed to the judge to hear the case in any other place than that appointed. It is not a mere question of procedure; a discretion is to be exercised by the archbishop. It is a new jurisdiction, and the procedure is adapted to the jurisdiction. On these grounds I have come clearly and satisfactorily to the conclusion that the question being one of jurisdiction, the jurisdiction has not been well founded, and that therefore the proceedings which went on in the absence of Mr. Tooth, were invalid, and that, in consequence, a writ of prohibition must be issued.

LUSH, J.—I also concur, though I extremely regret the necessity I am under of upholding this objection. It is one of a purely technical character, but there is nothing to show that the defendant has precluded himself from raising it; and that being so, we are bound to give effect to it, though, considering the time which has elapsed, it does not come with a good grace. I cannot agree that the Act is one which has merely altered the procedure. On the contrary, it initiates new and summary proceedings against clergymen charged with certain breaches of ecclesiastical law. It also enlarges the authority of a new tribunal over them; for, whereas before the Act the clergyman could not be cited out of his diocese, the Act authorises his being summoned anywhere in the province. The authority is not given to the judge, but to the archbishop, who is to direct where the case is to be heard. This alone is a material extension of the power which existed before the Act. In the present case the requisition—in the form given under the Act—did not include the "province;" but the rule or the form was not binding on the archbishop, and he might have specified any place in the province, according to the words in the Act. He, however, only specified the diocese, or London, or Westminster, and the judge sat neither in the diocese nor in London nor Westminster, but in Lambeth, where he had no authority to sit. The defendant did not appear, nor was he bound to appear. It is said that London may mean the metropolis at large, and so it may, but not when it is mentioned as contra-

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distinguished from Westminster. Therefore it must be taken that the archbishop authorised the judge to sit in the City of London or in Westminster, but he sat in neither, and sat at Lambeth, which is not in the diocese. The defendant was not bound to attend there, and did not attend. The judge proceeded against him in his absence. It is impossible that such a proceeding can stand, and there is nothing to prevent the defendant from taking advantage of it. We are bound, therefore, to give effect to the objection and to let the writ of prohibition go. The same point was raised before us in the case of Mr. Dale, but as there was another objection there which in itself was fatal we did not decide this point, but merely observed that it was one of a very serious character. We have now had the benefit of a full argument, and I confess that the view I had entertained has been strengthened by this additional argument, and that I decide without any doubt that the whole proceeding was *coram non iudice*, on the ground that Lord Penzance was not authorised to sit where he did, and that the defendant did not appear; and that, therefore, there was no authority to proceed against him in his absence.

Rule absolute for a prohibition.

Solicitors for the complainants, Moore and Currey.

Solicitors for the respondent, the applicant, Brooks, Jenkins, and Co.

Wednesday, Nov. 28.

(Before MELLOR and LUSH, JJ.)

LONDON TRAMWAYS COMPANY (LIMITED) (apps.) v. BAILEY (resp.) (a)

Agreement to oust jurisdiction of a court of justice—Conductor of tramway—Certificate of manager—6 & 7 Vict. c. 86, s. 22.

The respondent entered into an agreement to serve the appellants as a conductor, and deposited 5*l.* as security for the due discharge of his duties; amongst which he was to punch a ticket upon receipt of every passenger's fare according to certain rules of which he had a copy. It was agreed also that the appellants' manager should be the sole judge between the company and the conductor whether the company was entitled to retain the whole or any part of the deposit; and his certificate in writing should be binding and conclusive evidence between the parties in all courts of justice, and should bar the conductor of all right under any circumstances to recover the same. The agreement expressly excluded its application from criminal offences, and one of the rules stated that failure to punch on receipt of a fare was to be evidence of an attempt at embezzlement, and the act of failure would be dealt with accordingly.

The appellants' manager certified that the company were entitled to retain the whole of the respondent's deposit on the ground that he had received certain passengers' fares without punching the tickets according to the rules. The respondent applied to a stipendiary magistrate to recover this amount under 6 & 7 Vict. c. 86, s. 22, and the magistrate decided that this agreement was not binding.

Here, upon a case stated, that this agreement did

not oust the jurisdiction of a court of justice, but merely rendered the certificate a condition precedent to the company's right to retain the deposit; and that the rule as to evidence of embezzlement was nugatory. The agreement was therefore valid, and the case was sent back to the magistrate.

THIS was a case stated by one of the magistrates of the metropolitan police district, pursuant to sect. 2 of the statute 20 & 21 Vict. c. 43, for the opinion of the Queen's Bench Division of the High Court of Justice:—

On the 29th June 1877 I heard a summons which had issued from the Southwark police-court on the complaint of George Bailey, herein called the complainant, to the London Tramways Company, herein called the defendants, under the 22nd section of 6 & 7 Vict. c. 86, for the purpose of having determined by the magistrate what, if any, sum was due from the defendants to the complainant in the matter of his complaint. The section in question is as follows:

And be it enacted, that it shall be lawful for any justice of the peace to hear and determine all matters of complaint between any proprietor of a hackney carriage or metropolitan stage carriage, and the driver or conductor of the same respectively, and to order payment of any sum of money that shall appear to be due to either party for wages or for the earnings in respect of any such carriage, or on account of any deposit of money, and to order compensation to the proprietor in respect of damage or loss, which shall have arisen through the neglect or default of any driver or conductor, to the property of his employer intrusted to his care, or in respect of any sum of money which such proprietor may have been lawfully ordered by a justice of the peace to pay, and which has been actually paid pursuant to such order, on account of the negligence or wilful misconduct of the driver or conductor, and to order such compensation to either party in respect of any other matter of complaint between them as to such justice shall seem proper.

A tramway car is a metropolitan stage carriage, and the complainant was a conductor in the service of the defendants. He was by them discharged on the 21st June, after about three months' service. On entering the service he had received a copy of the company's rules, and had signed an agreement (copies of both which accompanied this case) and had paid into the defendants' hands the sum of 5*l.* as a deposit, under the 5th clause of the agreement. On the day of his discharge, besides this deposit money, there had accrued, as wages due to him, the further sum of 25*s.* This entire sum of 6*l.* 5*s.* the manager of the company declared forfeit to the defendants (clause 6 of the agreement), and informed the complainant that he was discharged for omitting duly to punch or register fares received by him from passengers, in violation of rule 157. The manager refused to inform the complainant on what information he grounded his charge, or in any way to support it.

At the hearing before me the complainant denied on oath that he had ever omitted to punch or register the fares, or in any way violate the company's rules. He further swore that, although the agreement had been read over to him, it had been read so fast that he did not understand its full force and effect at the time of signing it.

For the defendants no evidence at all was offered. They put in at the opening of the case, and entirely relied on, the accompanying certificate, bearing their manager's signature, objected to my receiving any evidence outside of it, and urged that I was precluded from deciding the case

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otherwise than in accordance with it (clause 7 of agreement).

I was of opinion—

1. That it was not competent to the parties, by contracting themselves out of the provisions of an important public general Act of Parliament, to preclude a justice of the peace from exercising the full jurisdiction therein conferred upon him; and that I ought in no way to be bound by the contract, which seemed to me to be opposed to the general policy and intent of the statute, and therefore illegal and invalid. I accordingly declined to accept the certificate as evidence of the facts therein stated. I also considered the agreement grossly unreasonable and inequitable, and that the possible operation of it had not been fully understood by the complainant.

2. Further, I was of opinion that, if the agreement be not absolutely illegal and void, and if I am compellable to receive this certificate as conclusive evidence against the complainant that he has committed the offence therein alleged, then such offence is an offence under 174 of the company's rules, which must be read with the agreement. Rule 174, "Failure to punch on receipt of a passenger's fare will be evidence of an attempt at embezzlement, and the act of failure will be dealt with accordingly." That, as an attempt at embezzlement is a criminal offence, and as such offences (under clause 8 of the agreement) are especially excepted from the operation of clauses 5, 6, 7, under which the moneys in question were withheld, the provision making the certificate conclusive evidence of the facts did not apply to this case, and that thus, under the agreement itself, the defendants were not justified in declaring the complainant's money forfeit.

And I accordingly ordered the defendants to pay the complainant the sum claimed, with the ordinary costs. Whereupon the defendants, being dissatisfied with my determination as being erroneous in point of law, made the necessary formal application to me to state and sign this case.

If this honourable court should be of opinion that upon none of these grounds stated my decision should be supported, but that the agreement between the parties is a bar to my making an award upon the merits, then I pray them to send the case back to me, with such directions as to them may seem fit.

The rules and form of agreement were printed together in a small book, a copy of which was given to the respondent, as to every servant of the company.

By rule 157:

For fares paid in money for journeys made in one car only the conductor (except on routes on which one uniform fare is charged for all distances) will carry with him separate single journey tickets for each separate rate of fare. The ticket for each rate will be distinguished by a different colour. On receiving a fare of any one of these rates the conductor must (before collecting any other fare), and in the immediate view of the person paying, punch from a single journey ticket for the rate of fare received, the figure denoting the amount of such fare, and deliver that ticket to the passenger paying such fare, and collect the ticket again from him just before the passenger leaves the car.

By rule 174:

A breach by any conductor of any of the foregoing rules will insure his instant dismissal, and the retention by the company of all money held by the company as security according to agreement. Failure to punch on receipt of a passenger's fare will be evidence of an

attempt at embezzlement, and the act of failure will be dealt with accordingly.

The agreement between the company and the conductor provided, amongst other things:

4. The conductor will faithfully fulfil all his duties as a conductor on any route on which the manager from time to time directs him to perform his services, and faithfully account for and pay over to the company daily, and as much oftener as he may be required, all money which he receives for or on behalf of the company, and especially will observe and be bound by as well all the clauses of the rules and regulations aforesaid, which relate to conductors, and also all alterations from time to time of these rules and regulations, or any of them.

5. The conductor will on the signing hereof pay to the company 5*l.*, to be retained by the company together with any such interest thereon as is hereinafter mentioned, and with all wages for the current week, as security for the due discharge of his duties as conductor, and for the due accounting for and paying over to the company all money received by him for or on behalf of the company, and for the due observance by him of the rules and regulations aforesaid, and all alterations thereof, and for the payment of all damages and loss occasioned to the company or their property by him, and all damages, fines and penalties, to which the company may become or be made liable by reason of anything wrongfully or negligently done, omitted, or suffered by the conductor, and for the payment of all moneys for which he is made liable, and the satisfaction of all things for which he is made responsible by any of the clauses of any of the said rules and regulations, or any alterations therein.

6. In case of any breach by the conductor of any of the said rules and regulations, or any alterations therein, the company may retain the whole of the said 5*l.* and any interest thereon, and the conductor's wages for the current week, as liquidated damages for such breach. In any other case the amount for the payment or satisfaction of which the said 5*l.* and any interest thereof, and the conductor's wages for the current week are hereby made a security, may also be retained out of the same sum and interest, and wages by the company as liquidated damages.

7. The manager of the company shall be the sole judge between the company and the conductor, whether the company is entitled to retain the whole or any part of the said 5*l.* and interest, and wages for the current week as liquidated damages. And his certificate in writing that the same or any given part thereof stated in such certificate are to be so retained, and of the cause of such retention shall be binding, and conclusive evidence between the parties in all courts of justice civil and criminal, and before all stipendiary and police magistrates and justices of the peace, both that the amount thereby certified as the amount to be retained is the true amount to be retained, and has become and is liable to be so retained by the company, and that that has happened which in such certificate is certified to be the cause, and that it is a lawful and sufficient cause for such retention, and such certificate shall bar the conductor of all right under any circumstances to recover the moneys so certified to be retained or any part thereof.

8. Provided always that no act or omission of the conductor amounting to a criminal offence for which he would or might be liable to be convicted either upon an indictment or by any stipendiary or police magistrate, or justice or justices of the peace in a summary way is or shall be deemed to be within the meaning of the provisions of clauses 5, 6, and 7 hereof, or any of them.

9. On the termination in any manner of the service and hiring hereby contracted for, and if and as soon as, but not unless the manager certifies in writing that, any part of the said 5*l.* remains unapplied and free from any liability to be applied as aforesaid, the amount which he so certifies to be so unapplied and free will be paid to the conductor and subject to the other parts of this agreement; interest at 5 per cent. per annum will also be allowed to the conductor upon so much of the said 5*l.* as the manager shall certify to have from time to time been unapplied and free from liability to be applied as aforesaid.

The following was the certificate referred to:

The London Tramways Company (Limited.)

I, William Jacques, the manager of the London Tramways Company (Limited), in pursuance and exercise of

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the authority in this behalf, vested in me by an agreement made the twelfth day of April 1877, made between the London Tramways Company (Limited), and George Bailey, as a conductor on the tramways of that company, and of every other authority vested in me, do, by this my certificate in writing, certify as follows, that is to say:

That the said company is entitled to retain as liquidated managers, and for the cause herein mentioned, the whole of the sum of five pounds paid by the said George Bailey to the said company, as in the said agreement is mentioned, and all interest thereon in the said agreement referred to [and the sum of one pound five shillings, which I certify to be the amount of the wages of the said George Bailey, under the said agreement for the week current at the time of his dismissal from the service of the company, which took place on the 20th day of June 1877, and] that the said sums and interest are to be so retained by the company for the cause herein mentioned.

And that the cause of such retention as aforesaid is that the said George Bailey, on the 18th of June 1877 committed a breach of the "rules and regulations for the officers and servants of the London Tramways Company (Limited)," in the said agreement mentioned, in that on the said 18th of June the said George Bailey did, between Brixton and Blackfriars, in the county of Surrey, receive from seven passengers then riding in and upon a tramway car of the said company, their fares of one of the rates mentioned in rule 157 of the said rules and regulations, and did not, before collecting any other fare, and in the immediate view of the persons paying punch from single journey tickets for the rate of fares received the figures denoting such fares, contrary to 157 of the same rules and regulations. Dated this 28th day of June 1877.

Witness William Dutton Calder.
William Jaques.

Manager of the London Tramways Company (Limited).

Kemp, Q.C. (with him John Humphreys) argued for the appellants, the complainants.—The magistrate seems to have thought that the effect of the agreement was to oust the jurisdiction of the courts, and to be invalid under the decision of the House of Lords in *Scott v. Avery* (5 H. of L. Cas. 811); but it really only provides that the manager's certificate shall be a condition precedent to the company's right to keep the money deposited, just in the same way as building contracts are made dependent upon certificates of the architect. The agreement excludes criminal offences, but the certificate is entirely consistent with an omission to punch not amounting to criminality; and the 174th rule does not necessarily render such an omission criminal. [LUSH, J.—It cannot possibly do so, and may therefore be treated as a nullity.] Exactly.

W. Wright (with him Safford) for the respondent.—Jurisdiction is given to a magistrate in a case of this kind by the section of the statute set out in the case, and no agreement to oust that jurisdiction can be valid. In *Scott v. Corporation of Liverpool* (3 De G. & J. 334), Lord Chelmsford, L.C. referring to cases of this kind, where the parties have agreed upon a particular private tribunal which shall adjust the right to a debt or obligation for them, says (at p. 360): "A right of action has accrued, and it would be against the policy of the law to give an effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals." Here the 7th paragraph of the agreement makes the manager the sole judge between the parties, and renders the whole agreement of no effect: (*Horton v. Sayer*, 4 H. & N. 643.) Moreover, the agreement itself expressly excludes from its application anything criminal, and the rules render this alleged act of the respondent evidence of em-

barrassment. [LUSH, J.—That is merely nugatory.] Here was evidence that the respondent had committed no breach of the rules.

Kemp, Q.C. was not heard in reply.

MELLOR, J.—It appears to me to be highly advisable that the company should take out the absurd expression in the rules with respect to evidence of embezzlement; but we cannot say that this agreement is illegal, nor can we entertain the objection made before the magistrate that the man did not understand the contract which he signed. It is said that the magistrate's jurisdiction is ousted by the terms of this agreement, and in one sense this is true; but the effect of it, as it appears to me, is merely to make the manager's certificate conclusive evidence of the respective rights of the company and the conductor to the money deposited. So where money is intrusted to a stakeholder in order that he may give it to the person he considers entitled, or where a builder is to be paid only upon an architect's certificate, such an agreement without fraud is binding on the parties. The 5*l.* deposited is the stipulated amount of damages for a breach of the agreement, and the manager is to be the sole judge of the company's right to keep it. His certificate is to be a condition precedent to that right, and to be conclusive evidence of the facts certified. There is nothing in this contrary to law or policy, and it is binding between the parties. I think the magistrate was wrong, and the case must go back to him.

LUSH, J.—I am of the same opinion. This is a civil contract, and we must enforce it. The conductor leaves to the company's manager to determine whether he forfeits the money deposited with the company. Such an arrangement constantly occurs in building contracts, and I see no reason why it should not be binding in this case.

Judgment for appellants.

Solicitor for the appellants, H. O. Godfray.
Solicitors for the respondent, Moss and Sons.

Friday, Nov. 30.

(Before COCKBURN, C.J., and MELLOR and LUSH, JJ.)

REG. v. HOLBROOK.(a)

Libel—Newspaper—Authority to editor—Protection of proprietor—6 & 7 Vict. c. 96, s. 7.

Upon a criminal information for libel it was proved that the three defendants, the proprietors of the newspaper in which the libel appeared, took an active part in the management of the paper, but had given a general authority to a competent editor to publish whatever he thought proper in the literary part of it. At the trial evidence was tendered by the defendants to prove that the libel was published without their authority, consent, or knowledge, and without want of due care or caution on their part, within the meaning of 6 & 7 Vict. c. 96, s. 7. The judge refused to hear this evidence, and directed the jury that the section did not apply. Upon a rule for misdirection,

Held, by Cockburn, C.J. and Lush, J. (dissentiente Mellor, J.), that notwithstanding the authority to the editor it was a question for the jury whether the protection given by this section applied to the defendants; and that there must be a new trial.

(a) Reported by M. W. McKellar, Esq., Barrister-at-Law.

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THIS was a criminal information for libel, tried at Winchester before Lindley, J. and a special jury, a verdict of guilty having been found against the defendants, who are the proprietors and publishers of the *Portsmouth Times and Naval Gazette*.

The information had been granted at the instance of Mr. John Howard, the clerk of the peace for the borough of Portsmouth, who, in effect, had been charged by an article in that newspaper with having packed a grand jury at the borough quarter sessions, for the purpose of improperly dealing with an indictment for personation at a municipal election.

The defendants, who pleaded Not Guilty only, were proved to be the publishers of the paper and to be actively engaged in the management. It appeared, however, that they employed a competent editor to superintend that part of the paper in which the libel appeared, and he had general authority to publish whatever he thought proper. The defendants then tendered evidence to show their exemption from liability under the 7th section of Lord Campbell's Act (6 & 7 Vict. c. 96). This evidence the learned judge refused to admit, and he directed the jury that the defendants were not in a position to avail themselves of that section.

The words of the 7th section of 6 & 7 Vict. c. 96, are,

That whensoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.

On the 3rd Nov. *Cole*, Q.C. obtained a rule *nisi* for a new trial on behalf of the defendants, on the ground of misdirection in the judge's statement that the defendants were criminally responsible for the publication of the libel, although they had appointed a competent editor to conduct the newspaper, and that the publication was made without their actual authority, consent, or knowledge, and did not arise from want of due care or caution on their part.

Charles, Q.C. and *A. L. Smith* now showed cause for the prosecution.—Here the evidence established an actual publication under the general authority given to the editor by the defendants, and therefore this was not the mischief aimed at by the remedy given in this section. It was held by the Exchequer Chamber in *Parkes v. Prescott* (L. Rep. 4 Ex. 169) that the criminal liability for a libel published by authority was more extensive even than the civil liability. No doubt as far back as 1770 we find it stated that *prima facie* evidence of publication, such as public exposure for sale and selling at the defendants' shop, might be rebutted by evidence in exculpation (*Rees v. Almon*, 5 Burr. 2686), but there is no subsequent case in which that dictum has been acted upon. From that time the law and practice concerning libel seems to have become more stringent against publishers, except so far as Mr. Fox's Libel Act (32 Geo. 3, c. 60) relieved them by empowering the jury to give a general verdict upon the whole matter in issue, and abolished the previous limitation of their right to consider the publication only, which was the law as laid down in *Rees v. The Dean of St. Asaph*, reported in a note to *Rees v. Withers*

(3 T. Rep. 428). In 1819 (*Rees v. Walter*, 3 Esp. 21) Lord Kenyon said at Nisi Prius, "he was clearly of opinion that the proprietor of a newspaper was answerable criminally as well as civilly for the acts of his servants or agents for misconduct in the conducting of a newspaper. That was not his opinion only, but that of Lord Hale, Powell, J., and Foster, J.: all high law authorities, and to which he subscribed. This was the old and received law for above a century; and was not to be broken in upon by any new doctrine upon libels." This ruling was followed by Lord Tenterden at Nisi Prius in *Rees v. Gutch* (Moo. & Malk. 433), who, in summing up the second trial of the same defendants, said (p. 438): "I tell you to-day, as I thought myself bound to tell the jury yesterday, that the proprietor of a newspaper is criminally answerable for what appears in it; I do not mean to say, nor ever did mean to say, that some possible case may not occur in which he would be exempt, but generally speaking he is answerable." So in *Hawkins' Pleas of the Crown*, Bk. 1, ch. 28, sect. 10, we find, "And it is said not to be material whether he who disseminates a libel knew anything of the contents or effect of it or not." There are also *dicta* of Lord Lyndhurst, C.B., and Alderson, B., in *Colburn v. Patmore* (1 Cr. M. & E. 73), which adopt this view of the law. The former said (p. 77): "There is this distinction between the case of libel and that of other acts committed by servants, that whether the libel be published negligently or wilfully, the master is responsible, but in other cases he is answerable only where the act is negligent." Alderson, B. added: "A master is presumed to authorise the insertion of a libel; in other cases the master is not presumed to authorise the wilful act of his servant in committing a tort. Does not the proprietor of a newspaper give authority to the editor to publish everything, libellous or not? Does not such a general authority cover the publication of a libel?" In the case above mentioned (*Rees v. Gutch*) the defendants were proved to be proprietors of the newspaper in what is said to have been then the usual manner, by their affidavit filed at the Stamp office, and no evidence on the point was offered. Similar evidence by declaration and certified copy was made conclusive against the publisher by 6 & 7 Will. 4, c. 76, s. 7; and although that section was repealed by 32 & 33 Vict. c. 24, s. 1, it was the law at the time Lord Campbell's Act (6 & 7 Vict. c. 96), was passed, and that evidence must have been intended by the description of "evidence which shall establish a presumptive case of publication against the defendant," contained in the 7th section. To meet this presumption created by the registration, that section provides a protection for a publisher if he can prove that the libel was published without his authority, consent, or knowledge, and without want of due care or caution, as by the insertion of a libel by an unauthorised person. It was not, however, intended in any way to apply to a case like the present where the publisher's general authority to the editor is proved, nor where the publisher is the manager of his own paper, and no libel can appear in it if due care and caution be exercised. This is implied by the note to this section contained in Chitty's Statutes, vol. 2 (3rd edit. 1865), p. 1254. That a general authority of this kind should render the defendants liable here is supported by the decision to that effect with

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respect to a fraudulent misrepresentation in *Barwick v. English Joint Stock Bank* (L. Rep. 2 Ex. 259). [LUSH, J.—That is with respect to civil liability.] It was similarly held upon an indictment for a nuisance in

Reg. v. Stephens, L. Rep. 1 Q. B. 702.

Oole, Q.C. and *Folkard* supported the rule.—The last case cited (*Reg. v. Stephens*) was expressly determined on the ground that there was no other remedy but an indictment, and that it was in the nature of a civil proceeding. In all cases of criminal liability except libel, the rule is and has always been admittedly that a person cannot be responsible without knowledge and consent for the illegal act of his servant or agent. Even at the time of *Rees v. Almon*, in the year 1770, it was possible to rebut the exception to this rule with respect to libel. The presumption against the publisher, although strengthened by the course of practice before Lord Campbell's Act, was always regarded as an anomaly; and it was to put an end to this anomaly, and not merely for the purpose of abolishing a particular mode of proof, that the 7th section was enacted. This is a case to which that section is exactly applicable, and the defendants ought to have been allowed to adduce the evidence which they tendered at the trial.

COCKBURN, C.J.—I am of opinion that this rule must be made absolute. The facts, as I understand them, show that the defendants are the three joint proprietors of this newspaper; but it appears that, when not absent from Portsmouth, the duties of conducting the paper are divided between four persons, viz., the three defendants and an editor appointed by them to manage the literary department. The defendants undertake respectively the commercial, the advertising, and the publishing duties. At the time of the publication of this libel one of the defendants was absent in Somerset on account of his health, and he clearly was not cognisant of the publication. The others were present, and discharging their ordinary duties, but, as the editor had full discretion to publish whatever he thought proper in that department which issued the libellous publication, without consulting them, all the defendants must be taken, for the purpose of this rule, to have known nothing of the insertion of the article complained of. The question is whether the defendants, or either of them, are criminally responsible. It is an undoubted principle of law that a man is responsible criminally only for his own acts, or those authorised expressly by him through his appointed agent. It is not to be implied or inferred, from the fact that the defendants gave their editor a general authority to manage the paper as he thought proper, that they authorised him to do what was unlawful in the conduct of his ordinary business. Although this is the rule of law, there seems to have been introduced an exception with respect to libel. Lord Tenterden, at *Nisi Prius*, in 1829, following a previous direction of Lord Kenyon, and a statement of the law in *Hawkins' Pleas of the Crown*, laid down that a proprietor of a newspaper was criminally responsible for a libel, although he took no part in the publication of the newspaper, nor of the libel in question. He further proceeded to justify this ruling, and expatiated upon the danger to the public which its modification might cause. It is not necessary to say how far we dissent from that doctrine; it was considered an anomaly by high

authority at the time, and I cannot doubt that the 7th section of Lord Campbell's Act was passed to put an end to it. It has been suggested that the object of this legislation was only to get rid of the presumption from particular evidence created by previous statute, or to apply to a case where the libel has been inserted by some one who had no authority to interfere at all with the publication. The answer to both these suggestions is that the section was unnecessary for the accomplishment of either of these objects, and I can come to no other conclusion than that it was intended by these words to reverse this anomaly, and to render libel subject to the general law. If then, as I think, this provision was designed to protect the proprietor of a newspaper from criminal responsibility for the act of another person, committed through no fault of his and without his authority, does not the case here come within its application? As to the defendant who was absent, he clearly is protected unless the prosecution can show that his general authority to the editor expressly included power to publish libels. As to the other two defendants, the section provides protection from liability for a publication made without a publisher's authority, consent, or knowledge, if he has exercised due care and caution: it would then be a question for the jury looking at all the circumstances, whether those defendants can show themselves entitled to that protection. If the jury should be in the defendants' favour on these points they can neither of them be criminally liable. I say nothing about their position civilly, but it seems to me that the section can have no application at all if it does not apply to this case. It is not for us to say whether it is expedient or desirable that proprietors of newspapers should be freed from liability under such circumstances, and I do not consider that question. Simply this section is, in my opinion, applicable to the facts upon which this rule has been granted; I think it must be made absolute, and the case must go back for a new trial.

MELLOB, J.—I regret much that I am unable to concur with the Lord Chief Justice and my brother Lush in their view of this matter. I dissent with the greatest diffidence, but I cannot think that the Legislature intended to apply sect. 7 of this Act to persons situated as these defendants are. They do not in the ordinary way live at any distance from the publishing office, they do not keep away from the general management of the paper, and the whole business is conducted for their profit and by their authority. The editor might by inadvertence have published this libel, but the want of care would then deprive the publication of the protection given in the Act. I think, too, that the absent partner is in the same position as the other two; they all gave their editor a general authority to do what he liked; they vested their discretion in him, they put themselves in his hands, and they must be taken to have authorised whatever he has done. The 7th section requires not only the absence of authority, consent, and knowledge, but also the presence of care and caution. I quite agree that, upon the evidence adduced at the trial, this libel, must be taken to have been published without the knowledge of the defendants; but, to be exempt from liability, they must further prove that it was beyond the authority they had given to their

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editor, and that they were duly careful and cautious in respect of its publication. If my brother Lindley took the view that the statute did not apply because the defendants could not show all or some of these conditions of exemption, he seems to me to have been right in his summing up and refusal to hear the evidence tendered. Proprietors who take part in the management of their paper, but commit themselves to the discretion of an editor who is careless, cannot escape responsibility; but if the failure in care is not due to the proprietors themselves, or to the person whom they trust, then it may be that this clause applies. The defendants here take various parts in managing their paper, and the learned judge was right, in my opinion, if he said upon the evidence before him that the libel was published with the defendants' authority and consent, if not with their actual knowledge, and that the protection given by this section did not cover them unless they showed no want of care on the part of the editor. The case, however, must go for a new trial upon the judgment of the majority of the court.

LUSH, J.—There are two questions for our consideration; one as to the construction of the 7th section of Lord Campbell's Act; the other, whether the evidence adduced at the trial was sufficient to justify the direction that this section did not protect the defendants. And, first, what was the object of this section? The Act professes to amend the law of libel, and to understand this particular provision we must consider what was the state of the previous law. We find that a proprietor was then liable criminally for the publication of a libel in his paper without his knowledge or authority. This was admitted to be an anomaly and felt to be a hardship. The nuisance case cited is quite a different matter; that was a public injury for which there was no private remedy, whilst a libel is a private injury for which a public remedy has been added to the existing private one. I do not feel at liberty to apply to this section the limited interpretation which has been suggested. What is the fair meaning of the words? They seem to me to exactly apply to a proprietor whose editor admits into the paper libels without his authority. The last part of the section must mean that a proprietor is bound to exercise proper care and caution in his appointment of an editor; and, if he does that, he is not responsible for the editor's acts done without his authority, consent, or knowledge. This is the remedy which the Legislature would naturally apply to such an admitted anomaly as this rule of law was. There is ample protection for the public without injury to the proprietor. The evidence tendered in this case ought to have been admitted; and it might have been sufficient, as it seems to me, to have justified the jury in finding for the defendants.

Rule absolute for a new trial.

Solicitors for prosecution, *Gregory, Rowcliffes, and Co., for John Howard, Portsmouth.*

Solicitors for defence, *Ford and Ford.*

Monday, Dec. 10.

(Before COCKBURN, C.J., MELLON and LUSH, JJ.)

CURTIS (app.) v. Buss (resp.) (a)

Appeal to Quarter Sessions—Notice to court of summary jurisdiction—Service—Address—Conviction for being found drunk—35 & 36 Vict. c. 94, ss. 12, 52.

The appellant was convicted by justices of the Cinque Ports, sitting at Ramsgate, of being found drunk under the Licensing Act 1872, s. 12. Five days afterwards he served upon the clerk to the justices, sitting at Ramsgate, a notice of appeal purporting to be in accordance with sect. 52, subsect. 2 of that Act, but addressed generally to the Justices of the Cinque Ports and the respondent. Neither of the justices who heard the complaint received any notice of appeal. The Recorder at Quarter Sessions held the notice bad, and did not proceed on the merits. He granted a case, however, on the sufficiency of the notice of appeal.

Held, on rule for mandamus to the recorder to hear the merits, that this was not notice to the court of summary jurisdiction of the appellant's intention to appeal, within the words of the said sub-section; and that the recorder was not bound to hear the merits if he considered he had no jurisdiction.

THIS was a rule nisi calling upon the deputy recorder of the borough and Cinque Port of Sandwich in the county of Kent, to show cause why a writ of mandamus should not issue directed to him commanding him to enter or cause to be entered continuances from session to session to the next general quarter sessions of the peace, to be holden in and for the said borough and cinque port, upon the appeal of Horace Curtis against a certain conviction bearing date on or about the 16th of April last, whereby the said Horace Curtis was convicted of having been found drunk on certain premises situate in the liberty of Ramsgate, licensed for the sale of intoxicating liquors by retail; and at such next general quarter sessions of the peace to hear and determine the merits of the said appeal.

The appellant, the said Horace Curtis, was charged, on the said 16th April, in the Town Hall, Ramsgate, before seven justices of the Cinque Ports (of which Ramsgate is a liberty), sitting in petty sessions, under the Intoxicating Liquors Licensing Act 1872 (35 & 36 Vict. c. 94), s. 12, with having been found drunk, on the night of the 4th April, in certain premises in Ramsgate licensed for the sale of intoxicating liquors by retail. The charge was made against the appellant by Edward Buss, superintendent of the Ramsgate police, who was respondent in the said appeal; and the said justices convicted the appellant and fined him 10s. and costs.

Two only of the said seven justices signed the conviction.

On the 21st April the following notice and grounds of appeal, signed by the appellant's solicitor, were served upon the respondent, and also upon the clerk to the justices who sit in petty sessions at Ramsgate; but no notice of appeal was received by any of the seven justices who were on the bench when the appellant was convicted:

"To Her Majesty's justices of the peace in and for the liberties of the Cinque Ports, and to

(a) Reported by M. W. McKILLAN, Esq., Barrister-at-Law.

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Edward Buss, chief officer of police in the parish of Ramsgate.

"I hereby, on behalf of Horace Curtis, who was convicted at the Town Hall, Ramsgate aforesaid, on the 16th day of April instant, of being found drunk on certain premises, licensed for sale of intoxicating liquors by retail, there situate, and in the occupation of one John Overy Eve, give you and each of you notice that it is the intention of the said Horace Curtis to appeal against such conviction at the next general quarter sessions to be held at Sandwich, on the ground that such conviction was against the weight of evidence produced at the hearing and trial of the complaint and information upon which the said conviction was made.

"Dated the 21st April 1877.

"H. W. DORMAN,

"Solicitor for the said Horace Curtis."

On the 23rd April the appellant and two sureties duly entered into recognisances to prosecute this appeal; and the bond recited the conviction as having been made by the two justices who signed it, giving their names in full, and describing them as "two of Her Majesty's justices of the peace in and for the liberties of the Cinque Ports."

At the hearing of the appeal at quarter sessions, the Deputy Recorder, upon the application of the respondent's counsel, held that service of notice of appeal upon the clerk to the justices only, and not upon any of the justices, was an insufficient notice to the court of summary jurisdiction, within the meaning of sect. 52, sub-sect. 2, of the said Licensing Act 1872, and that he had therefore no jurisdiction to hear the appeal. He, however, granted a special case for the consideration of the point of law by the Queen's Bench Division. A special case raising the question was accordingly settled by the parties; but their attention being called to *Reg. v. Sutton Coldfield* (L. Rep. 9 Q. B. 153), the appellant moved this rule, instead of proceeding therewith.

By sect. 52 of the said Act it is enacted that:

If any person feels aggrieved by any order or conviction made by a court of summary jurisdiction, the person so aggrieved may appeal therefrom, subject to the conditions and regulations following,

(2) The appellant shall, within seven days after the cause of appeal has arisen, give notice to the other party, and to the court of summary jurisdiction, of his intention to appeal, and of the ground thereof.

Kingsford showed cause against the rule on behalf of the respondent.—The two objections to this notice are, (1) that its address to the justices of the Cinque Ports is too wide; it should have been limited to those who convicted the appellant; and (2) that its service upon the clerk to the justices was no service upon the court of summary jurisdiction. No judicial interpretation has yet been put upon the required notice to the court of summary jurisdiction; but it has been held under words requiring a person, aggrieved by an order or conviction made by any justice, to give notice in writing to such justice that it was not enough, in the case of a conviction under the General Highway Act by two justices, to serve a notice only on one although addressed to both, and although it was proved that the justice who received the notice passed it on to the clerk of the justices. The validity of the notice in this present case is not affected by *Reg. v. Eaves* (L. Rep. 5 Q. B. 75), where it was held that

service upon the clerk in the presence of the justices was service upon the justices. Similar words are used with respect to notice upon the court of summary jurisdiction in 34 & 35 Vict. c. 32, s. 3, sub-sect. 2; but the effect of them has not been considered, although *Reg. v. Goodall* (L. Rep. 9 Q. B. 559) was decided upon other provisions of the Act.

Deane supported the rule.—The effect of *Reg. v. Sutton Coldfield* (L. Rep. 9 Q. B. 153) is that this appeal must be heard at the quarter sessions upon the merits before the preliminary objection to the notices can be brought before this court. This rule, therefore, must be made absolute. [LUSH, J.—The rule is, that the quarter sessions may hear and determine the appeal. How can we direct that court to determine a matter in which it may have no jurisdiction? COCKBURN, C.J.—We must decide the validity of the notice of appeal first.] The question on that point is whether the words requiring notice to the court of summary jurisdiction mean that the appellant must serve notice upon each magistrate who was on the bench during the hearing. The appellant is allowed seven days in which to make his appeal, and before that he may be unable to find out who or where those magistrates are. [LUSH, J.—At all events the appellant here had the names of the justices who signed the conviction in his recognisances within the time allowed.] The 2nd sub-section of this 52nd section does not require notice in writing, therefore the clerk's verbal information to the justices is sufficient.

COCKBURN, C.J.—This rule must be discharged on the ground that the deputy recorder was right in refusing to hear the appeal. It was quite within his jurisdiction to decide that the notices of appeal were not valid, and upon that decision his jurisdiction was ousted. It might be a question whether, upon the authority of *Reg. v. Sutton Coldfield*, we could consider the propriety of this decision upon a special case, even if the merits of the appeal had been afterwards heard. It is not necessary, however, to allude to it, because the point of law whether there was jurisdiction to hear the appeal upon these notices is more properly raised by this rule. One object of the 52nd section of 35 & 36 Vict. c. 94 is, that an appeal against a conviction by justices should be brought to the knowledge of those justices who took part in it. It is certainly not sufficient to serve a notice under the 2nd sub-section upon the clerk to the bench in the absence of the justices who heard the complaint. It should not only be served upon those justices in person, but I think it ought to be addressed to the particular bench of the division or borough which formed the court of summary jurisdiction. It is clear that this notice of appeal was bad, and therefore this rule must be discharged.

MELLOR, J.—It turns out that this notice was clearly insufficient, and the deputy recorder has rightly decided not to hear the appeal. If it had been otherwise, and the notice were good, we could have interfered by *mandamus*, and directed the hearing on the merits. This would be useless, however, until the preliminary question is decided.

LUSH, J.—This being a rule for *mandamus*, we must decide the preliminary question, whether the notice of appeal was good. Clearly, this was not a proper service; it is no duty of a justice's clerk to serve such a notice upon the members of

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his bench, and the justices who heard the complaint ought to have an opportunity of opposing the appeal.

Rule discharged.

Solicitors for appellant, *Kingsford and Dorman*, for *W. H. Dorman*, Margate.

Solicitor for respondent, *T. H. Boys*, Margate.

Wednesday, Nov. 21.

(Before COCKBURN, C.J. and MELLOR, J.)

TEBB (app.) v. JONES (resp.) (a)

Vaccination—Previous conviction—Notice to vaccinate—30 & 31 Vict. c. 84, s. 31—34 & 35 Vict. c. 92, s. 11.

The appellant was ordered by a magistrate, under sect. 31 of the Vaccination Act 1867, to cause his child to be vaccinated upon a notice from the vaccination officer headed Vaccination Acts 1867 and 1871, and reciting that appellant was in default under the above Acts in respect of his said child; the notice proceeded to require the appellant to have the child vaccinated within fourteen days, and do all other things the law requires touching the said vaccination; failing which it would be the vaccination officer's duty to report the case in order that proceedings should be taken as the law directs.

The appellant had been twice before fined in reference to the vaccination of the said child, who was two years old.

Held, upon a case stated, that there was nothing in the Vaccination Act of 1871 to prevent a repetition of a conviction for breach of the 31st section of the Act of 1867, and that this notice was well adapted to that section's requirements.

On the 25th May 1877 William Tebb, the appellant, appeared before one of the magistrates of the police courts of the Metropolis sitting in the Marylebone Police Court, in answer to a summons to show cause why an order should not be made directing Beatrice Hewetson Tebb (a child of the appellant, hitherto not successfully vaccinated, under fourteen years of age, and being within the said parish) to be vaccinated.

It was given in evidence by the respondent that the said child was two years of age, and that he had received no certificate that she had been vaccinated.

That on the 15th March last he had served notices at the residence of the appellant, copies of which were annexed.

That he did not know whether the child was now in the parish, and that the appellant had twice been fined in reference to the vaccination of the same child.

No evidence was offered on behalf of the appellant, but his counsel objected:

1. That the notice proved to have been served on the appellant, the neglect of which forms the ground for this information, is not the notice required by the Act 30 & 31 Vict. c. 84, s. 31.

2. That the appellant has already been convicted of neglect to attend to the notice required by the above-named section, and cannot be again proceeded against for the same neglect, nor can that notice be repeated.

3. That the limitation of time prescribed by the Act 34 & 35 Vict. c. 98, s. 11, is a bar to the present

proceeding, the child being beyond the age of fifteen months.

The further hearing of the case was then adjourned till the 15th June, and, being of opinion that the above-mentioned objections were not in accordance with the true intent and meaning of the said Acts, the magistrate made an order that the said child should be vaccinated.

The appellant being dissatisfied with this decision, as being erroneous in point of law, duly gave the magistrate notice in writing to state a case for the opinion of this honourable court, and duly entered into the recognisance required by the statute 20 & 21 Vict. c. 43.

The following are the notices referred to:—

Parish of Saint Pancras,
Vestry Hall, St. Pancras, N.W.,
15th March 1877.

Vaccination Acts 1867 and 1871.

Whereas you are in default under the above Acts respecting your child Beatrice Hewetson Tebb, I hereby require you to have the said child vaccinated within fourteen days from the date hereof, and do all other things the law requires touching the said vaccination, failing which it will be my duty to report your case in order that proceedings may be taken as the law directs.

W. T. JONES,
Vaccination Officer.

To Mr. William Tebb.
Mr. Claremont, M.B.C.S., Milbrook House, Hampstead-road, public vaccinator for St. Pancras, attends, &c., to vaccinate without charge children or other persons resident in the parish.

If the child be vaccinated at one of the above-mentioned stations, the public vaccinator is responsible for the transmission of the certificate to me, otherwise it devolves upon yourself to send me the certificate.

N.B.—This is the last notice; a summons will be issued at the expiration of fourteen days from this date.

If the child is unfit for vaccination it is necessary to forward a medical certificate of postponement.

A form "B." for the purpose will be found on the paper furnished by the registrar.

By 30 & 31 Vict. c. 84 (the Vaccination Act of 1867), s. 31:

If any registrar or any officer appointed by the guardians to enforce the provisions of this Act shall give information in writing to a justice of the peace that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure it being vaccinated, and that this notice has been disregarded, the justice may summon such parent or person to appear with the child before him at a certain time and place, and upon the appearance if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated, nor has already had the smallpox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been so vaccinated, or shall not be shown to be then unfit to be vaccinated or to be insusceptible of vaccination, the person upon whom such order shall have been made shall be proceeded against summarily, and unless he can show some reasonable ground for his omission to carry the order into effect shall be liable to a penalty not exceeding 20s.

Provided, that if the justice shall be of opinion that the person is improperly brought before him, and shall refuse to make any order for the vaccination of the child, he may order the informant to pay such person such sum of money as he shall consider to be a fair compensation for his expenses and loss of time in attending before the justice.

The only form of notice in the schedule to this Act requires vaccination within three months from birth, according to sect. 15, which requires the notice to be delivered by the registrar to the

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parent, for the purposes of being filled up, within seven days of the registration of birth.

By 34 & 35 Vict. c. 98 (the Vaccination Act 1871), s. 11 :

Proceedings under sect. 31 of the principal Act (the Vaccination Act of 1867) may be taken and proceeded with with respect to any child who is not within the union or parish for which a vaccination officer acts, if either the child or its parent was within such union or parish at the time of the information being given by such vaccination officer.

Where any parent of a child fails to produce such child when required so to do by any summons under the principal Act, such person shall be liable on summary conviction to a penalty not exceeding 20s.

Any complaint may be made and any information laid for an offence under the Vaccination Acts 1867 and 1871 at any time not exceeding twelve months from the time when the matter of such complaint or information arose, and not subsequently.

When a person is charged with the offence of neglecting to take or cause to be taken any child to be vaccinated, and on the defence made by such person it appears to the justices having cognisance of the case that such person is not guilty of such offence, but has been guilty of the offence of not transmitting any certificate required by the principal Act or this Act with respect to the vaccination of such child, the justices may convict such person of the last-mentioned offence in like manner as if he had been charged therewith.

The defendant in any proceedings under the principal Act or this Act may appear by any member of his family or any other person authorised by him in this behalf.

Baker argued for the appellant.—Under the 31st section of the Vaccination Act 1867 it was decided, in *Allen v. Worthy* (L. Rep. 5 Q.B. 163), that a parent might be proceeded against a second time for non-vaccination of his child; but sect. 11 of the Act of 1871 forbids any complaint or information after a year has expired since the offence. Now the offence, as provided by the form in the schedule, can only be non-vaccination in the first three months of life; the child here being two years old cannot therefore be within the compulsion of the former Act.

Francis appeared for the respondent, but was stopped by the Court.

COCKBURN, C.J.—This case is very clear, and I do not understand why the magistrate stated it. There has been here a complete compliance with the 31st section of the Act of 1867. The argument that a man cannot be punished twice for persisting in refusing to have his child vaccinated was considered and held to be of no avail under this section in *Allen v. Worthy*. There is nothing in the Act of 1871 to alter the law as determined by that case. If this notice were invalid merely because there is no form like it in the schedule to the Act, legislation on many subjects would be abortive. There is nothing in either statute to prevent a repetition of a conviction for breach of the 31st section of the earlier Act, and this notice is well adapted to that section's requirements.

MELLOR, J.—I am of the same opinion. In order to protect the public from smallpox, the object of these Acts is clearly to enforce successful vaccination. This is a notice in accordance with the terms of the 31st section of the Act of 1867, and the conviction must be affirmed.

Judgment for respondent.

Wednesday, Nov. 21, 1877.

(Before COCKBURN, C.J., MELLOR and LUSH, JJ.)

WATKINS (app.) v. PRICE (resp.) (a)

Game—Close time—Kill or take—Object of removal—1 & 2 Will. 4, c. 32, s. 3.

Respondent, in the month of May, finding a pheasant caught accidentally in a rabbit wire set upon land occupied by him, picked it up and took it away, the pheasant being alive.

Justices upon these facts refused to convict him of killing or taking the pheasant between the 1st Feb. and the 1st Oct. under 1 & 2 Will. 4, c. 32, s. 3.

Held, upon a case stated, that the justices must find as a fact the object with which he carried off the pheasant; and that, if he meant to appropriate it, he ought to have been convicted.

THIS was a case stated by three of Her Majesty's justices of the peace in and for the county of Monmouth, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as hereinafter mentioned.

At a petty sessions holden at Abergavenny, in the county of Monmouth, on Wednesday, the 30th May 1877, an information preferred by David Watkins (hereinafter called the appellant) against James Price (hereinafter called the respondent) under sect. 3 of 1 & 2 Will. 4, c. 32, charging for that he said respondent, on the 1st May 1877, at the parish of Cwmoy, in the county of Monmouth (the same day being between the 1st Feb. and the 1st Oct.), unlawfully did take one pheasant there, contrary to the form of the statute in such case made and provided, was heard and determined, the said parties respectively being present, and represented by their respective solicitors.

At the hearing of the said information the justices dismissed the charge against the respondent, without costs, and the appellant being dissatisfied with this determination, as being erroneous in point of law, and not in conformity with the intent and meaning of the Act 1 & 2 Will. 4, c. 32, applied to them in writing, within three days after the determination, to state and sign a case setting forth the facts and grounds of such determination as aforesaid, for the opinion thereon of this court, and duly entered into a recognisance as required by the said statute in that behalf. Therefore the said justices, in compliance with the said application and the provisions of the said statute, stated and signed the following case:—

By sect. 3 of 1 & 2 Will. 4, c. 32, so far as is material to this case, it is enacted "that if any person whatsoever shall kill or take any pheasant between the 1st Feb. and the 1st Oct. in any year, every such person shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every head of game so killed or taken such sum of money, not exceeding one pound, as to the said justices shall seem meet, together with the costs of the conviction."

Sect. 2 of the said Act 1 & 2 Will. 4, c. 32, so far as is material to this case, enacts that the word "game" shall for all the purposes of this Act be deemed to include pheasants.

Upon the hearing of the said information, the appellant, who is a gamekeeper, appeared with his

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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solicitor, and the respondent appeared with his solicitor, and the following facts were proved.

It was proved by and on the part of the appellant and found as facts, that he the said appellant was keeper to Mr. Lilburn Rosher. That on Tuesday morning, the 1st May 1877, a little after four o'clock, he saw a cock pheasant in a wire snare upon land occupied by the respondent; appellant concealed himself, and watched until about half-past seven a.m. when the respondent came and looked over the fence where the pheasant was; the respondent then seemed to be looking if anybody was about, and went away a short distance and then returned, picked up the bird, put it under his arm and took it away, the pheasant being then alive.

Appellant then called out to the respondent, but he did not seem to take any notice, when appellant went over the fence and across the field to him; respondent said, "Now, Watkins, you have put this one in for me, but I know I am in for it;" when appellant got up to him the bird dropped its head, and the respondent put it on the ground, when it moved, but could not get away. The appellant told the respondent that he might as well kill the bird as punish it; respondent did not kill it, but picked it up again and went off with it.

The solicitor for the appellant contended that respondent should be convicted.

On the part of the respondent it was contended that the respondent, who has the right to do so, set his wires to kill rabbits, which are in such numbers that they eat up all his corn and vegetables. That the wire by which the pheasant was held was a triple wire, not such as would be set for pheasants (a wire for a pheasant is generally a single one), and that it caught the pheasant wholly by accident and against the respondent's will. That the pheasant was not killed, the respondent refusing to kill it, and that it was not taken, but that it was simply moved from where it was found, in order to its restoration to health; that it was so restored, and that it was again set at liberty, and that the respondent had not committed any offence within the meaning of the statute. The respondent's solicitor alleged that the wire was such a one as is used for taking rabbits, but it was not produced. A live pheasant was produced in court by the respondent, who stated that it was the pheasant found in the wire, and it was suggested by the respondent's solicitor that it should be restored to liberty at the place where it was caught in the presence of witnesses. It was taken away by the respondent.

The justices, being of opinion that the respondent had the right of setting wires in the fence referred to for the purpose of destroying rabbits, and that he did set the said wire solely for the purpose of destroying rabbits, and not with the intention of catching pheasants, and being of opinion that the catching of the pheasant in the wire was accidental and not intentional on the part of the respondent, decided that it was not an unlawful taking within the object and meaning of the statute 1 & 2 Will. 4, c. 32, and dismissed the case.

Whereupon the opinion of the Queen's Bench Division was asked whether, upon the facts and under the circumstances hereinbefore stated, and the law applicable thereto, the said justices were correct in their determination as aforesaid.

If the Queen's Bench Division should be of opinion that they were correct, the information was to stand dismissed.

If the court should be of opinion that they were not correct, it was to be sent back to the justices to be dealt with accordingly.

Pritchard argued for the appellant, the complainant.—There is no such word as "wilfully" or "wrongfully" in the 3rd section of this Act, therefore any taking of a pheasant is an offence. Here, although the catching in the trap was accidental, there was a clear "taking" by the respondent within the meaning of the Act, if not from the trap itself, at all events afterwards when he picked it up from the ground and went off with it.

Bosanquet supported the decision of the magistrates on behalf of the defendant.—The only question, apparently, which is reserved, is whether an accidental taking is a breach of the Act. The justices, upon the whole of the evidence, have found for the respondent, thereby ignoring any unlawful or improper intention on his part.

COCKBURN, C.J.—The justices have omitted the important part of their finding. The only material fact is the object with which the respondent carried away the pheasant with him. We cannot decide that point, but must remit the case to the justices. If they are satisfied that he did not mean to appropriate the bird, there should be no conviction; but unless he meant to restore it to health and release it, he has taken the bird within the meaning of the Act.

MELLOR and LUSH, JJ. concurred.

Case remitted.

Wednesday, Dec. 19, 1877.

(Before MELLOR and LUSH, JJ.)

PRENTICE (app.) v. HALL (resp.) (a)

Coal mine—Check-weigher—Misconduct—Intimidation—Order of removal—35 & 36 Vict. c. 76, s. 18.

The appellant, a check-weigher, stationed by the persons employed in the respondent's mine to take an account of the weighing of the mineral gotten by them, under sect. 18 of the Coal Mines Regulation Act 1872, had been convicted and imprisoned for intimidating one of the workmen with a view to compel him to abstain from working as a waggon-rider in the respondent's employment. Respondent applied to justices for a summary order for the appellant's removal, under the provisions of that section, and the justices, although it did not so appear on the face of the conviction, admitted evidence to show, and found as a fact, that the said intimidation took place on the respondent's premises, where the appellant had no right to be, except in his capacity of check-weigher. It did not appear that this intimidation caused any impediment or interruption of the working of the mine, but the justices made the order of removal.

Held, upon a case stated, that the appellant had misconducted himself within the meaning of the section, and that the justices were justified in making the order.

THIS was a case stated by two of Her Majesty's justices of the peace in and for the county of Durham, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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was dissatisfied with their determination upon the questions of law which arose as hereinafter stated, on the 18th Aug. 1877, at the police-court in Bishopwearmouth, in the said county, the appellant having duly entered into a recognisance to prosecute the appeal.

Upon the hearing of a certain complaint preferred by the respondent against the appellant, under sect. 18 of the Coal Mines Regulation Act 1872, "That the appellant, being a check-weigher, under the provisions of the Coal Mines Regulations Act 1872, on behalf of the men employed at the mine known as the Ryhope Coal Mine, in the township of Ryhope, in the Sunderland division of Easington ward, and county of Durham, did unlawfully misconduct himself in the manner following: that is to say, he the appellant, on the 5th May 1877, at Ryhope, in the county aforesaid, unlawfully, wrongfully, and without legal authority, did intimidate one John Goodman, with a view to compel him to abstain from working as a waggon-rider in the employment of the said Ryhope Coal Company (Limited), for which offence he the appellant was, on the 2nd July 1877, indicted at the General Quarter Sessions of the peace holden at Durham in and for the said county of Durham, and thereof was duly convicted, and thereupon was ordered and adjudged to be imprisoned and kept to hard labour in the House of Correction at Durham aforesaid for the term of one month, which conviction was not in the least reversed, annulled, or made void, as appears by the record of the court. And the respondent, as manager and agent of the said Ryhope Coal Mine, prayed that the appellant might be called upon to show cause why he should not be removed from his said position as check-weigher as aforesaid.

The Justices made an order for the removal of the appellant from his office as check-weigher as aforesaid, but they made an order as to the costs of the proceedings.

The following facts were either proved or admitted by both parties:—

1. That on the said 5th May 1877 the appellant was check-weigher under the provisions of the Coal Mines Regulation Act 1872, on the behalf of the persons employed at the said Ryhope Coal Mine.

2. That the respondent was the registered agent, under the provisions of the Coal Mines Regulation Act 1872, of the Ryhope Coal Company, and of its owners, the Ryhope Coal Company (Limited).

3. That the Ryhope Coal Mine is situate within the township of Ryhope, in the Sunderland division of Easington ward and county of Durham.

4. That the Ryhope Coal Company (Limited) is a company incorporated and registered under the provisions of the Companies Acts.

5. That on the said 5th May 1877 the said John Goodman was a person employed by the Ryhope Coal Company (Limited).

6. That, in accordance with the custom at Ryhope Colliery (the said 5th May 1877 being Saturday) only a few "banksmen" were at work, and those were not in the pit, but at the surface of the colliery, and on the premises of the colliery.

7. That the said John Goodman was one of these banksmen (being a waggon-rider), and was on the 5th May 1877 on the "branches" of the colliery in his proper employment.

8. That on the said 5th May 1877, and whilst

the said John Goodman was in his proper employment as before set out, the appellant unlawfully, wrongfully, and without legal authority, did intimidate him the said John Goodman, with a view to compel him to abstain from working in the employment of the Ryhope Coal Company (Limited).

9. That for the said offence the appellant was, on the 2nd July 1877, indicted at the Midsummer General Quarter Sessions of the peace, held at Durham in and for the said county of Durham, and thereof was convicted and ordered and adjudged to be imprisoned and kept to hard labour in the house of correction aforesaid for the term of one month.

10. That the appellant suffered such term of imprisonment for the said offence.

11. That a certified copy of the said conviction, produced at the hearing of the complaint, was a true copy; and that the said William Prentice therein named is the appellant.

12. That the said appellant was not the servant of the Ryhope Coal Company (Limited); and, except in his capacity as check-weigher on behalf of the persons employed at the colliery, he had no right on the colliery premises, but was a trespasser.

13. That the intimidation took place on Ryhope Colliery premises.

14. That there was no work done at the colliery on Monday, the 7th May 1877; but on Tuesday, the day following, the said John Goodman worked there under the protection of the police as such waggon-rider as aforesaid, and was so employed at the hearing.

On the part of the appellant it was contended:

1. That neither the written complaint, nor the office copy conviction produced, disclosed that the intimidation of the said J. Goodman occurred at the Ryhope Colliery, and on its works; and a question asked on the behalf of the respondent as to the locality, whether it was or was not a part of the colliery premises, was objected to by the appellant, the objection being overruled by the justices, but was noted at the request of the appellant.

2. It was further contended on the part of the appellant that, if there were general words in a statute, or section of a statute, the construction of such words was limited by particular words preceding or following them (*Sandiman v. Breach*, 7 B. & C. 96, quoted in support); and that in this case the general words "or has otherwise misconducted himself" (sect. 18 of the Act 35 & 36 c. 76) must be taken in connection with and are limited by those particular words preceding the general words in the same section. The following are the words of sect. 18:

The persons who are employed in a mine to which this Act applies, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as "a check-weigher") at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed. The check-weigher shall be one of the persons employed either in the mine at which he is so stationed or in another mine belonging to the owner of that mine. He shall have every facility afforded to him to take a correct account of the weighing for the persons by whom he is so stationed; and if in any mine proper facilities are not afforded to the check-weigher as required by this section, the owner, agent, and manager of such mine shall each be guilty of an offence against this Act, unless he prove that he has taken all reasonable means by enforcing to the best of his

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power the provisions of this section to prevent such contravention or non-compliance. The check-weigher shall not be authorised in any way to impede or interrupt the working of the mine, or to interfere with the weighing, but shall be authorised only to take such account as aforesaid, and the absence of the check-weigher shall not be a reason for interrupting or delaying such weighing. If the owner, agent, or manager of the mine desires the removal of a check-weigher, on the ground that such check-weigher has impeded or interrupted the working of the mine, or interfered with the weighing, or has otherwise misconducted himself, he may complain to any court of summary jurisdiction, who, if of opinion that the owner, agent, or manager shows sufficient *prima facie* ground for the removal of such check-weigher, shall call upon the check-weigher to show cause against his removal. On the hearing of the case, the court shall hear the parties, and, if they think that at the hearing sufficient ground is shown by the owner, agent, or manager to justify the removal of the check-weigher, shall make a summary order for his removal, and the check-weigher shall thereupon be removed, but without prejudice to the stationing of another check-weigher in his place. The court may in every case make such order as to the costs of the proceedings as they think just. If in pursuance of any order of exemption made by a Secretary of State, the persons employed in a mine to which this Act applies are paid by the measure or gauge of the material gotten by them, the provisions of this section shall apply in like manner as if the term "weighing" included measuring and gauging, and the terms relating to weighing shall be construed accordingly.

And the contention of the appellant is, in short, that the misconduct that renders the check-weigher liable to proceedings and removal from his position under this section must be misconduct in his capacity as check-weigher, and must be misconduct whereby the working of the mine was impeded or interrupted or the weighing interfered with.

On the part of the respondent it was contended:

1. That there was a sufficient disclosure in the written complaint of the place at which the intimidation of the said John Goodman occurred to justify us in our admission of an answer to the question whether or not it was on the colliery premises, and that such question and the answer were in accordance with the lawful rules of evidence.

2. It was further contended on the part of the respondent, that the true interpretation of the 18th section of the said Act 35 & 36 Vict. c. 76, was that, if a check-weigher did misconduct himself upon the colliery premises other than by impeding or interrupting the working of the mine, or by interfering with the weighing, he would be liable to proceedings before the justices, and be subject to the provisions of the said section; and that at the discretion of the justices hearing the complaint an order of removal might be made on sufficient ground shown by the complainant.

The Justices being of opinion that the contention of the respondent was the legal and proper one, on the ground that the Act could not reasonably be construed to give a check-weigher unlimited liberty and licence of action and speech, so long as the working of the mine was not impeded or interrupted, nor the weighing interfered with, and being of opinion that the intimidation of the said John Goodman was sufficient ground proved by the respondent to justify in making them in making an order for the removal of the appellant from his office as check-weigher as aforesaid for misconduct, and that the said intimidation was misconduct within the meaning of the Act, gave their determination against the appellant in the manner before stated.

The questions of law upon which this case is stated for the opinion of the court, therefore, are:

1. Whether there is not a sufficient disclosure in the complaint and copy conviction of the appellant for the intimidation of the said John Goodman as aforesaid, in the words "at Ryhope in the said county," to justify our decision to admit the question whether the place where the intimidation of the said John Goodman occurred was or was not a part of the colliery premises, and the answer that it was, and that the said John Goodman was then working on what are known as the "branches" of the colliery, such question and answer being objected to by the appellant and the objection noted as before mentioned.

2. Whether the words "or has otherwise misconducted himself," in the said sect. 18 of the Act, are to be construed and limited by the preceding words of the same section, "if the owner, agent, or manager of the mine desires the removal of a check-weigher, on the ground that such check-weigher has impeded or interrupted the working of the mine, or interfered with the weighing." And whether, as a result, the misconduct which makes a check-weigher liable to proceedings and removal under this section must be misconduct as a check-weigher, and be such as occasions the working of the mine to be impeded or interrupted, or the weighing interfered with. And whether the words "or has otherwise misconducted himself" are to be taken as referring to a separate and distinct class of misconduct by a check-weigher, from the particular misconduct of impeding or interrupting the working of the mine, or interfering with the weighing; and whether, in this case, in which the opinion of the court is now sought, the intimidation on the colliery premises of the said John Goodman by the appellant was misconduct, within the meaning of the section, affording legal and just ground for the complaint and for the order of removal, and generally as to the construction of the section, and what is misconduct which subjects a check-weigher to an order of removal.

A. Wills, Q.C. (with him A. Jones) argued for the appellant.

Mellor, Q.C. (with him E. Clarke), for the respondent, was not heard.

MELLOR, J.—It has been considered essential by the Legislature that the person who occupies the position of check-weigher, as provided by this section, should have no authority to impede or interrupt the working of the mine. There is nothing in the section to limit the kind of interruption intended to be forbidden, or to confine the time in which such interruption might occur to the mere actual working hours. In this case the check-weigher was not a mere trespasser on the respondent's premises; he was using his position as check-weigher as an opportunity for intimidating a workman; such a proceeding comes within the very words of the section, as tending to impede the working of the mine. But, even if not covered by the words themselves, we ought not, I think, to be too strict in limiting the meaning of the expression "otherwise misconducted himself," which, in my opinion, certainly includes the ground of the respondent's application to the court of summary jurisdiction in this case. I am satisfied that the justices were right on all the points they have reserved, and were fully justified in making the order appealed against.

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LUSH, J.—I am entirely of the same opinion. The meaning of the section is plain. A man is put in a position to care for the interests of the workmen, which is independent of the employer or owner of the mine. If, however, he uses that position so as to impede or interrupt the working of the mine, or otherwise misconduct himself in any way having that tendency, whether on or off the premises, or whether in or out of the working hours, he is liable to be removed. The essence of the offence is the use of his position, and the case finds as a fact that, except as check-weigher, he had no right on the premises where the intimidation for which he was convicted took place. It is not necessary to show that actual interruption to the working of the mine was the direct result of the check-weigher's conduct. Intimidation was calculated to have that effect, and is clearly pointed out by the words "otherwise misconducted himself." The order of removal will be affirmed.

Judgment for respondent.

Solicitors for appellant, *Johnson and Weatherall*, for *Bovey and Brewis*, Sunderland.

Solicitors for respondent, *John Scott*, for *Wm. Bell*, Sunderland.

Nov. 28 and Dec. 21, 1877.

(Before MELLOR and LUSH, JJ.)

PIKE (app.) v. ROSSITER (resp.) (a)

Salmon fishery—Fishing mill-dam—Obstruction to fish—24 & 25 Vict. c. 109 s. 22.

The respondent was charged before justices, under sect. 22 of the Salmon Fishery Act 1861, with omitting to maintain a clear opening of not less than four feet wide through the crib, box, or cruiwe of a fishery occupied by him, during the weekly close time. It was proved that his mill-dam had been a fishing mill-dam before 1859, and there were now the remains of a box with fenders over openings of the required size. But part of the old box was broken away; there were no internal appliances, and the box had ceased to be used, or capable of being used, for catching fish. A certificate of the Fishery Commissioners in 1871, however, referred to this dam as a fishing mill-dam, but there was no evidence of any alteration since the passing of the Act, by which increased obstruction to fish was created.

Held (upon a case stated), that this dam had ceased to be a fishing mill-dam before the said Act; that sect. 22 did not apply, and that the justices were right in dismissing the charge.

THIS was a case stated by four of Her Majesty's justices in and for the county of Devon, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law which arose before them as hereinafter stated.

At a petty sessions holden at the Guildhall, in Totnes, in and for the division of Stanborough and Coleridge, in the county of Devon, on the 9th July 1877, an information preferred by Anthony Pike (hereinafter called the appellant) against John Reap Rossiter (hereinafter called the respondent), charging "for that the said respondent being the occupier of a fishery at Totnes Weir, in the parish of Darlington, in the said county of Devon, did not between twelve o'clock at noon on Saturday, 30th June last, and six o'clock on the

Monday morning following, maintain a clear opening of not less than 4ft. in width from the bottom to the top through the crib, box, or cruiwe, of the said fishery at the Totnes Weir, so that a free space of that width was not effectually secured for the passage of the fish up and down through the said box, crib, or cruiwe, contrary to sect. 22 of statute 24 & 25 Vict. c. 109," was heard and determined, the said parties respectively being then present; and upon such hearing the justices dismissed the said information: at the request, however, of the appellant they granted the following case:—

It appeared from the evidence taken at the hearing before the justices that there was what the appellant called a box at the weir. It was proved that only a wood sill, level with the floor at the bottom of the box where the gates hung, was there now, and iron fenders, which are capable of being raised or lowered to regulate the supply of water to the mill, are also still existing. That the engines which used to exist were not at the weir now, although there was evidence of their existence up to 1859.

That the fenders could be raised 4ft.; but if the fenders were down, or only raised a small distance, salmon could not ascend into the higher water. The length of the side walls of the so-called box was 46ft. 6in., and the floor 15ft. 1in. wide at the bottom, and 13ft. 4in. at the top, and part of one of the iron fenders was broken.

That the difference at the weir, as compared with years ago, was that there were iron fenders now instead of wooden ones. These fenders when shut down are as high as the rest of the weir. That the fenders are now at the head of the sluice as formerly, but all other interior fittings and traps used for the catching of fish were removed, and no evidence was given as to the date of removal. That when water was running over the weir salmon had been seen by a witness on many occasions attempting to run up, but he had never seen a fish pass into the higher water.

That the traps were made a very great number of years before the remembrance of an old man who gave his evidence. That there was not now a perfect box, as all the fittings had been removed by means of which the fish used to be caught.

That the Special Commissioners of English Fisheries, when they held their meeting to inquire into the legality of fixed engines for catching salmon, pursuant to the Salmon Fishery Act 1865, did not give any notice that, unless a pass was put within a certain time in the dam, the fishery would cease. When at the weir on the 1st July 1877, it was considered by a witness that it was a box within the statute; but the same witness considered that it was not at present a perfect box, or adapted for catching fish. It was proved by the clerk to the Endowed Schools Governors for Totnes, who produced a certificate of the Fishery Commissioners for England and Wales, relating to the Totnes Weir, dated 1st Dec. 1871, that the fishing mill-dam, being the mill-dam which is the subject of the present proceeding, having a trip or coop on the right bank situate in the river Dart, was legal, and that there was no fish pass in connection with the fishing mill-dam as required by law, and that the mill-dam was at the head of the weir which diverts the water to the town mills. That the said certificate

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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PIKE (app.) v. ROSSITER (resp.)

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was granted to the trustees of the municipal charities, who were then the owners of the mill premises, but under the endowed schools scheme the management and administration of the property had passed to the governors of the schools, and the legal estate vested in the official trustees of charitable lands.

No witnesses were called on behalf of the respondent, but his solicitor contended that he wanted to protect his client's rights.

That the respondent was at present the occupier of the Totnes mills as sub-lessee under a gentleman of the name of Bowden, and that the lease under which the lessee rented bore date 5th May 1863, and that during the time the mills had been in respondent's occupation as such sub-lessee there had been no fishery used in any respect by any person or persons as a fishery, and therefore he contended that the respondent was not bound under the section of the Act of Parliament to keep his fenders up between the times specified in the information.

He also stated on the respondent's behalf that it had not been proved that the respondent had either a crib, box, or cruiwe, or that he had used either for taking salmon in the fishery, and denied that it was a fishery, or that it had been used as a fishery, with the exception of between the years 1856 and 1859, during a previous lease.

That by or under the lease of 1863, a reduced rent had been accepted in consequence of the fishery being abolished, and that ever since the respondent had been the occupier of the mills under the present lease, no fish had been caught there, nor had any appliances, such as a box, &c., been placed there for the purpose of taking fish. That one of the witnesses for the appellant admitted that it was not a perfect box which could be used for taking fish; and the said lease of 5th May 1863 contains an exception and reservation to the lessors of the fishing, if any, near the Rack Marsh called the Salmon Pool, and the fishery near the Rack Marsh, and all other fisheries, if any, belonging to the lessors.

That all traps and gratings had been removed so as to prevent the taking of fish since 1859, and that, if altered from what it is at present, it would damage the respondent's mills; and that the removal of the interior fittings and hecks was done for the purpose of preventing any further use of them being made for the purpose of killing salmon; and consequently there were no means whatever to allow the respondent to kill fish, nor let it or use it as a fishery. He referred to the great damage done to the respondent's mills by the floods rushing down and swamping the grain, and otherwise damaging the machinery, which damage was averted by the use of the fenders.

That there was no proof that it had been used in any shape as a fishery since 1859.

That there was no evidence given that any fish had been taken by the supposed box since the year 1859.

The justices dismissed the case because they did not consider that the supposed box was a box of a fishery within the meaning of the Act, as it had not been used for taking fish since 1859, and even if refitted with hecks, &c., it could not be legally used as such until a pass was put in the weir.

The question of law arising on the above statement for the opinion of the court therefore is,

whether there is a box, crib, or cruiwe of a fishery within the Salmon Fishery Act 1861 (24 & 25 Vict. c. 109), now that the iron fenders are used solely for the purpose of regulating the water which supplies the mill.

Whereupon the opinion of the Court of Queen's Bench is asked upon the said question of law, whether or not the said justices were correct in their determination as aforesaid. And as to what further should be done or ordered by the said court in the premises.

J. Paterson argued for the appellant, the complainant.—The Salmon Fishery Act 1861 (24 & 25 Vict. c. 109), by sect. 4 gives as definitions: "'dam' shall mean all weirs and other fixed obstructions used for the purpose of damming up waters: 'fishing weir' shall mean a dam used for the exclusive purpose of catching or facilitating the catching of fish: 'fishing mill-dam' used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes." The word "fishery" is not defined, but from its use throughout the Act it must include every place in which fish are or have been caught, as well as the right to catch them. With these definitions sect. 22 necessarily applies to the circumstances of this case: "The proprietor or occupier of every fishery shall, between twelve of the clock at noon on Saturday and six of the clock on the Monday morning following, maintain a clear opening of not less than four feet in width from the bottom to the top, through all cribs, boxes, or cruiwes, used for taking salmon within his fishery, so that a free space of that width is effectually secured for the passage of fish up and down through each box, crib, or cruiwe, whether used for the purpose of fishing or not; and shall, for the purpose of maintaining such opening, remove the inscales and rails of all such boxes, cribs, or cruiwes; and any person acting in contravention of this section shall incur the following penalties: (1) He shall for each offence pay a sum not exceeding five pounds, and a further penalty not exceeding one pound for each fish so taken: (2) He shall forfeit every fish caught in contravention of this section." Although the respondent may have no right to catch fish, he has the entire control over these fenders, and is bound to keep an opening for fish in the close time. The object of the section is to compel a passage up and down stream to be kept for fish during part of each week; this passage is found to be necessary for the encouragement of breeding. It would be impossible for fish to increase in this river if their passage is thus prevented. Sect. 20 contains a similar provision in respect of the close season as that of sect. 22 in respect of the weekly close time; and it has been held that the application of that section is not limited to a fishery actually in use; nor to fishing mill-dams where injury to the milling power cannot be done by carrying out the section. Any obstruction to the free passage of fish through a box at the prohibited times was held to be penal under this Act of Parliament:

Hodgson v. Little, 14 C. B. N. S. 111, and 16 C. B. N. S. 196.

Pitt Lewis for the respondent.—The justices were right in holding that this was not a box within the meaning of the Act. *Hodgson v. Little*

[Q.B. Div.] *REGENT'S CANAL CO. (apps.) v. ST. PANCRA'S ASSESSMENT COMMITTEE (resps.)* [Q.B. Div.]

has no application to this case, because the 20th section requires the removal of every obstruction to fish, whilst the 22nd requires only a fish pass. Moreover, the respondent is found by the justices to be no occupier of a fishery, nor is this a fishing mill-dam within the definition given in the Act. Before the passing of this Act, the existing fishing mill-dam was converted into a mere mill-dam, having no contrivances for catching fish; such dam was held to be no fishing mill-dam in

Garnett v. Backhouse, L. Rep. 3 Q. B. 30.

Paterson in reply.

Our. adv. vult.

Dec. 21.—LUSH, J. delivered the judgment of the court (Mellor and Lush, JJ.).—This case, although it was the subject of an elaborate argument on the construction of the Fisheries Act 1861, turns entirely on a question of fact. The statement is so vague, and fact and argument are so mixed up together, that we were unable to discover what the real facts were till we came to examine the case closely. Having done so, it is clear to us that the dam in question had ceased to be a fishing mill-dam before the Salmon Fisheries Act passed, inasmuch as all the appliances and arrangements in the so-called "crib, box, or cruiue" by which it had been adapted for catching fish, and which so far as can be collected from the case were what constituted the dam a "fishing mill-dam," had been removed in the year 1859, and had never been replaced. This is the inference we draw from the evidence stated and the comments upon it, though it is not expressly found, as it should have been, by the justices. A "fishing mill-dam" is defined by the Act to mean "a dam used or intended to be used partly for the purpose of catching or facilitating the catching fish, and partly for the purpose of supplying water for milling or other purposes." From the time that the "crib, box, or cruiue" ceased to be "used," or capable of being used, for catching fish, the dam ceased to be a dam "used or intended to be used" for that purpose, and became a mere mill-dam. The argument, which was so much pressed upon us, that a dam, which was a fishing mill-dam at the passing of the Act, cannot afterwards, by the removal of all means and appliances for catching fish, be reduced to a mere mill-dam, so as to relieve the occupier from the obligation of maintaining a fish pass, is entirely out of place. It must not be taken that we should have assented to that view if the argument had been applicable to the facts. We express no opinion upon the point, because it is unnecessary to do so. The 22nd section of the Act has therefore no bearing upon the case, and, as no alteration has been made in the dam since 1861 which creates "increased obstruction to fish," the claim to have a fish pass by virtue of that section equally fails. We were referred to the certificate given by the Fishery Commissioners 1871, by which it was certified that the dam which the commissioners therein describe as a "fishing mill-dam" was legal. We are at a loss to see what bearing this has upon the question before us, which is not whether the dam is one which the owner has a lawful right to maintain, but whether it is a fishing mill-dam. Upon that question the commissioners have no power to adjudicate. Their calling it a fishing mill-dam does not make it one. We do not know what evidence was laid before the commissioners,

but the evidence before us shows that it was not, either in 1871 or 1861, a fishing mill-dam. The appeal must consequently be dismissed with costs.

Judgment for respondent, the defendant.

Solicitors for appellant, *Hooper and Michelmore*, Newton Abbott.

Solicitors for respondent, *Makinson and Carpenter*, for *Merlin Fryer*, Exeter.

Wednesday, Dec. 19, 1877.

(Before MELLOR and LUSH, JJ.)

REGENT'S CANAL COMPANY (apps.) v. ST. PANCRA'S ASSESSMENT COMMITTEE (resps.)(a)

Rating—Canal—Land of like quality—52 Geo. 3, c. cxcv. s. 101.

By 52 Geo. 3, c. cxcv. s. 101, the lands of the appellants, whether covered with water or not, and also all dwelling-houses, wharfs, warehouses, lockhouses, and other houses are to be rated in their several parishes, the lands, according to their quantity and quality, and the wharfs and houses according to the nature and respective uses, dimensions, and descriptions thereof, in like manner as lands of a like quality, and wharfs and houses of a like and similar size, nature, dimension, or description in the respective parishes where the same shall be situate, are rated.

Held, that the appellants' canal and adjoining paths were to be rated, not as an ordinary canal, nor as land with buildings upon it like those in the other parts of the parish; but as lands, not intended to be built upon, in an improving neighbourhood, of like quality in the parish.

THIS was a special case stated under the provisions of 32 & 33 Vict. c. 67 (the Valuation (Metropolis) Act 1869), sect. 40, by consent of the parties and by order, notice of appeal to the assessment sessions having been previously given by the appellants as provided by the said Act.

1. The Regent's Canal Company was incorporated by an Act of Parliament, 52 Geo. 3, c. cxcv., local and personal (but which Act is a public Act, and may be referred to by either party on the argument of this special case), for the purpose of "making and maintaining a navigable canal from the Grand Junction Canal in the parish of Paddington to the River Thames in the parish of Limehouse, with a collateral cut in the parish of Saint Leonard, Shoreditch, in the county of Middlesex."

2. The canal was made in pursuance of the said Act, and part of the said canal passes through the parish of Saint Pancras, in which parish there are four double locks. The property of the said company in the said parish in the occupation of the company consists, as described in the Valuation List hereinafter mentioned, of
No. 6590 . . Canal, towing path, sloping banks, and locks.

" 6591 . . Dwelling-house, office, and stable,
" 6591a . Cottages near locks,
and the extent of the property above mentioned numbered 6590 is about 21½ acres, and the length of the canal 2 miles 3 furlongs and 196 yards of width varying from 31 to 129 feet.

3. By 52 Geo. 3, c. cxcv. s. 101, it is enacted as follows:

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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And be it further enacted that the lands, whether covered with water or not, and also all dwelling-houses, wharfs, warehouses, lockhouses, and other houses of and belonging to the said company, shall be rateable and chargeable to the maintenance of the poor and to all other parochial rates and taxes in the several parishes and places where they are respectively situated, the lands according to their quantity and quality, and the dwelling-houses, wharfs, warehouses, lockhouses, and other houses according to the nature and respective uses, dimensions, and descriptions thereof, and shall be charged and assessed in like manner as lands of a like quality, and dwelling-houses, wharfs, warehouses, lockhouses, and other houses of a like and similar size, nature, dimension, or description in the respective parishes where the same shall be situate are or shall be assessed or charged; and that the rates, duties, and other personal property of the said company liable to be rated to the poor or other parochial taxes in any such parishes or places shall be rated and assessed in like manner and in the same proportion as other personal property rateable in the said parishes and places respectively shall be rated and assessed, and according to the length of the line of the said navigation in such respective parishes and places, and not otherwise or in any other manner; provided that before such personal property shall be rated fourteen days' notice shall be given in writing to or left at the dwelling-house or usual place of abode of the treasurer or clerk, or any officer of the said company residing in the parish or place where such rate shall be intended to be made, by the respective overseers of the poor of the intention so to do.

4. At the date of the passing of this Act (1812) the lands through which it was proposed that the canal should pass and through which it was afterwards made, were to a considerable extent lands agricultural and pasture, and some of the said lands were used as yards or gardens and some were covered with houses, &c. At the present time within the parish the lands adjoining the canal have been built upon, with the exception of that part passing through Regent's Park, and these buildings are assessed to the poor-rate. If the area now occupied by the canal and towing-path were assumed to be covered by buildings similar in rateable value to the buildings adjoining the canal, allowing for necessary roads, access, &c., and a proportionate part of such rateable value were taken as representing the rateable value of the lands so covered, as distinguished from the buildings standing upon them, then such proportionate part would be the sum of 1134*l.* gross and 915*l.* net rateable value.

5. The area of uncovered land in the parish in 1873 amounted to about one-fourth of the total area of the parish. If the canal were assessed in the ordinary way in which canals, the Acts of Parliament relating to which do not contain any special provisions as to rating, are now assessed—namely, by deducting from the gross receipts in the parish the expenses and outgoings in the parish, and allowances for tenants and trade profits risks, maintenance, &c.—then the sum at which the property of the company is now assessed exceeds the sum at which the appellants claim to be rated.

6. In June 1875 the overseers of the parish of St. Pancras made, under the provisions of the Valuation (Metropolis) Act 1869, a valuation list of the property in the said parish, and in the said list the "gross value" of the property belonging to the Regent's Canal Company therein numbered 6590 was increased from 500*l.* to 2268*l.* and the "rateable value" from 418*l.* to 1418*l.*, the sums of 500*l.* and 418*l.* respectively being the amount of the "gross" and "rateable" values at which the same property had been assessed in the assessment of 1870.

7. The company duly objected before the assessment committee of the said parish of St. Pancras to the valuation list with respect to the property therein numbered 6590 on the ground that the "gross" and "rateable" values of the said property were not made in accordance with the requirements of the Company's Act of Parliament, 52 Geo. 3., c. cxcv, s. 101, but the company failed to obtain such relief as they deemed just. In their notice of objection they stated as the correction which they desired to make that the "gross value" should be reduced to 107*l.* 10*s.* and the "rateable value" to 81*l.*

8. Notice of appeal was duly served, upon which it was agreed to state this case.

9. If the said canal and towing-path were assessed (as the appellants contend they ought to be assessed) as uncovered land of similar quantity and quality applicable to any purpose except building purposes on a building agreement, the "gross" and "rateable" values would not exceed the values which the appellants desired to have inserted in the valuation list in lieu of those inserted by the parish officers; or if the canal and towing-path were rated or assessed as in the alternative the appellants contend that they ought to be assessed according to their quantity and quality as uncovered land in like manner as lands of the like quantity and quality are in point of fact assessed in the parish of St. Pancras, the appellants' valuation would be correct.

10. The respondents contend that the section set out in paragraph 3 was not inserted by the Legislature for the purpose of limiting directly or indirectly the assessable value of the appellants' property, but only to remove a difficulty that then existed from the view of the law then laid down by the courts, namely, that canal rates or dues, &c., were assessable *per se* and only in the parish in which they were considered to be earned, namely where the voyages respectively terminated. That this view of the law was altered shortly after this Act, and the canal rates, &c., have been since considered as an element of the occupation, in other words as of the quality of the land; and, therefore, the property should be rated on the principle laid down in paragraph 5, or in the alternative annual value of the adjoining lands as in paragraph 4.

The question for the opinion of the court was upon what principle the canal and towing-path are to be valued and assessed. If the court should be of opinion that either of the two contentions of the appellants is right, then the gross and rateable values are to be reduced to 215*l.* gross and 204*l.* rateable. If the principle stated in paragraph 4 be correct, then the gross value is to be reduced to 1134*l.* and the rateable value to 915*l.* If the principle stated in paragraph 5 be correct, then it was agreed that the amount of the gross and rateable values respectively shall be determined by an arbitrator. It was agreed that judgment should be entered at the assessment sessions at their session next or next but one after the decision of the court or of the arbitrator in accordance with the judgment of the court, and for such costs as the court should adjudge.

F. M. White, Q.C. (with him *B. S. Wright*) argued for the appellants.—The canal and the adjoining paths ought, under the 101st section of the local Act, to be rated at the amount at which uncovered land is rated in the parish. The construction of this particular section was considered

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MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF EXETER v. HEAMAN.

[C.P. Div.]

in *Ex v. Regent's Canal Company*, 6 B. & C. 720, where it was held that the land used for the purposes of the canal was rateable, not in respect of its improved value, but as if it had not been used for those purposes. And in the *Grand Junction Canal v. Hemel Hempstead*, L. Rep. 6 Q. B. 173, a very similar rating section in an Act of 1794 was interpreted exactly in the sense of the appellants' contention in this case; it was there held that the land occupied by the canal was to be rated in the same proportion as the open land lying near, the value of which might be increased from time to time by circumstances, and the buildings belonging to the company in the same proportion as the buildings lying near.

Poland (with him *Oastle*) for the respondents.—It is impossible to support the principle of rating described in paragraph 5 of the case, in the face of the special rating clause contained in the Act of Parliament. But there can be no doubt that, if this canal did not occupy this particular ground in this parish, the ground would be built upon, as the lands of a like quality have been built upon in the parish. The meaning of the section, therefore, may be defined to authorise the rating of the canal and adjoining paths as if covered with buildings, allowing for roads, &c. The words of [34 Geo. 3, c. xxiv. s. 19, upon which the case of *Grand Junction Canal v. Hemel Hempstead* was decided, differ from the words of the 101st section of this Act, and do not justify the application of the same construction to the present case.

F. M. White, Q.C. was not heard in reply.

MELLOR, J.—We are of opinion that the plan of assessment supported by the appellants' contention is better, more reasonable, and more intelligible than that adopted by the respondents. I cannot think how Mr. Poland's principle could be applied; he admits this land cannot be covered with buildings, but he says we must assume that it is, and then for the purpose of rating separate the land from the buildings upon it. The Act says the buildings of the company are to be rated as buildings of a like nature in the parish; but I do not see how it can be interpreted to say that the land is to be rated as if it had buildings of a different nature from the company's standing thereon. Such a principle would give rise to enormous difficulties, and it seems to have no justification in the words used by the Legislature. It is impossible to furnish accurate data upon which to carry out the assessment according to the section; but, as it appears that both of the modes of rating mentioned in paragraph 9 produce the same result, it will be sufficient if we hold that either of them is correct.

LUSU, J.—I am of the same opinion. The respondents contend that the appellants' land must be assessed as if it were covered with buildings, but at the same time as if the buildings were severed from the land. This is an ingenious principle of rating, which is not only new, but also inconsistent with the words of the 101st section. Lands are to be charged and assessed, not as lands covered with buildings, but as lands of a like quality in the parish—that is, as lands not built upon, and not intended to be built upon, in a growing and improving neighbourhood. This is the appellants' principle, and their appeal must be allowed.

Judgment for appellants.

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Solicitors for appellants, *Ellis and Ellis*.

Solicitors for respondents, *Cunliffe, Beaumont, and Davenport*.

COMMON PLEAS DIVISION.

Friday, Nov. 30, 1877.

(Before GROVE and LINDLEY, JJ.)

MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF EXETER v. HEAMAN. (a)

Market—Infringement by sale within the limits—Conviction—Amendment of summons.

The respondent was charged before the magistrates of the city of E. for having infringed a private Market Act (6 & 7 Vict. c. cxxii., s. 3), which imposed a fine on any person selling, offering, or exposing for sale any carcases or meat within the limits of the city and county of E., except within the markets. It was proved on the 12th Jan. 1877, the respondent delivered certain carcases at a door within the limits, and that the carcases were then weighed and paid for, but it was alleged that they were delivered in pursuance of a previous contract, entered into between the same parties at the same place on the 5th of the same month. The summons was taken out for the 12th Jan., and the magistrates found that there had been a previous sale and purchase on the 5th.

Held (reversing their decision), that they should have convicted the appellant on the above facts, and that if they had thought it necessary, they should have amended the summons by altering the date on which the offence was alleged to have been committed from the 12th to the 5th of the month.

APPEAL from the magistrates of the city of Exeter under 20 & 21 Vict. c. 33. The following case was stated:

At a petty sessions for the city and county of the city of Exeter, holden at the Guildhall therein, on the 19th Jan. 1877, before us, Frederick Franklin and John Knapman, Esquires, two of Her Majesty's Justices of the Peace, acting in and for the city and county of the city of Exeter, a complaint was preferred by Charles Chaplin, the inspector and toll collector, for and on behalf of the said mayor, aldermen, and citizens of the city and county of the city of Exeter, the owners of the Exeter markets, and the tolls, stallage, and profits thereof (hereinafter called the appellants), that Richard Heaman (hereinafter called the respondent), on the 12th Jan., in the year aforesaid, did sell certain carcase meat, to wit, two whole carcases and two half carcases of pigs, at a certain price, within the said city and county other than the Higher or Lower Market therein, that is to say, at the shop and premises of one Elizabeth Bishop, in the Parish of Saint Sidwell, within the said city and county, whereby, as alleged, the said respondent had rendered himself liable upon conviction thereof to forfeit and pay a sum not exceeding 5l., nor less than 40s., and which said complaint was heard and determined before us at the petty sessions aforesaid, and upon such hearing we did dismiss the said complaint.

The said appellants, being dissatisfied with such our determination and judgment as being erroneous in point of law, have applied to us pursuant to the statute 20 & 21 Vict. c. 43, for a case setting forth the facts and the grounds of our deter-

(a) Reported by J. A. FOOT, Esq., Barrister-at-Law.

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MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF EXETER v. HEAMAN.

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mination for the opinion of the Queen's Bench Division of the High Court of Justice. Wherefore we, the said justices, make and sign the following case.

By statute 3 & 4 Vict. (local and personal) c. 122, entitled, "An Act to alter, amend, and enlarge the power of provisions of an Act for removing the markets held in the High and Fore-streets, and other places within the city and county of the city of Exeter, and for providing other markets in lieu thereof," it is by sect. 3 enacted, "that if any person or persons shall at any time sell, offer, or expose for sale (*inter alia*) any carcase, meat, flesh, or other raw victuals, at any other place within the city and county of the city of Exeter, than two certain markets, in the said Act called the Higher and Lower Markets; every person so offending shall for every such offence forfeit and pay any sum not exceeding 5*l.* nor less than 40*s.*" This section contains a proviso exempting every inhabitant of the said city and county selling a carcase meat in the respective houses, shops, and premises from the operation of this section, and also a proviso exempting from its operation hawkers of fish and poultry, &c. (not including carcase meat) upon which the regular market tolls have been paid. By the 11th section of the same Act it is enacted that the delivery of any goods, wares, commodities, articles, or things, thereby made chargeable with or liable to the payment of any toll upon the sale thereof, shall in all cases be evidence of the sale thereof.

It was proved in evidence and admitted, that between six and seven o'clock in the morning of Friday, the 12th Jan. aforesaid, and being one of the said market days, the respondent, who is a carrier residing at Ashreigney, in the county of Devon, unloaded from a cart bearing his name and standing at the door and shop of Mrs. Elizabeth Bishop, who is a pork butcher, residing in Saint Sidwell, within the said city and county, and there delivered into her shop (that being a place outside the market), two whole carcasses and two half carcasses of three pigs, and which were received by Mrs. Bishop. On the part of the respondent it was contended that the said delivery was not a sale of the said carcasses, but a delivery in pursuance of a previous contract, in support of which Mrs. Bishop stated that on the previous Friday, the 5th Jan. she at her said shop had agreed with the respondent for the purchase of three carcasses of pigs at 10*s.* per score to be delivered on the following Friday the 12th, the day in question.

On being asked on cross-examination when she considered the carcasses had become her property, she replied on the day they were delivered to her (the 12th); she further stated that she had not on the previous Friday purchased any particular pigs of the respondent, but had merely bespoken of him a certain quantity of pork of a certain quality; that she had not paid for the carcasses until the evening of that day (the 12th), as she did not know the weight of them until brought in, but the price at 10*s.* a score was agreed for on the previous Friday, and which she considered as binding on her. On the part of the appellants it was contended that the said carcase having been delivered on the 12th Jan. and it being admitted that the contract of sale was made within the city of Exeter at a place outside the said market, the offence against the statute was completed on the

said 12th Jan., and that the respondent should have been convicted in the penalty.

On the facts we decided that there had been a previous sale and purchase on the 5th Jan., and that what took place on the 12th was but a delivery of the carcasses in pursuance of such sale. We did not give any importance to the fact of the price not having been paid until the evening of the 12th, as Mrs. Bishop did not know the weight of the carcasses, or the amount to be paid until the carcasses were so delivered.

Whereupon we declined to convict the respondent, and dismissed the said summons and complaint. The question for the opinion of the court is whether, supposing the facts as stated and admitted by the respondent to have happened on the 5th and on the 12th Jan. to be true, we were right in dismissing the said summons and complaint, or whether we should have convicted the respondent.

Buckmill for the appellants.—The justices were wrong in refusing to convict. Sect. 11 of the Exeter Market Act (3 & 4 Vict. c. 122) enacts that the delivery of any goods, wares, commodities, things, or articles thereby made chargeable with or liable to the payment of any toll upon the sale thereof shall in all cases be evidence of the sale thereof. [GROVE, J.—Surely something must be imported into that to limit its general effect? Mere delivery cannot prove the sale.] It is *prima facie* evidence of it. Further, notwithstanding the finding of the justices, it is clear that the sale did take place upon the 12th. There was only an arrangement for a future sale on the previous occasion, by which neither party was bound. If the justices had thought differently they should have altered the date in the summons, and convicted them upon that.

The respondent did not appear.

GROVE, J.—Even upon the case as stated—and certainly I did not at first think we were called upon to decide a matter which could have been decided by merely amending the summons, simply because the justices did not think fit to amend the summons themselves—they say that they decided that there had been a previous sale and purchase on the 5th Jan., and that what took place on the 12th was only a delivery in pursuance of such sale. As I understand it, if the date in the summons had been the 5th of the month, they would have convicted; and their decision seems to have been that the Act had been contravened on the 5th and not on the 12th, so that they actually prevent the operation of the Act because it has not been contravened on the particular day for which the summons was issued. Cases of this sort should not be sent up, when they are such that the justices might have decided them at the time. I am, however, of opinion that the Act was contravened by what took place on the 12th of the month, within the meaning of this Act. I think there was an infraction of it on the 12th, when the price was ascertained and the meat delivered and the price paid, within the city and not in the market; because, until the weighing and delivering of the meat, the whole transaction was inchoate and incomplete. I must not, however, be taken as saying that because we say the Act was infringed upon the 12th it may not also have been infringed upon the 5th. I think sufficient took place on the 12th to constitute an offence against the provisions of the Exeter Market Act;

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and the decision of the justices must, therefore, be reversed.

LINDLEY, J.—I am of the same opinion. The question is whether the justices were right in dismissing the summons, which was taken out for the 12th Jan. Now, there certainly was a sale within the city of Exeter, and not within the marketplace, of certain carcasses which would have been the subjects of toll had they been sold in the market. That is the substance of the case; and, therefore, it appears quite plain that the justices were wrong in dismissing the summons. I cannot help thinking that they would have amended it if they had been asked to do so; and, as a matter of fact, I think they should have done it without being asked. The question whether the sale took place upon the 5th or upon the 12th should not have arisen at all, if it was clear that the Act had been, upon the one day or the other, infringed. The decision must be reversed.

Decision reversed.

Solicitors for the appellant, *Geare and Co.* for *Gidley*, Exeter.

Monday, Nov. 19, 1877.

(Before DENMAN and LINDLEY, JJ.)

PHILLIPS v. SALMON. (a)

Parliament—County vote—Lease of waste land of a manor—Presentment by burgesses for occupation of common.

The burgesses of the borough and manor of N., in accordance with immemorial custom, at the annual courts, leet and baron, held in 1841, 1852, and 1855, presented to the lord the respondent, one of their number, for occupation of certain portions of the waste of the manor, at a rent to be agreed upon between him and the lord. The burgesses of N. enjoyed a right of common of pasture over the waste land of the manor, but a sufficiency was left of the said waste for the exercise of the rights of the commoners.

The respondent entered into possession of the land, and paid nominal rents to the lord in respect of his occupation. In the year 1861 the lord granted to the respondent a lease of the said plots of land for three lives, with a covenant for the insertion of two new lives in lieu of those two that should first drop. It was admitted that the annual value of the holding was sufficient to qualify for the county franchise.

Held, that the respondent, who continued in possession and paid rent under the lease, had a freehold qualification to entitle him to the county franchise.

APPEAL from the decision of the revising barrister for the county of Pembroke. The following case was stated:—

1. John Phillip duly objected to the name of John Salmon being retained in the list of voters for the county of Pembroke.

2. The name of Salmon appeared in the list of claimants to be entitled to vote for the county as follows:

Name.	Abode.	Nature of Qualification.	Street, lanes, &c.
Salmon, John.	Blaenwarrn.	Feehold lease of house and land.	Blaenwarrn.

3. In support of the claim, the claimant pro-

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

duced a lease duly executed, dated the 28th Feb. 1861, whereby Thomas Davies Lloyd, in the lease described as lord marcher of the barony of Kemes, in the county of Pembroke, demised to the claimant, his heirs and assigns, the dwelling-house, outhouses, garden and lands called Blaeny-Warrn, situate at Newport, in the barony of Kemes, reserving to the lessor mines and minerals, with the ordinary powers for working the same, to hold to the claimant, his heirs and assigns, during the lives of his son, daughter, and grandson, therein respectively named, and the survivors and survivor of them, at a yearly rent of 5s., payable to the lessor, who also thereby covenanted with intent so as to create a lien upon the reversion of the demised premises and all persons who should become entitled thereto, but not to create a personal charge upon the lessor, his executors or administrators, that he, his heirs and assigns, would grant unto the claimant, his heirs or assigns, a lease for adding a life on the said premises, to be named by the claimant, his heirs or assigns, upon the death of such one of the lives therein named as should first drop, and also a further lease for adding a life on the said premises upon the death of such one of the survivors of the lives therein named, and the additional life as should first drop in manner therein mentioned. [A copy of the lease accompanied, and was to form part of the case.]

4. The question on this appeal was, whether T. D. Lloyd had power to grant the lease for the lives of the persons named, or any of them, and in manner therein appearing, so as to create the qualification in respect whereof Salmon claimed.

5. No witnesses were called, nor any further documentary evidence given before the revising barrister, but the following facts were agreed upon between and by the parties in reference to the claim.

6. The site of the dwelling-house and land called Blaenwarrn were formerly part of the waste of the manor of Newport, which manor is co-terminous with the borough and parish of the same name. The barony of Kemes comprises several manors, one of which is the manor of Newport; and the barony also comprises twenty-six parishes, of which the parish of Newport is one.

7. At the time of granting the lease, T. D. Lloyd was lord of the barony of Kemes, and as such lord of the manor of Newport. There are no copyholds in the manor.

8. The borough of Newport is governed by a mayor and burgesses, who have from time immemorial held courts called courts leet and courts baron for the borough. At one of such courts holden annually on the 29th Sept. it has been the custom for the burgesses to present three of their number, one being the mayor in office at the time for the following year. These presentments were delivered to the lord, who thereupon elected one of such persons presented to him, and such person was thereupon sworn into office as mayor.

9. By a charter dated in 1192, Nicholas Fitzmartin, then lord of the barony, confirmed to his burgesses of Newport, then called Newburgh, certain liberties and customs which William, his father, had granted to them, and amongst others, that they should have common of pasture in his land, and easement of wood for their houses and buildings, and for firing, by view of the forester;

likewise that they ought to have a bailiff and a common council for him and for them. This charter was exemplified and enrolled by the justices of the Great Session holden at Haverfordwest, in the thirty-fourth year of the reign of Queen Elizabeth, on the application of the bailiff and burgesses of Newport; and it was again similarly exemplified and enrolled in the fifth year of the reign of James I.

10. At the courts leet and courts baron it has been the practice of the mayor and burgesses, for 100 years and upwards, to present to the lord individual burgesses for occupation of pieces of the common or waste lands, and most commonly with the addition, after naming such burgess, "he to agree with the lord for the rent." In all cases the persons so presented took possession of the apportioned plots of land, generally building cottages and other buildings thereon, and paid the rents to the lord which he had fixed; such rents being very small sums, varying according to circumstances. No duration of the holding was specified in such presentments; but, upon the death of the person presented, his personal representatives continued to occupy and pay rent to the lord without further reference to the court leet.

11. In the year 1838, disputes having arisen between the lord and certain of the persons holding under the above-mentioned circumstances, as to their liability to pay the said rents, the lord took proceedings to recover such rent from one of them, and recovered the amount thereof in an action tried at the assizes.

12. Since the date of such trial the successive lords of the barony have granted many similar leases to that under which the present claim is made, and the leasees have taken possession of the plots demised by such leases, and have paid the rents thereby reserved. There was no evidence that such leases had been granted previously to such date; nor has any notice been taken of such leases on the court rolls.

13. During the time that T. D. Lloyd was lord of the barony, extending from the year 1845 to the present year, the records of the courts leet and courts baron were headed as follows:

"Town and corporation of Newport, in the county of Pembroke, barony of Kemes, whereof Sir Thomas Davies Lloyd is lord of the corporation. The court leet and court baron held at Newport, within the said barony. Before me, A. B., mayor."

14. The original presentment to the claimant of part of the lands in respect of which he claimed as aforesaid was made in the customary form by the jury at the court leet holden on the 14th May 1841, and was in the words following: "We present two pieces of ground on the common to John Salmon, weaver, northwards and westwards of Yetyrhose, admeasurement about 60yds. long by 30yds. He to settle with the lord of the manor for the rent."

15. A further part of the said lands was presented to the claimant by the jury at a court leet holden on the 26th Nov. 1852; and such presentment was in the words following: "We present to John Salmon, of Blaenwarrn, a piece of land on the common, bounded, &c. (mentioning the abutments.) The mayor will mark out the boundaries. The said John Salmon to settle with the lord of the manor for the rent. Received 6d.

in court on account of rent." Then follow the names of the jurors.

16. A further part of the lands in respect of which he claimed was presented to the claimant by the jury at a court leet holden on the 6th Nov. 1855, and such presentment was in the words following: "We present to Mr. John Salmon, of Blaenwarrn, all that piece or spot of land, being part of Newport Common, and situate near a house and garden the property of T. D. Lloyd, Esq., the said spot or piece of land to be of the extent of 60yds. by 30yds. or thereabouts. The said John Salmon shall not encroach or stop up any public roads, and shall settle with the lord of the barony for the rent of the same spot of land. The mayor, accompanied by Mr. J. Llewellyn, Mr. T. Bevan, Mr. J. Harris, and Mr. W. Salmon, are hereby directed to mark out the boundaries. Mr. John Salmon has on this day paid on account of rent the sum of one shilling." Then follows the names of the jurors. The sums of 6d. and 1s. paid on account of rent by the claimant were received by the steward as part of the rent to be fixed by the lord of the manor to be paid for the said plots of land respectively.

17. The lease executed by T. D. Lloyd to the claimant in manner aforesaid included the several pieces of land referred to in the three presentments hereinbefore recited, and included no additional or other land, and possession has been retained by him and rent paid to the lord until the present time, in accordance with the said lease.

18. The burgesses of Newport have from time immemorial exercised rights of common of pasture over the wastes of the manor of Newport. Such wastes consisted originally of 3000 acres or thereabouts within the manor, of which in the year 1861 about 300 acres had been inclosed, and were then held in severalty under the presentments hereinbefore referred to; but a sufficiency of such waste lands was then and still is left for the use by the commoners of their said right of pasture. No right of turbary or estovers has been exercised by the burgesses; and there is no turf or trees within the said waste lands available for the user of either of the last-mentioned rights, if they exist.

19. It was contended for the claimant that the lord had a right to approve against common of pasture, leaving sufficient waste for that purpose; and, if so, that he had also a right to demise the lands so approved; and that there were no other rights of common in this manor. Moreover, that a custom so to demise was proved by the foregoing facts.

It was answered for the objector, that no right to demise could be incidental to the right to approve, without a custom; and that such custom was in this case only recent, and not of legal origin.

The Revising Barrister decided that the contention of the claimant was well founded. He inserted the name of Salmon in the list of claimants. If the court should be of opinion that his decision was wrong, the register was to be amended by erasing the name of Salmon therefrom.

Grantham, Q.C. (Vernon Smith with him) for the appellant.—The respondent has no sufficient qualification. The lord may approve against common of pasture, but he cannot, unless by express custom, grant a lease of the waste, even if sufficient be left for the commoners. The lease

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in respect of which the respondent claims is, therefore void, inasmuch as no precedent for such a demise is shown. [DENMAN, J.—*Prima facie* the land is the land of the lord. It is for you to show that, in demising it, he exceeded his powers.] The lease speaks for itself. He cited

Lascelles v. Ouslow, L. Rep. 2 Q. B. D. 433;
Elton on Commons, p. 238.

Sir H. James, Q.C. (*Besley and Tickell* with him) for the respondent.—The lessor's title cannot be attacked by a political objection to the lessee's vote; but even admitting the appellant's right to this objection, the qualification is good. The presentments by the burgesses amount to a consent by them that the respondent shall occupy at least during his own life, and he is not to be in a worse position because he has a lease. The commoners are at any rate *prima facie* bound by their presentments, and his interest therefore amounts to a freehold. Secondly, we say that his possession for more than twenty years is sufficient under the Statute of Limitations to give him a qualification.

Grantham, Q.C., in reply, referred to

Coke Inst. ii. 85;
Arlett v. Ellis, 7 B. & C. 346;
Case of the Fishermen of Chichester, Godb. 231.

DENMAN, J.—I think the respondent is entitled to our judgment. A good many points have been argued or touched upon in the course of the argument which might give rise to some difficulty if the facts in this particular case did not dispose of them, and enable us to give judgment without reference to certain niceties of law which might have arisen. The decision really turns upon the 10th paragraph of the case stated by the barrister, which states that at the courts leet and courts baron it has been the practice for the mayor and burgesses for a hundred years and upwards—which I read here in the absence of any contradiction as equivalent to time immemorial—to present to the lord individual burgesses for occupation of pieces of the common or waste lands, and most commonly with the addition, after naming such burgess, of saying, "he to agree with the lord for the rent." It is further stated that in all cases the persons so presented took possession of the apportioned plots of land, generally building cottages and other buildings thereon, and paid the rents to the lord which he had fixed, such rents being very small sums, varying according to circumstances. Now, no question arises here as to the value of the premises; and it must be assumed in this case that, subject to the bare point of law, the holding was of sufficient value to give the voter his franchise. The case goes on to state: "No duration of holding was specified in such presentments, but upon the death of the person presented his personal representatives continued to occupy and pay." That, I take it, is equivalent to the statement that from time immemorial the course of things has been this: The tenants have agreed that A. B. or C. D. shall take a particular lot, and that the lord should let him into it, he paying a certain rent, for a period at least as long as the duration of his life. As to what happens upon the death of such tenant, no question arises in the present case, because Salmon, the respondent, is the person presented and who took a lease, and held the land from the lord, and has paid rent to

him, with the consent of the commoners. This at least is made out, and this is sufficient to give him a qualification. Here he is, holding land sufficient in value to give him a vote, for a period at least equal to the duration of his natural life; and that is enough to give him all the necessary qualification to vote for the county. And without deciding that it would have been sufficient here to state that he was in possession, leaving the person who takes the objection to prove that he was not in possession as a freeholder, it seems to me that the real existence of a lease for a period longer than his life cannot give him a less title than he would have had without it according to the statement of the custom, and that there are all the necessary elements of qualification to give him a vote. The decision must be supported.

LINDLEY, J.—I am of the same opinion. Whether Salmon is or is not entitled to a vote depends upon the answers to be given to only two questions. First, has he a property qualification in law? Secondly, is it of sufficient value? Now the qualification in respect of which he claims, consists of a freehold lease of a house and lands; that is, it is a lease for lives from the lord of the manor of this barony. The lord must be assumed to be owner in fee of that land, there being nothing to cut down his interest; so that the matter stands thus: the voter has a freehold, given to him by a person who has a right to give it. All that can be said against that is that the lease is subject to the rights of certain commoners in the lands demised. Suppose it is so, that is all, and the lease remains none the less. It is quite obvious that the lease is good as against the lord, and against the commoners it is good to this extent at least, that they cannot disturb the tenant's possession for the duration of his life. Then we come to the question of value, and as to that there is no dispute that the qualification is sufficient. I am of opinion that the claim is good, and that the appeal must be dismissed.

Solicitors for the appellant, *Peacock and Goddard*.

Solicitors for the respondent; *Cookson, Wainwright and Pennington*.

Friday, Nov. 23, 1877.

(Before GROVE and LINDLEY, JJ.)

CAMPBELL (app.) v. STRANGEWAYS (resp.) (a)

Fraction of a day—Dog licence—First of two Acts
—"On the day on which"—30 Vict. c. 5, ss. 8, 5.

By 30 Vict. c. 5, s. 8, it is enacted that, "if any person shall keep a dog without having in force a licence granted under this Act, he shall forfeit 5l." Sect. 5 provides that "every licence shall commence on the day on which the same shall be granted."

Held, that "on the day on which" must be taken to mean "at and from the time when," and that it is no answer to a charge of having kept a dog without a licence on a particular day to produce a licence taken out on that day, if it is proved that the licence was applied for later in the day than the detection of the offence charged.

THIS was a case stated by the magistrate of the Westminster Police-court.

An information, laid by the appellant, an excise officer, charged that, on the 21st Oct.

(a) Reported by A. H. BIRTLESTON, Esq., Barrister-at-Law.

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1877 the respondent kept a dog without a licence. The 30 Vict. c. 5, imposing an excise duty on dogs, provides for the granting of licences to keep them. By sect. 5, "The licences to be taken out under this Act shall be in such form and shall be granted by such officers of Inland Revenue as the Commissioners of Inland Revenue shall direct; and every licence shall commence on the day on which the same shall be granted, and shall terminate on the 31st Dec. following." By sect. 8, "If any person shall keep a dog without having in force a licence granted under this Act authorising him to do so, or shall keep a greater number of dogs than he shall be licensed to keep, he shall for every such offence forfeit the sum of five pounds."

On the 21st Oct. 1877, at 12.40 p.m., the appellant discovered that a dog was kept by the respondent. No licence for the animal was then in force. At 1.10 p.m. the respondent took out a licence, the form of which authorised him "to keep one dog in great Britain from the date hereof until December the 31st, 1877." The magistrate being of opinion that this licence produced by the respondent was an answer to the information, dismissed the charge.

Lockwood for the appellant.—In 1 Chitty's Archbold, 12th ed., p. 164, it is stated that "the court will take notice of the fraction of a day, if it be necessary for the purposes of justice." In *R. v. Justices of Middlesex* (9 Jur. 758; 14 L. J. N. S. Mag. Cas. 139, 142), Wightman, J., says: "Where the question is, which of two acts takes precedence of the other, a fraction of a day may be considered." [GROVE, J.—The words of sect. 5 are, "Every licence shall commence on the day on which the same shall be granted." LINDLEY, J.—The licence itself substitutes the words "from the day" for "on the day"] In *Combe v. Pitt* (3 Burr. Rep. 1423, 1434, 1 Wms. Bl. 437) Lord Mansfield says: "But though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too, where it is necessary and can be done, for it is not like a mathematical point, which cannot be divided." Here the whole of the offence was complete as soon as it was ascertained that the respondent had no licence. [LINDLEY, J.—If I have to do a thing on a day, have I not the whole day upon which to do it?] In *Chick v. Smith* (8 Dowl. 337), Patteson, J., said: "Where it is necessary to show which was the first of two acts, the court is at liberty to consider fractions of a day."

GROVE J.—There is a good deal to be said for the decision the magistrate has come to in this case; but we must give effect to the provisions of the Act of Parliament, if we can. *Chick v. Smith* (8 Dowl. 337) and the other cases cited are authorities to show that, where it is necessary for the purposes of justice to ascertain which is the first of two acts, the law will regard the divisions of the day. Sect. 8 of 30 Vict. c. 5 provides that, "if any person shall keep a dog without having in force a licence granted under this Act, he shall forfeit 5*l*." Here unquestionably, without a possibility of ambiguity or doubt, the defendant has kept a dog without having a licence granted under the Act. Can the words of sect. 8 be modified by the words of sect. 5, which are, "every licence shall commence on the day on which the same shall be

granted and shall terminate on the 31st of Dec. following?" The object of that provision is to explain that, if a person does not take out a licence on the 1st Jan., the licence, when he does take it out, will only cover the subsequent part of that year. Here we are holding that the licence did begin on the day on which it was granted, but not earlier on the day than it was taken out. The two sections so read are not inconsistent. There might be a case, as I suggested to Mr. Lockwood in the course of the argument, in which a person, having been convicted in the early part of the day of keeping a dog without a licence on that day, later on the same day obtains a licence. Then, if the licence relates back to the commencement of the day on which it is taken out, the conviction would be bad. If the licence would not relate back in such a case, then neither will it in any other. I am of opinion that this case comes within sect. 8 of the Act, and that the decision of the magistrate must be reversed.

LINDLEY, J.—I also am of opinion that the decision of the magistrate must be overruled, although at first I was disposed to take the same view as he has done. It occurred to me that a man who had just got a dog might be charged under this section before he had had time to obtain a licence, if we adopted a different construction to that of the magistrate. But the section speaks of keeping a dog without a licence, not having a dog. The form of the licence is left by the Act for the officials of the Inland Revenue to settle; but they must not adopt a form inconsistent with any words in the Act. The 5th section of the Act provides that a licence shall commence on the day upon which it is granted. To commence on the day must mean here not on any previous day. But then the 8th section provides that any person keeping a dog without a licence shall forfeit 5*l*. What construction are we to put upon the two sections? It is clear we may be driven to split up the day in order to see whether the 8th section has been infringed, and we are driven to do so in this case. Then, if we are entitled to look at the order of events, when we do so the facts show that the licence was obtained subsequent to the offence having been committed and detected. I think it is going too far to say that a licence taken out on any part of the day covers the whole day. The two sections may be reconciled, as my brother Grove suggested, by reading "on the day" to mean at and from the time when the licence was obtained. No doubt the object of the provision, that the licence shall commence on the day on which it is granted, was to prevent the possibility of its being supposed that a licence could cover any day previous to that on which it is taken out.

Judgment for the appellant, without costs.

Solicitor for the appellant, *Solicitor to the Inland Revenue.*

EXCHEQUER DIVISION.

Thursday, Dec. 6, 1877.

(Before KELLY, C.B., CLEASBY and POLLOCK, BB.)

THE ATTORNEY-GENERAL v. MOORE. (a)

Penalties — 3 & 4 Vict. c. 97, sect. 16 — To whom payable, the Crown or borough — The Municipal Corporations Act (5 & 6 Will. 4, c. 76), sect. 126.

The effect of 5 & 6 Will. 4, c. 76, and 3 & 4 Vict. c. 97, sect. 16, is that penalties recovered under the latter section in a summary manner before a justice of a borough having a separate court of quarter sessions, go to the borough and not to the Crown.

INFORMATION by the Attorney-General against the clerk to the justices of the borough of Warwick, to recover a sum of 11. 10s., being fines received by the defendant as such clerk, and alleged to be payable to Her Majesty. By the consent of the parties a case was stated under 22 & 23 Vict. c. 21, sect. 10, which disclosed the following facts:

The borough of Warwick is one of the boroughs contained in schedule A. of 5 & 6 Will. 4, c. 76, as having a commission of the peace. It has also a separate court of quarter sessions.

On the 29th May 1876 one Amos Dalton was convicted before two of the justices of the peace of the borough of a breach of sect. 16 of 3 & 4 Vict. c. 97, for that he did unlawfully and wilfully obstruct and impede one Robert Billington, then being in the execution of his duty on the Great Western Railway within the borough, and he was adjudged to forfeit and pay the sum of 5s. to be paid and applied according to law.

On the 6th Sept. 1876 one John Reeves was convicted and adjudged to forfeit and pay the sum of 11. 5s. for a similar offence.

Both these fines were received by the defendant, and were claimed by the Lords Commissioners of Her Majesty's Treasury as belonging to the Consolidated Fund, and as being payable by the defendant to the receiver of fines on the ground that, upon the right construction of 3 & 4 Vict. c. 97, s. 16, the said fines were forfeit, and therefore payable to Her Majesty. The defendant however declined to pay over these fines to Her Majesty, contending that, upon the right construction of 5 & 6 Will. 4, c. 76, s. 126, they ought to be paid to the treasurer of the borough to the credit and on account of the borough fund, inasmuch as the Act under which the penalties were recovered is not an Act relating to trade so as to bring it within the provisions of the last-mentioned section.

The question for the opinion of the court was whether the fines ought to be paid to Her Majesty or not.

The sections on which the question turned were to the following effect.

5 & 6 Will. 4, c. 76, s. 126:

When by any Act any penalties or forfeitures are or shall hereafter be made recoverable in a summary manner before any justice or justices of the peace, and by such Act respectively the same are or shall be limited and made payable to His Majesty, . . . in every such case the same if recovered, and adjudged before any justice of any borough in which a separate court of quarter sessions of the peace shall be holden as aforesaid, shall, notwithstanding anything in such Act respectively contained, be recovered for and adjudged to be paid to the treasurer of such borough for the time being to the credit and on account of the borough fund of such

borough. . . . Provided always, that nothing herein contained shall extend to any penalties or forfeitures recovered under any Act relating to the customs, excise, and post office, or to trade or navigation, or any branch of His Majesty's revenue.

3 & 4 Vict. c. 97, s. 16:

If any person shall wilfully obstruct or impede any officer or agent of any railway company in the execution of his duty upon any railway, . . . every such person so offending . . . shall and may be seized and detained by any such officer or agent, until such offender or offenders can be conveniently taken before some justice of the peace for the county or place wherein such offence shall be committed, and when convicted before such justice as aforesaid (who is hereby authorised and required upon complaint to him upon oath, to take cognisance thereof, and to act summarily in the premises), shall, in the discretion of such justice, forfeit to Her Majesty any sum not exceeding 5l.

Sir Hardinge Giffard, Solicitor-General (Sir John Holker, Attorney-General, and Bowen with him) for the Crown.—Under sect. 126 of the Municipal Corporations Act, certain fines and fees recovered in the manner therein specified go to the borough fund. The question is, whether sect. 16 of the Railways Act (3 & 4 Vict. c. 97), does not repeal this enactment *pro tanto*; so as to make penalties recovered under the Railways Act, though recovered in the manner specified in the former Act, go to the Crown and not to the borough. I submit that the two enactments are inconsistent, and that the former section is virtually repealed so far as it relates to these particular penalties. The case of *Wray v. Ellis* (1 E. & E. 276) is analogous to the present question.

Mellor, Q.C. (*Dugdale* with him), for the respondent, was not called upon.

KELLY, C.B.—I am of opinion that the respondent is entitled to our judgment. When we refer to the Act of Will. 4, we find that it is expressly enacted, "That when by any Act any penalties or forfeitures are or shall hereafter be made recoverable in a summary manner before any justice or justices of the peace, and by such Act respectively the same are or shall be made payable to His Majesty . . . in every such case the same, if recovered and adjudged before any justice of any borough in which a separate court of quarter sessions shall be holden as aforesaid, notwithstanding anything in such Act respectively contained, shall be recovered for and adjudged to be paid to the treasurer of such borough for the time being to the credit and on account of the borough fund of such borough." Now all the requirements of this section have here been fulfilled, and the only question for us is, whether these penalties still belong to the borough or not. They have been recovered under 3 & 4 Vict. c. 97, s. 16, under which persons acting in contravention of its provisions shall, in the discretion of the justice by whom he is convicted, "forfeit to Her Majesty any sum not exceeding 5l." In my opinion there is no doubt that penalties recovered under this section are "payable to Her Majesty." But the previous Act says that, if they are recovered in a certain way, and are payable to Her Majesty, they are to be paid to the borough. We must read the two Acts together; I can see nothing inconsistent in them, and I consider that the previous one must be considered as containing an exception to the general rule that under this second Act all penalties recovered are payable to

(a) Reported by H. DICKENS, Esq., Barrister-at-Law.

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Her Majesty. I therefore think these penalties belong to the borough, and that the defendant is entitled to our judgment.

CLEASBY, B.—I cannot entertain any doubt in this case. The enactment of the Act of Will. 4 is in substance that penalties which are payable to Her Majesty go to the borough fund in certain cases. The language of the second Act declares that the penalties recovered under it shall be forfeit to Her Majesty. Now no attempt was made to found a distinction between the language of the two Acts "payable to Her Majesty," and "forfeit to Her Majesty"; and the language may be taken as though they were the same. That being so, I see no inconsistency between the statutes; the latter seems to be a re-enactment of the former. The former says that penalties recovered as these have been recovered go to the borough. I am of opinion, therefore, that these belong to the borough.

POLLOCK, B. concurred.

Judgment for the respondent.

Solicitor for the appellant, *Hare and Fell*, for Solicitor to the Treasury.

Solicitor for the respondent, *Field, Roscoe, and Co.*, for *Moore*, Warwick.

Thursday, Dec 6, 1877.

(Before KELLY, C.B., CLEASBY and POLLOCK, BB.)

BENT v. ROBERTS.(a)

Revenue—Inhabited house duty—Property tax—Occupier of premises—Superintendent of police-station—48 Geo. 3, c. 55, Sched. B. R. 1—5 & 6 Vict. c. 35, s. 63, No. 9—14 & 15 Vict. c. 36—16 & 17 Vict. c. 34.

The appellant, as superintendent of a police-station, was compelled to reside, and did reside with his family, in a house within the boundary wall of what was generally known as the premises of the police-station, and which, though quite separate from the station itself, had a communication with the station yard by a doorway in its own yard wall. He kept the keys, and with his family had the sole access to the house, the front entrance facing the street being quite distinct from the entrance to the station. There was no accommodation in the house beyond what was actually necessary for the requirements of himself and his family and the transaction of his business as superintendent, and he would not have been permitted to make use of the premises for any other purpose. It was liable, moreover, to be used for such purposes connected with the police force as the chief constable of the county might direct, and it might occasionally be used as a place of detention for prisoners. He paid a small sum by way of rental, and was liable to be removed from station to station at any time.

Held (on appeal by him from assessment in respect of inhabited house duty, and under Sched. A of the Income Tax Act), that he was not the occupier of a house and premises within the meaning of the Acts imposing these duties, and was therefore not liable to assessment in either respect.

CASE stated by the Commissioners of Income Tax and Inhabited House Duty for the Division of Manchester, upon an appeal against an assessment under Schedule A of the Income Tax Act and for

inhabited house duty on the house occupied by James Bent, of Old Trafford, in the township of Stretford, in the district of Manchester, second superintendent of the police station there, which was assessed at 50l. under Sched. A. and 50l. for inhabited house duty.

1. The county constabulary of the county of Lancashire was established under 2 & 3 Vict. c. 93.

2. The county is divided into police districts or divisions, and station-houses and strong rooms have been built and provided under 3 & 4 Vict. c. 88.

3. The force is annually inspected by a Government officer, and, if his report is satisfactory, a grant is made by the Treasury, amounting to one-half of the expenses of the pay and clothing of the force, in aid of the police rates.

4. The house in which the appellant resides is included within the boundary of certain premises known as the Old Trafford police-station, which comprised other buildings and offices provided for the purposes of the Manchester police district.

5. In addition to the communication between the appellant's house and the drill yard there is a further communication between the drill yard and the cell yard which adjoins, and into which the cells open.

6. It is necessary for the police purposes of the district of Manchester that the appellant should reside in the house in question, for the due performance of his official duties.

7. The appellant is compelled to live on the premises in question, and the house in which he resides is liable to be used for such purposes connected with the police force as the chief constable of the county may direct; and the appellant is further liable to be removed from station to station at any time.

8. There is no accommodation in the appellant's residence beyond what is actually necessary for the requirements of himself and his family, and the transaction of his business as superintendent of police; and he would not be permitted to make use of the premises for any other purpose.

9. The appellant is not assessed to the poor-rate.

10. The appellant admitted that the house which he occupied was separate from the police-station, but added that there was a communication with the station yard by a doorway in his own yard wall. The front entrance was quite distinct. He said that he himself possessed the keys of the house, and that he and his family alone had access thereto; that it was wholly occupied by himself and family, and furnished throughout with his own furniture; that it might occasionally be used as a place of detention for prisoners; and that on one occasion he had admitted a female prisoner there for a few hours who was not in very good health, and who was of a more respectable class than prisoners ordinarily are.

11. He contended that he was not liable to house duty, nor to schedule A. of the income-tax, beyond the amount of his rental, 10l. 0s. 8d. per annum, and the reasons assigned were that the house was a part of the police-station, it being included within the boundary wall known as the Old Trafford police-station, which, in addition to the house occupied by the appellant, comprises other buildings and offices provided for the police purposes of the Manchester police division; that

(a) Reported by H. F. DICKENS Esq., Barrister-at-Law.

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the force was annually inspected by a Government officer, and that the whole of the premises was used for the purposes of the county constabulary, and being so used was used for Government purposes, and was exempt from assessment as being occupied for the purposes of the Crown, and that in any case the house in question ought not to be separately assessed, but should be included in one charge with the police-station, some of the apartments of which were occupied by police constables, who paid rentals for them. In support of his opinion he cited *Reg. v. St. Martin's, Leicester*, L. Rep. 2 Q. B. 993.

12. The appellant admitted that he was the officer of the county, and was paid out of the county fund.

13. The surveyor submitted that the case referred to did not apply, and that, as the house in question was admittedly separate and distinct from the police-station, its front entrance facing the street or road (formerly an ancient footpath) and the only communication with the station-yard being by a doorway in the wall of its yard, which doorway could easily be closed up; and its being, moreover, furnished throughout by the appellant as a private residence, it was, to all intents and purposes, a private house, and was separately assessable upon its full annual value, for which the appellant was liable, he being the beneficial occupier. *Judge's case*, No. 2827, was referred to in support of this view.

After considering the statement of the appellant and the surveyor, the commissioners were of opinion that the superintendent was the servant of the county, and not of the Crown, and that the house being separate and distinct from the police-station, the only communication being by a door in the yard wall to the drill ground, and being furnished by the superintendent at his own expense, was liable to be assessed upon its full annual value, and from its position was separately chargeable. They, therefore, confirmed the assessment.

Gorst, Q.C. (H. Hulton with him) for the appellant.—The appellant is not liable to be assessed, either in respect of property tax or inhabited house duty. The latter is regulated by 48 Geo. 3, c. 55, and 14 & 15 Vict. c. 36. By sect. 1 of the second Act the duties were granted on inhabited houses, as specified in the schedule annexed, in lieu of duties by that Act repealed; but by sect. 2 the powers, rules, and provisions of former Acts were to remain in force. Looking back, then, to 48 Geo. 3, c. 55, we find by Sched. B. R. 1, that the duties are to be charged on the occupier or occupiers for the time being of every such dwelling-house. With regard to property tax, precisely the same reasoning applies. By 16 & 17 Vict. c. 34, s. 5, the duties imposed by that Act are to be assessed and raised under the provisions of the recited Acts. Of these, 5 & 6 Vict. c. 35, is one; and by sect. 63, No. 9, of that Act, we find that the duties imposed are to be charged on and paid by the occupier for the time being. In order that the appellant may be liable to either assessment, he must be the occupier; but he is not the occupier within the meaning of the Acts. In order to be so, he must have the exclusive use of the house, which he certainly has not:

Clark v. Bury St. Edmunds, 1 U.B. N.S. 23.

[He was stopped by the Court.]

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Dacey (Sir John Holker, A.G., and Sir Hardinge Giffard S.G., with him).—It is quite clear the appellant is the occupier of this house within the meaning of the Act. So long as he occupies, that is sufficient to make him liable to assessment, and it is then for him to show that he falls within one of the exemptions. By sect. 63, No. 9, of 5 & 6 Vict. c. 35, we find, first, that the said duties, except when other provisions are made as to estimating particular properties, shall be estimated according to the general rule in Sched. A., and shall be charged on and paid by the occupier for the time being; second, every person having the use of any lands or tenements shall be taken and considered for the purposes of this Act as the occupier of such lands and tenements. Moreover by R. 9, occupiers may recover the amount of their assessment from the landlord by deducting it from the rent. Here the appellant clearly has the use of the house, and is therefore undoubtedly liable to the duty in the first instance. This, however, is not the point on which the case was stated; but, if the court is against me on this point, it is useless for me to enter upon any other question.

KELLY, C.B.—The question in this case is, whether the appellant is the occupier of the premises in question within the meaning of the Inhabited House Duty Act, or within the meaning of the Income Tax Act. It appears, according to the statement of the case before me, that the appellant has been assessed in respect of both statutes for the year's occupation from the month of April 1875 to the month of March 1876, and the question which we have to determine is, whether the occupation and the use of these premises by the appellant in the manner and under the circumstances stated in this case render him liable to either the one or the other of these assessments. I am clearly of opinion that he is liable to neither. If the case were confined to what is stated in paragraph 10 of the case, a question might well arise as to whether he might or might not be liable, for there it appears that the appellant admitted that the house which he occupied was separated from the police-station yard by a doorway in his own yard wall. It appears, moreover, that the front entrance was quite distinct, that he himself possessed the keys of the house, and that he and his family alone had access thereto, that it was wholly occupied by himself and family, and furnished throughout with his own furniture, that it might occasionally be used as a place of detention for prisoners, and that on one occasion he had admitted a female prisoner there for a few hours who was not in very good health, and who was of a more respectable class than prisoners ordinarily are. Now, if the case had stopped there, and had contained nothing else to assist us in determining whether this was an occupation within either of these Acts, the question might well have been arguable; but it goes further. When we refer to another paragraph, we find that the appellant, who, it appears, is an officer of the constabulary of Lancashire, is, by the duties of his office and under the circumstances in which he holds that office, compelled to live on the premises in question; and that the house in which he resides is liable to be used for such purposes connected with the police force as the chief constable of the county may direct; and the appellant is further liable to be removed from station to station at any time. Now any one of the portions of this paragraph would

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in my opinion, be perfectly fatal to the argument on the part of the Crown, that the appellant has such an occupation of these premises as to render him liable to either of these assessments. The first is, that he is compelled to live on the premises. A man who pays rent for premises has the right to live upon the premises under a contract between himself and the landlord to whom he is liable for the rent, and to whom, under the contract between them, he is bound to pay the rent, and is in return entitled to the occupation of the premises. No such case exists here. This, though it is called a rent in the statement of the case before us, is clearly no rent at all. It is stated that the appellant is compelled to live upon these premises, but while there he enjoys a lodging which probably saves him the rent of some lodging elsewhere. It amounts to nothing more than this, that the authorities by whom he is employed think fit to deduct from the salary that they pay him, a certain sum a year in consequence of the benefit that he derives from lodging in this house with his family during whatever time they may compel him to remain there. That is not a rent at all, it is not a tenancy at all, it is not an occupation at all in respect of the acts which regulate and determine either of these assessments; and therefore, were it upon that ground alone, I should hold that this is not an occupation within the meaning of either of these Acts of Parliament. But the paragraph goes on thus, "that the house in which he resides is liable to be used for such purposes connected with the police force as the chief constable of the county may direct." Under this power, the chief constable might either, upon a particular occasion, or any number of occasions where the proper conducting of the business of the police offices might require it, send any number of persons, who might be taken in custody, and who would have to remain in custody until the following morning before they could be taken before the magistrate, into this house, and put half-a-dozen of them into half-a-dozen of the beds in the different rooms of this house; and they might, if they thought fit, in order to do so (and it might be a public duty on their part that they should do so), confine him to a single bed in a room at the top of the house, or they might desire him to lie upon the floor all night, in order that those several prisoners might be in safe custody. That alone is inconsistent with the beneficial occupation or use of the house by a tenant who is liable to assessment under these Acts of Parliament; and therefore, if it stood alone upon this second clause of the 7th paragraph, it would also be fatal to the question of occupation. But then, when we come to the last provision in this 7th paragraph we find that "the appellant is further liable to be removed from station to station at any time." Here is a man assessed for the income tax for the year, and assessed to the inhabited house duty for the year, who might, if it were thought fit, a week, or a month, or even a single day after the assessment, be removed to another place altogether. He might not occupy the house for a single day after the notice, or the command is issued to him to quit the station and remove himself to another station. It is not arguable whether or not this could be an occupation within the meaning of these Acts of Parliament. I am clearly of opinion, therefore, that he is not an occupier; he is merely a ser-

vant of the constabulary, put into the house for their purposes, and has liberty and permission to live in that house just so long as they think fit, and no longer. Under these circumstances, it clearly is not an occupation within these statutes.

CLEASBY, B.—I must say that I was a good deal surprised at the statement of the learned counsel for the Crown that the point intended to be raised here was a different one from that which we are now considering. I refer to the case, and I see that this is the only point upon which the case is stated. In paragraph 15 we read that "after considering the statements of the appellant and the surveyor, the commissioners were of opinion that the superintendent was the servant of the county and not of the Crown, and that the house being separate from the police-station, the only communication being by a door in the yard wall to the drill ground, and being furnished by the superintendent at his own expense, was liable to be assessed upon its full annual value." They state everything connected with the place to show in what way it is connected with the police-station, and not deciding anything upon the other question, the commissioners decide that it is to be regarded as if he were living altogether apart from the police-station in a street in the town. Passing by every other question, the commissioners held that in this case, as he occupies the premises separate from the police premises, and furnishes them at his own expense, he is liable to be assessed. Upon that, which is mainly a question of fact, we come to a different conclusion. I will only say, with reference to the case of *Reg. v. St. Martin's, Leicester*, which was not referred to in the *Judges' case*, that the question there considered was a totally different one. What we have to consider is simply this: is the appellant to be regarded as a person occupying or living upon these premises in any different manner than this, that he lives there upon part of the police premises, and is allowed to live there? I apprehend that, if the police premises were shut in by an outer door, and this man had the house within that outer door, no question whatever could possibly arise. It would not be in his occupation in any sense of the word, according to these Acts of Parliament; but in a general way, as he has the key of the house, it is said that he occupies it. No one would contend, if it were at all within the wall of the police premises over which of course the police authorities would have the exclusive control, that he was the occupier of the house, though he was the only person living in it. How can it be that it makes a difference if, for the more convenient enjoyment by their servant of the particular house, with all the internal communication requisite for the discharge of his duties, they allow him to have an outer door into the footpath or street? It appears to me not of the slightest importance. The Lord Chief Baron has fully gone into the statements of the case, and I will not repeat them. This is an application by the police authorities, and, if this man is to efficiently discharge his duties as their servant, he must have a place to live in. I am, therefore, of opinion that he is entitled to our judgment.

POLLOCK, B.—I also think that there is ample material for a decision in this case contained in the argument alone addressed to us by Mr. Dicey, and which turns upon the meaning of the word "occupier" in Schedule B. of the 48 Geo.

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3, c. 45, and the facts stated in the case, upon which we have to draw inferences of fact as well as of law. It is sufficient to say that such a so-called occupation as is shown to exist in this case is not such an occupation as makes the man an occupier within the meaning of either of the statutes, and after what has been said by my Lord, I think it quite unnecessary to repeat the reasons given by him.

Judgment for the appellant.

Solicitors for the appellant, *Eidsdale, Craddock, and Eidsdale*, for *Birchall, Wilson, and Hulton*, Preston.

Solicitor for the respondent, *Solicitor of the Inland Revenue*.

June 11 and 12, 1877.

(Before KELLY, C.B. and HUDDLESTON, B.)

THE IMPERIAL CONTINENTAL GAS ASSOCIATION (apps.) v. NICHOLSON (resp. (a))

Revenue—Foreign company incorporated in England—Carrying on business abroad—Portion of profits remitted to England—Portion retained abroad—Income tax—Gasworks on the Continent—“Foreign possessions”—5 & 6 Vict. c. 35, s. 60, Schedule A., rule 3—Sect. 10, Schedule D., cases 1 and 5—16 & 17 Vict. c. 3, s. 2, Schedule D.

A joint-stock company, established and incorporated by Act of Parliament in England, but carrying on its business entirely abroad, is assessable to income tax upon the whole of the annual profits of its business, whether such profits are or not remitted to this country, or are or not distributed as dividends amongst its shareholders resident in England or abroad, or are applied to some other legitimate purposes of the company abroad.

The appellants, a copartnership association, established to supply foreign cities and towns with gas, and incorporated by Act of Parliament in England, have offices in London, where the directors meet and the business of the company is transacted, and whence all the orders emanate. They possess interests, of various natures and tenures, in gasworks in France and other continental countries, the profits of which arise wholly in those countries, and in such of them as have a tax equivalent to an income tax, those profits are there assessed to such tax. The entire profits of the company arise and accrue abroad, and, in making their return to the income tax in England, the company admitted their liability to the tax upon the amount of profits as from “foreign possessions” actually remitted to this country, and applicable to the payment of dividends to their shareholders, whether resident here or abroad, but denied their liability in respect of their profits ultra such remittance, and which were never transmitted to England or applied in payment of dividends, but were retained abroad and applied in liquidation of other legitimate engagements of the company abroad.

The special commissioners assessed the company in respect of the whole of their profits, including the last-mentioned portion of them, and upon appeal therefrom it was, on a case stated for the court, Held by the Ex. Div. (Kelly, C.B. and Huddleston, B.), upholding the assessment, first, that the company, though a foreign undertaking in a continental country, yet, being a joint-stock

company, incorporated and resident in England, were in the position of a person residing in the United Kingdom, and were therefore taxable under the first case of Schedule D. (sect. 100) of 5 & 6 Vict. c. 35, and Schedule D. of 16 & 17 Vict. c. 34, in respect of the whole of the profits arising from their business abroad, including not only the portion remitted to England and applied in payment of dividends to shareholders resident there or abroad, but also the portion retained and applied to the other purposes of the company abroad. And, secondly, that the provisions of sect. 60, Schedule A., rule 3, of 5 & 6 Vict. c. 35, which treat gasworks as “property,” relate exclusively to gasworks in this country, and do not include or relate to gasworks on the Continent, and that such last-mentioned works are not “foreign possessions” within sect. 100, Schedule D., rule 5, of the same statute.

The *Cesena Sulphur Company (Limited) v. Nicholson* (35 L. T. Rep. N. S. 275; L. Rep. 1 Ex. Div. 428; 45 L. J. 821, Ex.) followed.

THE Imperial Continental Gas Association, being dissatisfied with the decision of the special commissioners upon an appeal of the association against an assessment to the income tax made upon them by the said commissioners, required the commissioners to state a case for the decision of the court, under part 3 of the Act 37 & 38 Vict. c. 16; and, the commissioners having stated and signed a case accordingly, the same was subsequently amended in conformity with the order of Huddleston, B., dated 3rd Jan. 1877, and as amended was as follows:—

AMENDED CASE.

1. The Imperial Continental Gas Association, having required to be assessed to income tax by the special commissioners, made by their secretary a return under schedule D. for the year 1875, ending the 5th April 1876, of 210,665l.

2. The said association are a company originally established under the provisions of a copartnership deed, bearing date 9th March 1835, for the purpose of supplying cities, towns, and places in foreign countries with gas, and were incorporated by an Act (16 & 17 Vict. c. 190) intitled “An Act for consolidating and amending the powers of the Acts of the Imperial Continental Gas Association.” The said Act was repealed by the Imperial Continental Gas Association Act 1870, but the association remained incorporated by virtue of the said last-mentioned Act.

3. The offices of the association are at 30, Clement’s-lane, Lombard-street, in the City of London, and the meetings of the directors of the association take place at such offices.

4. The association possess interests of various natures and tenures in gasworks in France, Germany, Austria, Holland, and Belgium, the profits of which wholly arise in those foreign countries, and in such of them as have a tax equivalent to the income tax those profits are assessed to such tax.

5. The said sum of 210,665l., being the amount stated in the return made on behalf of the association in respect of profits, is made up of two sums, viz., 208,805l. and 1860l. The sum of 208,805l. was stated to be in respect of profits from foreign possessions, and the sum of 1860l. was stated to be in respect of interest of money.

6. The reason given, on behalf of the associa-

(a) Reported by HENRY LEXER, Esq., Barrister-at-Law.

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tion, for confining the amount of the return to the said sums is, that the said sum of 208,805*l.* represents the profits of the association from foreign possessions actually remitted, and which would have to be remitted to the United Kingdom to make up (together with 1860*l.* interest of money lent in the United Kingdom) the interest on the debenture debt of the said association, and the gross total amount found from time to time by the directors to be applicable for the purposes of dividend, including both the dividend paid to non-resident shareholders and that paid to resident shareholders. And further, that the profits, *ultra* such remittances, and wholly arising abroad as aforesaid, are never transmitted to this country at all, but are retained abroad in liquidation of charges and expenses arising abroad from the exigencies of contracts for lighting foreign places, and are not divided among the shareholders either in this country or abroad.

7. The special commissioners, in making their assessment, charged the association in the sum of 258,668*l.* in respect of the whole of their profits. Assuming the assessment to be made on the right principle (which the appellants deny), it is admitted, for the purposes of this case, that the association ought to be assessed in the said sum of 258,668*l.*

8. Against such assessment the association gave notice of appeal, and the appeal was heard by the special commissioners, at their office, on the 27th July 1876, when Mr. Albert F. Jackson, the secretary, attended with Col. Wilkinson, one of the directors.

9. No accounts were produced, the secretary stating that the said association contend that the assessment should be confined to profits accruing in the United Kingdom, and to so much of those accruing abroad as are received by them in the United Kingdom for distribution amongst the shareholders, whether residing in the United Kingdom or elsewhere.

10. The special commissioners decided that the association were liable for the whole of their profits, and confirmed the assessment made by them on the amount thereof, 258,668*l.*, the secretary of the association expressing his dissatisfaction at the decision.

The question for the opinion of the court is, whether the assessment made by the commissioners is in principle correct.

Points for argument for the appellant :

1. That the appellants are not liable to be assessed upon the whole of their profits wherever made. 2. That the assessment should be confined to the profits which actually are received in England, and should not include profits made and retained abroad. 3. That the appellants correctly made their return in respect of foreign possessions.

Points for argument for the respondent :

1 and 2. That the Imperial Continental Gas Association, being an English company incorporated by Act of Parliament, having their office in England, are in the same position as a person residing in the United Kingdom, and are liable to income tax under Schedule D. of the Act 16 & 17 Vict. c. 34, in respect of the whole of the annual profits and gains of the company derived from their business, whether carried on in the United Kingdom or elsewhere, and whether such profits or gains are remitted to the United Kingdom or

not. 3. That on the facts of the case it appears that the association resides in the United Kingdom.

4. That the case of *The Cesena Sulphur Company v. Nicholson* (L. Rep. 1 Ex. Div. 428) has decided that the association, being an English corporation resident in England, are assessable upon the whole of their gains and profits derived from their business, whether carried on in the United Kingdom or elsewhere. 5. That the return made on behalf of the association as stated in paragraph 5 of the case is bad in law. 6. That the assessment made by the commissioners as stated in paragraph 7 of the case is good in law.

Charles, Q.C. for the appellants.—This assessment was made on a wrong principle. The point is new, though somewhat similar in character to that in the cases of *The Cesena Sulphur Company (Limited) v. Nicholson* and *The Calcutta Jute Mills Company (Limited) v. Nicholson* (35 L. T. Rep. N. S. 275; L. Rep. 1 Ex. Div. 428; 45 L. J. 821, Ex.) The appellants admit their liability to the tax upon all profits divisible amongst the shareholders wherever they may reside, whether in England or on the Continent, but deny their liability to taxation on profits made and kept abroad, and neither remitted to England nor divisible amongst the shareholders, but applied by the company to their other legitimate purposes abroad, such as maintaining and improving their income-producing power. The Crown will contend that the association is liable for all the money earned by them abroad. [KELLY, C.B.—And why not?] Because under the Income Tax Acts a corporation resident in England, but trading wholly abroad, is expressly dealt with, and, under the terms of Schedule D., their only liability is upon the money that reaches the governing body for distribution amongst the shareholders, wherever resident—upon, in fact, such portion only of the profits made wholly abroad as, in the words of the Court of Exchequer Chamber, “come home” to the United Kingdom. The question turns on the 16 & 17 Vict. c. 34—an Act which for all practical purposes is identical with the earlier Act, 5 & 6 Vict. c. 35. By sect. 1 of the later Act the duties are to be assessed and recovered in accordance with the provisions of the earlier Act (5 & 6 Vict. c. 35), by sect. 1 of which the duties mentioned in certain schedules are made payable. Schedule A. relates to lands, &c., in Great Britain, and then, passing over Schedules B. and C., comes Schedule D., which gives the tax upon “the annual profits or gains arising or accruing to any person residing in Great Britain from any kind of property whatever, whether situate in Great Britain or elsewhere, and upon the annual profits or gains arising or accruing to any person residing in Great Britain from any profession, trade, &c., whether the same shall be respectively carried on in Great Britain or elsewhere.” The rules for assessing the properties mentioned in Schedule D. are contained in sect. 100, under the several cases 1, 2, 3, 4, and 5. Case 1 is “duties to be charged in respect of any trade, manufacture, or concern in the nature of trade not contained in any other schedule of this Act.” Now, though foreign gasworks are not *eo nomine* contained in any other schedule, yet Schedule A. throws light on the view the Legislature took of such undertakings in 1842, for gasworks in England are mentioned in Schedule A., which deals with lands in Great Britain; and by sect. 60, the duties in Schedule A.

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are to be assessed under certain rules, rule 3 being for "estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned;" and amongst them will be found in sub-sect. 3, "gasworks," and it is provided that "the annual value of the properties herein described shall be understood to be the full or the actual amount for one year, &c., of the profits received therefrom." In 1842 the Legislature, therefore, classed "gasworks" as property to be assessed under Schedule A., amongst lands, &c., showing that they were dealt with as a possession *in pari materia* with a possession of lands, &c. Now there being no statement in the Act with regard to "foreign gasworks," it is submitted that the present case comes within Schedule D., but not within the first but the fifth case of that schedule, which deals with (*inter alia*) "foreign possessions." The only cases which at all touch the point are *Sully v. The Attorney-General* (2 L. T. Rep. N.S. 439; 5 H. & N. 711; 29 L. J. 464, Ex.; *The Cesena Sulphur Company (Limited) v. Nicholson*, and *The Onclutia Jute Mills Company (Limited) v. Nicholson* (*ubi sup.*). Sect. 100 provides the rules for charging the duty in respect of "possessions." English gasworks are treated by 5 & 6 Vict., under Schedule A., as lands, and are not removed therefrom by sect. 2. of 29 & 30 Vict. c. 36, but are thereby directed to be taxed under schedule D. If English gasworks are classed with property in the ordinary sense of "possessions," why should not foreign gasworks be classed as "foreign possessions?" The whole policy of the Income Tax Acts is to tax the profits which are here, in this country, and none other, and it is not the persons living here who are assessable. Sect. 108 clearly contemplates that "foreign possessions" means something besides the possession of land.

Dicey (with whom were the *Attorney-General*, Sir J. Holker, Q.C., and the *Solicitor-General*, Sir H. Giffard, Q.C.), for the Crown, respondent, *contra*.—In construing a statute of this kind the court is strictly bound by its words and provisions, and an exception made in one case is not necessarily to be introduced in an analogous case. [CLEASBY B.—Is not the question this, whether the present case comes within case 1 or case 5?] It will probably come to that at last; but there are some other points. We have here, first a person resident within the United Kingdom; and, secondly, profits and gains accruing to such person. These precise general words must not be frittered away by words simply intended to carry out a general intention. The case is decided and governed by the *Cesena Sulphur Company* case (*ubi sup.*), which the company are now attempting to overrule. The question there was, What was the company, and were they to be treated as the possessors of land or as persons carrying on a business abroad? [CLEASBY, B.—The contention in that case was, on both sides, what was the rate upon the profits of the trade? Now, here a different point is raised: that this company is to be assessed on the profits of the property.] That it was assumed to be so in the *Cesena* case is a strong argument in favour of its being the natural and right view of the matter, and that the present question was not raised in that case is against its validity now. The only distinction between the two cases is that in the present case a portion of the profits was not divided amongst the shareholders, but kept

abroad to pay the debts of the company; whereas in the *Cesena* case all the profits were paid to the shareholders both at home and abroad. [KELLY, C.B.—The point taken by the appellants' counsel in the present case was not taken in the *Cesena* case.] Probably it was assumed there to have been decided in one way. Now Schedule A. refers only to "possessions" in England, and "foreign" gasworks are therefore not to be treated differently from other trades. In England, for certain purposes, they are placed artificially amongst lands; but even English gasworks are not turned into "lands" for all purposes, and foreign gasworks are not mentioned in the Act. [HUDDLSTON, B.—It required a special legislative provision to bring English gasworks within the definition of "property," but no such provision has been made with reference to foreign gasworks.] They come so near to the cases in Schedule D. that, by sect. 8 of the 29 & 30 Vict. c. 36, they were re-transferred to that schedule.

Charles, Q.C. in reply.—The *Cesena* case does not touch the present question. There was only one contention there, and the point argued here was not thought of or alluded to in that case. The company there contended that the assessment was to be restricted to profits distributed in England, and the whole argument was that the company was a foreign company. It had not then been decided that a company registered abroad as well as in England was resident in England at all. The present company are prepared to pay tax on all dividends wherever distributed, and that is the distinction between the two cases. The Crown construes the word "possessions" too narrowly, and the Act does not warrant its being restricted to "real property," properly so called. The phrase "foreign possessions" occurs only in sects. 5 and 108. Why are not foreign gasworks "property?" and if "property," why not "possessions?" Unless "foreign possessions" be held to mean only "foreign lands," as contended for by the Crown, the argument of the appellants is left unanswered.

KELLY, C.B.—This case has been very admirably argued on both sides, and, although considerable doubt was raised for some time in our minds by the able arguments of Mr. Charles on behalf of the gas company, yet, from an attentive consideration of the Acts of Parliament, as well as of the decision of this court in what I may briefly call the *Cesena* case, it appears to me that the Crown is entitled to our judgment. In the first place, let me observe that there is really no substantial distinction, either in fact or in principle, between that case and the case now before us. In both of them a joint-stock company, incorporated under the Joint Stock Companies Act, established, existing, and registered in England, and, within the meaning of the language of the Acts of Parliament, "resident" in England, was possessed of extensive works in foreign countries, in which what may not improperly be called a manufactory and trade is carried on, and carried on at a profit, but in which all that is earned in the way of profit, when it has been earned and ascertained, becomes the property of and is payable to the company established and resident in this country; and the company is assessed to the income tax in respect of the whole of these profits; and the objection made to that assessment in the present case is, that the com-

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pany ought to be assessed only on that portion of the profits accruing and received abroad which is remitted to and received by the company in this country. Now, the only difference, which is so slight as to be scarcely any difference at all, between the present case and the *Cesena* case (*ubi sup.*) is, that in the latter the profits of the company for the year in question consisted of a sum of money which became due and was dealt with in the form of a dividend payable to the whole of the shareholders of the company; whereas, in the present case, the profits which have been acquired by the company, through its dealings in foreign countries, have been applied, not altogether, in the form of a dividend. The greater portion of them, no doubt, have been paid to the shareholders in the shape of a dividend; but another portion has been applied by the company, as they were fully entitled to do, in some other way, as in improving their works or matters of that description. It was still all profit, and the case differs from the *Cesena* case only in this, that there the whole of the profits acquired were distributed as a dividend, whereas here the profits were distributed partly in paying a dividend and a portion was applied by the company at their pleasure to some other purpose. In both cases, however, there was this common feature, which raised the question before the court in each of them, namely, that a portion only of the entire profits acquired was remitted to or ever received by the company in this country. In the *Cesena* case a number of the shareholders were resident in various parts of the Continent, and consequently only that portion of the profits which was payable to the shareholders in England was ever remitted to this country, the rest being paid to the shareholders resident abroad. In the present case a portion only of the profits has been remitted to this country, and that portion payable as a dividend to the shareholders, and the other portion has never been remitted to this country at all. On all these points, in everything which constitutes the substance of the case, the two cases are identical. Under these circumstances, therefore, were we to give effect to the argument of Mr. Charles, we should really be overruling the decision of this court in the *Cesena* case, which I should be most unwilling to do; but still, if I were satisfied not only that in point of law that decision was wrong, but that justice required, there being no appeal in this case, that we should give effect to the argument which has been offered to us on behalf of the appellants, I do not say that I should not be prepared to take that course; but upon full consideration of the Acts of Parliament it appears to me that the argument of Mr. Charles, even if it had been offered and brought under the attention of the court in the *Cesena* case, ought not to have prevailed then, and ought not to prevail now. The question that that argument raises is, whether this case is for all purposes to be treated as within Schedule A.; not only whether these gasworks on the Continent are to be considered as property, substantially speaking, as land on the Continent, not only in construing the different schedules A., B., C., and D., but also in giving effect to the cases and the rules for carrying the schedules into effect to be found in various parts of the old Act 5 & 6 Vict. c. 35, and in the later Act of the 16 & 17 Vict. c. 34. Now, when we look at the Act 5 & 6 Vict. c. 35, we find Schedule A. in the

first instance relating to lands, tenements, hereditaments, and heritages; and on referring to sect. 60 (and it is upon this section and all that follows that reliance is placed by the learned counsel for the company), we find that the duties in Schedule A. are to be assessed and charged under certain rules therein set forth, and which rules are to be deemed and construed to be a part of the Act. First comes "No. 1. A general rule for estimating lands, tenements, hereditaments, or heritages named in schedule A. The annual value of lands, &c., charged under Schedule A. shall be the rent by the year at which the same are let at rack-rent, &c.; or if not let at rack-rent at which the same are worth to be let by the year," &c. Then comes "No. 2. Rules for assessing the tax in respect of tithes," and certain other descriptions of property therein mentioned; and then comes the following, "No. 3. Rules for estimating the lands, hereinafter mentioned, which are not to be charged according to the preceding general rule. The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount of one year of the profits received therefrom within the respective times therein limited." Then under that heading are dealt with first, quarries of stone, slate, &c.; and, secondly, mines of coal, tin, lead, and so forth; and then we find, "thirdly, ironworks, gasworks, salt-springs," and so on. "Gasworks" are thus made "properties," and are to be dealt with under Schedule A., and it is therefore contended on the part of the appellants that their gasworks, though they are not strictly speaking land or landed property, are yet nevertheless, for the purpose of this portion of the Act of Parliament, treated as "property" within and subject to the operation of Schedule A. and the cases and rules for carrying that schedule into effect. But, on looking carefully at the whole of the provisions in all these cases and rules under Schedule A., and especially at those which relate to and include gasworks, we find that they all relate to properties and works within the United Kingdom, and that there is nothing in any of them which deals with or relates to or can include gasworks, situated as these works are out of this country. In short, the whole of the provisions which treat gasworks as "property" within Schedule A., relate only to gasworks in this country, and there is no provision, case, or rule, at all applying directly or indirectly to gasworks or any property of that description abroad. I think, therefore, that Mr. Charles's argument, captivating as it seemed at first sight, ought not to prevail. We have, therefore, only to consider the law concerning these gasworks, treating them as within Schedule D., which undoubtedly they are. It is unnecessary to go through the different sections of the Act, and the various cases and rules for expounding and carrying into effect the original provisions of Schedule D., and every description of property, work, or undertaking within it, because the present case, in all respects that can apply to it, is identical with the case of the *Cesena Company*. Under these circumstances, and on the grounds which I have stated, this being a foreign undertaking in a continental country, but belonging to a joint stock company, established, incorporated, and resident in England, I am of opinion that the whole of the profits, whether that portion of them

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which has been remitted to and received in this country, or that which has been applied to the other purposes of the company abroad, are assessable to income tax in this country, and that, consequently, the right of the Crown being established, our judgment should be in its favour. I ought to add, at the request of my brother Cleasby, that he, being a shareholder in this company, does not think that he ought to be a party to the present judgment.

HUDDLESTON, B.—The real practical question in this case is, whether this company are to be assessed in this country, where their place of business is, on a sum of 258,668*l.*, or on a sum of 210,665*l.* The company claims exemption as to a sum of 48,003*l.*, on the ground that the sum is profits never transmitted to this country at all, but retained abroad, and appropriated there in liquidation of charges and expenses arising abroad from the exigencies of contracts for lighting foreign places, and not divided among the shareholders either in this country or abroad. Mr. Charles says that, if that is to be taken as part of the profits (as it undoubtedly is if this be a trade), he concedes that it would be assessable; but he says that we must not look at it in that light, because "gasworks" are to be assessed in the way that real property is assessed, namely, under the 5th case of sect. 100, Schedule D., and therefore that this portion of the profits is not assessable, because it has not been actually received annually in this country. Thus the question is raised for our consideration. Now I want, first of all, to see whether these are really profits of a trade. They are clearly profits arising from something that has been carried on; that is to say, from the manufacture and sale of gas abroad. I cannot help thinking that, in ordinary parlance, that is a trade. The mere fact that what is manufactured is gas does not distinguish it, as far as I can see, from any other trade. It is made, manufactured, and sold, and the profits, looking at it as a book-keeping concern, are what is received *minus* the outgoing expenses. Now, upon looking at Schedule D., in the 16 & 17 Vict. c. 34, it seems to be clear that those profits come within the words of that schedule. The words are: "Upon the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, or from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, there shall be charged," &c. These clearly are profits arising from or accruing to a person (and for this purpose a corporation may be held to be a person) residing in the United Kingdom from property out of the United Kingdom, and clearly, therefore, come within the words of Schedule D. Indeed, Mr. Charles does not deny that; but he says that they are assessable under case 5, and not under case 1. As I understand his argument—and certainly it is not from any fault on his part if one fails to understand it—he says it may be that the case comes within Schedule D., but that the company must be assessed under case 5 of that schedule, because, in fact, the works abroad are "foreign possessions," and he says it is so by referring to the Act of the 5 & 6 Vict. c. 35 and the cases under Schedule A., because

under rule No. 3 of Schedule A. "gasworks" are placed in the category of "lands, tenements, and hereditaments," and the assessments are to be on the annual value of these properties. That is what I understand him to argue, and he says, these things being "foreign possessions," they are only to be assessed under the 5th case upon that amount of money which is actually received in this country. I can only say that, if Mr. Charles's view is correct, the case of the *Cesena Sulphur Company* (*ubi sup.*) was wrongly decided, for that case is precisely the present one. There is no distinction between mines and gasworks. Mines are mentioned specifically in the 2nd subsection of rule No. 3 attached to Schedule A. and gasworks are mentioned in the 3rd subsection; but all the rules with reference to them are applicable to the Nos. 1, 2, and 3, and therefore, as far as the *Cesena Sulphur* case is concerned, it is exactly on all-fours in all its circumstances with the present case, as pointed out by my Lord, and I do not wish to repeat what has been already said upon that. I well recollect an argument was raised in that case as to how far that portion of the profits would be assessable to income tax which was paid to persons abroad and had never come to this country at all. It is said that the point which Mr. Charles has suggested was not raised in the *Cesena* case; but I must say that I think Mr. Dicey furnished a complete answer to the argument offered on the part of the appellants. Now what is that argument? It is obvious that this Schedule D., which has reference to trades and to gasworks, is confined to gasworks in the United Kingdom. In substance it says that gasworks in England shall be assessable as real property. I cannot help thinking that it must have required a legislative enactment to put that construction upon gasworks. I really cannot see that the manufacture of gas is not a trade; nor can I understand that, although it is carried on with buildings and by pipes put in the ground, it is not just as much a trade as that of carrying on a hotel by means of buildings and gardens. It could never be said that a company formed in England for the purpose of carrying on the business of hotel keepers on the Continent were not to be assessable in England because they carried on their business by means of houses and gardens. I have said that it required a legislative enactment to bring English gasworks within the category of real property; and there is no legislative enactment to that effect with reference to gasworks abroad. I cannot help thinking that gasworks abroad are to be considered as works used for the manufacture of gas, and so they come within the definition of a trade, and that they do not come, as contended for by Mr. Charles, within the category of "possessions" abroad, or of lands, tenements, and so on. Two points were no doubt strongly put by Mr. Charles to show that the first case under sect. 100 of Schedule D. would not be applicable to gasworks abroad, and he argued that under rule 5 of the rules applying to both the first and second cases, there would be no power to charge the duties in one division unless when the person is engaged in different concerns in trade in different places. That seemed, no doubt, at first to raise a difficulty; but the Act says: "Every statement of profits to be charged under this schedule shall include every source so chargeable on the person delivering the same on his own

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account, or on account of any other person; and every person shall be chargeable in respect of the whole of such duties in one and the same division, and by the same commissioner, except in cases where the same person shall be engaged in separate partnerships, or shall be engaged in different concerns relating to trade or manufacture in divers places, in each of which cases a separate assessment shall be made in respect of each concern, at the place where such concern, if singly carried on, ought to be charged as herein directed." Where is the business place of these gasworks? In England. If the concern was carried on in different places, it might be assessed in different places; but here, as pointed out by Mr. Dicey, according to the decision of the court, in *The Calcutta Jute Mills* case (*ubi sup.*), the business is carried on at the place whence the orders emanate. That is the central point where the business is carried on, where the directors meet and whence the orders are issued, and where the whole transactions occur, and, according to the fifth part of this clause, it would be assessed here. Our attention was then called to sect. 108 for the same purpose. If I am right in my view that these gasworks are not "foreign possessions," then sect. 108, is inapplicable here, because it applies only to "foreign possessions." On the whole I am clearly of opinion that these works are assessable in that sum of 48,003*l.*, and that therefore our judgment should be for the Crown.

Judgment for the Crown with costs.

Solicitor for the appellants, *Maresco Pearce.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

Wednesday, Dec. 5, 1877.

(Before KELLY, C.B., CLEASBY and POLLOCK, BB.)

KNOWLES AND SONS (LIMITED) (apps.) v. M'ADAM (resp.) (a)

Revenue—Income tax—Coal mines—Working of on lease for years—Balance of profits or gains—Exhausted capital at end of year—Deduction on account of—What allowable—5 & 6 Vict. c. 35, sect. 60, sched. A., No. 3; sect. 100, sched. D., third case—Rules 1 and 3, sect. 159—16 & 17 Vict. c. 34, sect. 2, sched. D.—29 Vict. c. 36, sect. 8—Construction.

The plaintiffs, a colliery company, owned certain leasehold coal mines, the lease of which they had purchased for a term of years; and in carrying on their business during the first year of the term they raised and sold a quantity of coal, thereby reducing the value of the mines at the year's end to 10,424*l.* less than the sum which they had originally paid for them. Upon being assessed to the income tax upon their profits as a colliery company for the year, they claimed to deduct from their gross receipts the above-mentioned sum of 10,424*l.* as for exhausted capital; and on a case stated by the special commissioners for the opinion of the court, it was

Held, by the Exchequer Division (Kelly, C.B. and Cleasby and Pollock, BB.), that coal mines were by sect. 8 of 29 Vict. c. 36, transferred from Schedule A., No. 3, sect. 60, and were assessable under Schedule D., sect. 100 of the 5 & 6 Vict. c. 35; and that, in estimating the balance of their

profits or gains under rule 1 of the latter schedule, the company were entitled to make the deduction claimed, which was not within any of the deductions forbidden either by rule 3 of that schedule or by sect. 159 of the Act.

Forder v. Handyside and Co. (ubi infra) not in point or applicable.

THIS was a case stated for the opinion of the court by the commissioners for the special purposes of the Income Tax Acts, under 37 & 38 Vict. c. 16, as to income tax assessed under Schedule D., on appeal for the year ending the 6th April 1875.

CASE.

Andrew Knowles and Sons (Limited), a company carrying on business as colliery proprietors at Pendlebury and elsewhere, appealed against an assessment on the sum of 226,824*l.* made on them under Schedule D. of the Act (16 & 17 Vict. c. 34) in respect of the profits of their business as colliery proprietors.

At the hearing of the appeal the commissioners were of opinion that the assessment should be reduced to the sum of 216,827*l.* 2*s.* 10*d.*; but it was urged by Mr. Chadwick that a sum of 10,424*l.* 15*s.* 3*d.* should be deducted on the ground that, in estimating the amount of assessable profits, the commissioners ought to allow as a deduction that sum, which was claimed by the company as "depreciation," and which, as stated in the annual report for the year ending 31st Dec. 1874, "is based on a calculation of the extent of coal available and the duration of existing leases, but it may be modified as future circumstances require;" and he further explained that the term "depreciation" in the balance-sheet was used to show to the shareholders the deterioration or difference in the value of their property at the end of the year and after the working out of a year's coal and the expiration of a year of their leases, as compared with the value of such property at the beginning of the year; or, in other words, that a re-valuation of the property showed that it was worth at the end of the first year 10,424*l.* 15*s.* 3*d.* less than at the time of the purchase twelve months before.

The commissioners were of opinion that they were precluded, by the 3rd rule applicable to the first case of Schedule D. in sect. 100 of the Act (5 & 6 Vict. c. 35), and by sect. 159 of that Act, from allowing the deduction claimed, and determined to enforce the assessment in the said sum of 216,827*l.*

The company thereupon expressed their intention to appeal, and this case was accordingly stated and signed by the commissioners on the 22nd March 1876.

The case came on for hearing before the Court of Exchequer in the Hilary sittings on Jan. 24, 1877, before Cleasby and Pollock, BB., when it was partly argued, and by decision of the court was directed to stand over for an amended statement to be made, showing the circumstances under which the deduction of 10,424*l.* was claimed, the court being of opinion that the case, as stated, did not raise the point between the parties so distinctly as it was desirable that it should do. The following amendments by way of addenda to the case were accordingly made.

AMENDMENTS TO CASE.

The company's colliery property comprises both freehold and leasehold mines, which were purchased by them; the price paid for the leasehold

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coal mines, subject to an average royalty rent of 7d. per ton, and having an average of thirty-two years to run, being 717,421l., the purchase-money for the freehold mines being 67,550l.

At the end of the first year's working, which is the year of the assessment in question, it was ascertained that from the company's leasehold collieries 844,877 tons, and from their freehold pits 62,000 tons of coal had been wrought or gotten and sold in that year, the total quantity therefore being 906,877 tons.

The appellants allege that, in ascertaining by a correct and accurate balance-sheet the profits made in that year, the company valued their coal mines at 10,424l. 15s. 3d. less than the sum for which they had purchased them at the commencement of the year, which sum (as the appellants alleged) fairly represented the diminution in their value by reason of the coal gotten as above mentioned, and which sum for the purposes of such balance-sheet was technically, but perhaps incorrectly, referred to as "depreciation." Of the said sum of 10,424l. 15s. 3d. the sum of 721l. 17s. 11d. represents the diminution in the value of the freehold mines, and the balance that of the leasehold.

The appellants further alleged that, in ascertaining the profits of the freehold mine, no sum is set against or deducted from the gross receipts on account of any rent assumed to be paid in respect thereof.

Points for argument on behalf of the appellants:—1. That the determination of the commissioners is erroneous. 2. That the assessment upon the appellants under the Income Tax Acts, in respect of their business as colliery proprietors for the year ending 6th April 1875, ought not to be in a sum including the sum claimed as a deduction by the appellants. 3. That the sum claimed by them as a deduction is no part of the profits upon which they are liable to be assessed under the Acts in respect of the profits of their said business for the said year, and ought not to be included therein. 4. That the assessment upon the appellants ought not to be in a greater sum than 206,402l. 7s. 7d.

Points for the Crown:—1. That the amount of duty chargeable upon the appellant's colliery is to be calculated upon the full annual value of the profits of such colliery on an average of the preceding three years, without making any deduction therefrom on the ground of its depreciation in value, either through the working out of the coal, or the expiration of any portion of the lease. 2. That the deduction claimed by the appellants in the present case from the amount of profits or gains arising from their said colliery is not such as the appellants are justified in claiming under the provisions of the third rule of the first case of Schedule D. of the Income Tax Act (5 & 6 Vict. c. 35), and is contrary to law. 3. That the case of the colliery in question does not differ in principle from the case of leasehold properties or annuities, in neither of which cases is any such deduction allowable as is now claimed by the appellants.

The following sections, schedules, and rules of the Income Tax Act (5 & 6 Vict. c. 35, 16 & 17 Vict. c. 34, and 29 & 30 Vict. c. 36), are material to this report.

The 5 & 6 Vict. c. 35, enacts (*inter alia*) as follows:

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Sect 60 :

That the duties hereby granted and contained in the said Schedule A. shall be assessed and charged under the following rules, which rules shall be deemed and construed to be part of the Act, and to refer to the said duties as if the same had been inserted under a special enactment.

SCHEDULE A.

No. 1. General rule for estimating lands, tenements, hereditaments, and heritages mentioned in Schedule A. The annual value of lands, &c., charged under Schedule A. shall be understood to be the rent by the year at which the same are let at rack rent, if the amount of such rent shall have been fixed by agreement commencing within seven years previous to the 5th April next before the making of the assessment; but if not so let at rack rent, then at the rack rent at which the same are worth to let by the year, and which rule shall be construed to extend to all lands, &c., except the properties mentioned in Nos. 2 and 3 of this schedule.

No. 3. Rules for estimating the lands, &c., hereinafter mentioned, which are not to be charged according to the preceding general rules. The annual value of all the properties hereinafter described shall be understood to be the full amount for the year, or the average amount for one year of the profits received therefrom within the respective times herein limited.

Secondly, of mines of coal . . . on an average of the five preceding years subject, to the provisions concerning mines contained in this Act.

Sect. 100 :

SCHEDULE D.

First case.—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act.

RULES.

First.—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, &c., upon a fair and just average of three years, &c.

Third.—In estimating the balance of the profits and gains chargeable under Schedule D., for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, on account of any sum expended for repairs of premises occupied for the purposes of such trade, &c., nor for any sum expended for the supply or repairs or alterations of any implements, &c., employed for the purposes of such trade, &c., beyond the sum usually expended for such purposes, according to an average of three years, &c.; nor on account of loss not connected with or arising out of such trade, &c.; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, &c.; nor for any capital employed in improvement of premises occupied for the purposes of such trade, &c.; nor on account or under pretence of any interest which might have been made on such sums if laid out at interest; nor for any debts, except bad debts, proved to be such to the satisfaction of the commissioners respectively; nor for any average loss beyond the actual amount of loss after adjustment; nor for any sum recoverable under an insurance or contract of indemnity.

Sect. 159 :

That in the computation of duty to be made under this Act in any of the cases before mentioned . . . it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act; nor to make any deduction from the profits or gains arising from any property herein described, or from any office, &c., on account of diminution of capital or of loss sustained in any trade, &c., profession, employment, or vocation.

The 16 & 17 Vict. c. 34, enacts (*inter alia*) by sect. 2, Schedule D.:

That for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall respectively be carried on in the

United Kingdom or elsewhere, and to be charged for every 20s. of the annual amount of such profits and gains.

And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, &c., exercised within the United Kingdom, and to be charged for every 20s. of the annual amount of such profits and gains.

The 29 & 30 Vict. c. 36 enacts (*inter alia*) by sect. 8:

That the several and respective concerns described in No. 3 of Schedule A. of the 5 & 6 Vict. c. 34 shall be charged and assessed to the duties hereby granted in the manner in the said No. 3 mentioned, according to the rules prescribed by Schedule D. of the said Act, so far as such rules are consistent with the said No. 3.

Herschell, Q.C. (with whom was *T. J. Sanderson*) for the appellants.—The question is, whether at the end of a year's working the appellants are or not entitled, in making up the balance of profit and loss, to take into account the exhaustion during the year of so much of what may be called their stock, and to make a deduction in respect of such exhausted stock for the purpose of arriving at the balance showing the profit made during the year. The Crown contends that the appellants are not entitled so to do. The case comes, and the tax is assessable, under Schedule D., sect. 100, of the 5 & 6 Vict. c. 35, to which coal mines have been transferred from No. 3 Schedule A. of the Act by sect. 8 of the 29 Vict. c. 36. In every trade or business, in order "to arrive at the value of the profits or gains" of a year's trading, it is necessary to take stock at the commencement and at the end of the year, and the exhausted stock must, so to speak, be replaced at the year's end before any profits can be said to have been made; that is to say, exhausted capital must be accounted for before profits can be reckoned. The definition of profits by political economists is in accord with that. *McCulloch* in his "Principles of Political Economy," 4th edition, chap. 7, p. 530, says: "Profits really consist of the produce, or its value, remaining to those who employ capital in industrial undertakings after all their necessary payments have been deducted, and after the capital wasted or used in the undertakings has been replaced. If the produce derived from an undertaking, after defraying the necessary outlay, be insufficient to replace the capital expended, a loss will have been incurred; if the capital be merely replaced, and there is no surplus, there will then be no loss, but there will be no annual profit, and the greater the surplus is the greater the profit." I would adopt that language here. Take the ordinary case of a coal merchant having at the beginning of the year 100,000 tons of coal in his coal yard, purchased by him at 1*l.* a ton. If during the year he sold 10,000 tons for 10,000*l.* he has made no profit; if he has sold it for 12,000*l.* his profit is not the whole 12,000*l.* but the 2000*l.* difference between it and the 10,000*l.* which the coal cost him. The Crown will not dispute these propositions. What difference, then, is there in principle between that case and one where the coal produced is underground, or in a mine, as in the present case? The appellants contend there is none. The merchant at the year's end has 90,000 tons only left, instead of 100,000, and this company have, at the end of the year, not all the coal in the mine when first bought, but only that quantity (say 1,000,000 tons) less the quantity (say

100,000 tons) got out and sold by them during the year. The price originally paid for the 100,000 tons must be deducted from the price the coal sold for, and the difference, after deducting expenses of working—which are not here disputed—is the balance of profit for the year. Had the 100,000 tons of coal been sold for less than the price they were bought at, the result, if the Crown's contention is right, would be that the appellants would have to pay income tax on the selling price notwithstanding that at the end of the year there were a balance of loss instead of profit on the year's trading; so also, if that contention is to prevail, a person purchasing or inheriting a stock of coal above ground or in a mine, and selling it all in the year, would have to pay tax upon the net proceeds, even though his whole capital were exhausted. The appellants, however, contend that he might deduct from the proceeds the selling or market value of the stock of coal at the time at which he acquired it. The principle and the way in which the balance of profits is arrived at are the same, whether it is a lease of a mine for one year or (as here) for thirty-two years, and there is no difference between them. In neither case does profit begin until the exhausted capital, which is gone and will never be seen again, is replaced. This is properly a sale of so much coal to the appellants, and not a lease at all: (*Gowan v. Christie*, *L. Rep.* 2 H. L. Sc. App. 273). In that case Lord Cairns, speaking of a lease of minerals, says, at p. 283: "Without pursuing the question with regard to agricultural leases further, I should doubt extremely whether *dicta* of this kind apply at all to leases of mineral subjects; for, although we speak of a mineral lease or a lease of mines, the contract is not in reality a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase—there is no sowing or reaping, in the ordinary sense of the term, and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land and to get certain things there if he can find them, and to take them just as if he had bought so much soil." Now, if at the expiration of their term the appellants should have gotten out and sold all the coal for less or for the same sum as they paid for their lease, they will have made no profit, and yet the Crown will contend that they will have been liable to tax every year upon their net yearly receipts. That would be regarding as profits all that a man receives, even though less than his exhausted capital. If a trading company, with power to pay dividends only out of profits, had realised 10,000*l.* by the sale of coal, but in so doing had exhausted an amount of coal which more than represented that sum, and then proposed to pay a dividend, the Court of Chancery would stop the payment on the ground that the company had no profits. It would say, "True, you have 10,000*l.* at your bank, but you have 15,000*l.* worth of coal less in your mine." There is nothing in rule 3 of the first case of Schedule D., on which the Crown will rely, that modifies or conflicts with the appellants' argument. That rule points out the matters in respect of which no deduction is to be

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made in estimating the balance of profits, &c., viz., on account of sums expended in repairs of trade premises, &c.; for the supply, repair, or alteration of implements, &c., beyond the usual sum, on an average of three years, or on account of any loss arising out of the trade, or for any capital employed in the trade, or in the improvement of the trade premises, &c., none of which are applicable here, and all of which are beside the present question. Neither is sect. 159, nor the case of *Forder v. Handyside and Co.* (35 L. T. Rep. N. S. 63; L. Rep. 1 Ex. Div. 233; 45 L. J. 809, Q. B. C. P., & Ex.), on both of which the Crown relied, in point or applicable to this question.

Dicey (with him were the Attorney-General, Sir J. Holker, Q.C., and the Solicitor-General, Sir H. Giffard, Q.C.), for the Crown (respondent) *contra*, contended, first, that the case came within sect. 60, Schedule A., and not under Schedule D., and the appellants therefore had no *locus standi*; but secondly, even if it were within Schedule D., they had still no *locus standi*. Originally mines were treated by Parliament, not as trades, but as belonging to or coming under the category of lands, tenements, and hereditaments (sect. 60, Schedule A., rule No. 3, second sub-section), and they were not, as the appellants have contended, transferred by sect. 8 of 29 Vict. c. 36, from that schedule to Schedule D. For some purposes it is true they were by that section brought under that schedule for convenience, that persons might go privately before the commissioners. Sect. 8 only directs that in some respects they shall be assessed under the rules in Schedule D. so far as is consistent with Schedule A., under which schedule they still are. Sect. 7 of the 23 & 24 Vict. c. 14, confirms this view. The question here is not about deductions from profits, but about the "annual value." As a matter of political economy, the doctrine contended for by the appellants may be correct, but the Income Tax Acts ignore political economy altogether. The tax, though it has in fact continued for many years, yet in theory it is an annual Act, and the intention is that everyone should pay a proportion of his income for each and every year. Mines under Schedule A. are to be treated as lands, and to be taxed upon their annual value, and not upon a balance of profits like a trade. The value of a mine is what a man gets from it by the coal which he sells, the Act treating coal exactly as if it were the produce of the land. That is the legal, though not perhaps the economical way of treating it. But assuming the mines to be brought within Schedule D., the present deduction is forbidden by the express words of rule 3 of the first case in that schedule, which prohibits any deduction "on account of any capital withdrawn therefrom" (that is from "the trade, manufacture, or concern"), nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern," and sect. 159 of the same statute (5 & 6 Vict. c. 35) is also against the appellants' claim. The Act makes no distinction between a purchaser and an inheritor of land. If a landowner discovers a mine under his land, and takes out the coal and sells it for 100,000*l.*, even my friend, I think, would not contend that in calculating the gains the landowner may say, "I've got 100,000*l.*, but I must deduct enough to enable me to replace my estate in the position it was in

before I got the coal." So if a man buys land out and out, and then finds a mine, and takes the coal and sells it, could it be contended that he might deduct the purchase money of the land from the money he received from the sale of the coal? But if the purchaser of land out and out may not deduct his purchase money, why should a leaseholder for, say ninety-nine years, be allowed to deduct the money paid for his lease? The case, however, is virtually decided by the case of *Forder v. Handyside* (*ubi sup.*) As in that case, so here, I say the amount set aside is in effect an addition to capital. It is either capital withdrawn or a sum employed or intended to be employed in the trade, &c. It is an attempt to set aside money to compensate for coal sold.

Herschell, Q.C. was not called on to reply.

KELLY, C.B.—I had not the advantage which both my learned brothers enjoyed of hearing the argument on the former occasion in this case; but, looking at the nature of the Income Tax Acts, and the plain and simple, clear, and undoubted meaning of the word "profits," I do not think that this case admits of any doubt. The reference which has been made to the case of *Forder v. Handyside* (*ubi sup.*), and to the statutes passed before the time when this question arose, may be disposed of almost in a word. Under the 29 & 30 Vict. c. 30, sect. 8, it appears to me to be clear that the question here is transferred from Schedule A. to Schedule D., and we have therefore only to consider the construction of Schedule D. and the different rules to which the learned counsel on both sides referred, and upon which the whole question turns. Now, the first rule of Schedule D. is as follows: "The duty to be charged in respect thereof;" that is, "in respect of any trade, manufacture, adventure, or concern," which includes "mines" and the business of working them, shall be computed "on a sum not less than the full amount of the profits and gains of such trade, manufacture, &c., upon a fair and just average of three years," and so on. That is the substantial enactment, the construction of which must decide the present question, unless it is qualified by something which comes after. Now, what is "the balance of the profits or gains" of such trade, &c. Beginning at that point, let us take the simplest possible case, and imagine a man purchasing at a wholesale warehouse a bale of cotton or a chest of tea for 40*l.*, and selling it by retail for 45*l.*, incurring no expense in the transaction beyond his purchase money of 40*l.* What is his profit? It is the sum of 5*l.*, the balance or difference remaining to him after having repaid himself everything that he expended in order to obtain the bale or chest which he sold for 45*l.*; and, if it stood by itself simply, it would be his whole year's income; but if it be multiplied some hundred times by as many different transactions, his income would be 500*l.* a year, and in respect of the one or the other sum, if so small a sum as 5*l.* were assessable at all, he would be assessable to the income tax. Now let me go a little further, and suppose that the man became the owner of a bale of cotton by purchase for 20*l.*, and of a chest of tea of that value, which had been left to him as a legacy. Starting in business with these two articles of the joint value of 40*l.*, he sells them in the course of the year for 45*l.* What is his profit? Is it not the difference between the value of the articles and that for which he sold them, viz., 5*l.*

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only? If the 20*l.*, the value of the tea which was bequeathed to him, is to be transmuted into "profits" and to be treated as such, and his "profits" are to be put at 25*l.*, I see no escape from the proposition that, if a man has a legacy of 20*l.* or 100*l.* left to him in goods or money's worth, it is to be taken as his income. Now, if that were so, what would be the inevitable consequence? Let us take the case of money first, and suppose a man dying possessed of half a million of money, which he leaves equally between his five children. Could it be contended for a moment in a court of law that that was income, and that each child was to be assessed to the income tax upon 100,000*l.*? To contend that the corpus of a man's whole fortune was to be taken as his year's income, and that he was to pay income tax upon it after that rate, would be a startling, not to say ludicrous proposition. If it were so, and the money remained untouched and uninvested, and none of it were spent during the whole of the man's life, he would still, according to that proposition, be liable to be assessed at the same rate for the remainder of his life, which would surely be a monstrous contention. Then, is there any difference between that case and the case of goods which are assessable under Schedule D.? Suppose a merchant dies and leaves to his son all his goods in his warehouses, consisting of, say, 20,000 bales of cotton, and that the son, on succeeding to his father's business, carries it on, and in the course of the year sells 1000 of the 20,000 bales, what is his profit? Is it what he receives for the 1000 bales without any deduction? It is not so. His profit must be reckoned in this way. What would it have cost him to purchase at wholesale price the 1000 bales which he has sold? Suppose they would have cost him 10,000*l.*, and that he has sold them for 12,000*l.*, is his profit the whole 12,000*l.*? If it be, then, if he had sold all the 20,000 bales in the year, his profits would have been equivalent to a legacy of 240,000*l.* in money, and he must have been assessed on that amount as if it were a yearly income. But that is not so. What he has really gained in the way of "profit" is the sum for which he has sold the bales, deducting therefrom the price for which he bought them, or, if he inherited them or took them under a gift, the market value or sum which he would have had to pay for them if he had purchased them, and that difference alone is his profit. Now, let us apply this principle to the case of a coal mine, and suppose, as it was I think unanswerably put by Mr. Herschell in his argument, that the present case was one of a lease of the mine for one year only, for which the appellant company had paid 1000*l.*, thereby having the liberty to work and raise as much coal as they could find and get out during the year. What at the end of the year would be their condition? We will suppose that in the course of the year they bring to the surface a quantity of coal which they sell for 1200*l.*: what is the profit which they have earned in the year? They paid 1000*l.* for the lease, the means by which alone they obtained the liberty to enter and work the mine, and that lease is now expired and gone. We will assume that the machinery and labour employed cost them during the year 100*l.* more, and they sold the coal obtained for 1200*l.* Is their profit the whole of that sum? To apply the term "profit" to such a transaction would be an abuse of language. Their profit

would be that which remained to them, and which they can put into their pockets, after deducting their expenses, viz., the 1000*l.* paid for the lease and the 100*l.* expended in machinery and labour and the cost of getting the coal. Their profit then would be 100*l.* only. If that, then, be the case with regard to a lease for one year, it must be the same with respect to a lease for thirty-two or any other number of years. There is and can be no difference in principle between the two cases. In order to arrive at their profits, whatever they may be, the company have a right to set off against their gross receipts the whole expenditure over the thirty-two years, divided into thirty-two portions, if their dealings have been alike in all the years, just as they would, supposing it had been a lease for one year; and now what is the expenditure? It is, in addition to the yearly expenses and cost of labour, the premium or rent paid for the lease, which, if it be for one year only, would have to be set off against the gross earnings for that year; and if it be a thirty-two years' lease, it would then have to be divided into thirty-two parts, in order to ascertain what, if any, during the thirty-two years, is their annual profit in respect of which they would be assessable to the income tax. Such, in my opinion, is the construction of this provision of the first rule under Schedule D. of the Act, supposing there to be no subsequent qualification in any other section. Now the third rule is as follows: "In estimating the balance of profits and gains eligible under Schedule D. for the purpose of assessing the duty thereon," no sum shall be deducted from it "on account of loss not connected with or arising out of such trade;" that is, on account of something not in the way of trade, as for instance, a loss through some speculation incurred whilst working the mine. The loss so incurred would have nothing to do with the trade in which the individual was engaged. Then next, "nor on account of any capital withdrawn therefrom." The meaning of that is perfectly plain. If a man begins to work a mine, or to carry on any other trade, &c., with a capital of 40,000*l.*, and in the course of a year withdraws 10,000*l.* of it for the purpose, say of building coal warehouses in other places in which he carries on his business, that would be a portion of his capital withdrawn, which would not be taken into consideration in ascertaining the balance of his profits. Then come the other words, "nor for any sums employed or intended to be employed as capital in such trade." These words I think refer to and mean something additional to the capital which has been actually employed in realising the profit that has been acquired during the year. If, for instance, during the year the lessee of the mine, in order to work it with greater success, has added to all his previous expenditure a sum of money, say 1000*l.*, in order to assist in working the mine in general, that would be a sum which might add to the value of the mine, and in one sense it would be employed in the trade, because it would be employed to add to the value of the mine; but yet it would not be an element in ascertaining that year's profit. Then we come to sect. 159, which enacts "that in the computation of duty to be made under this Act in any of the cases before mentioned, either by the party making or delivering any list or statement," and so on, "it shall not be lawful to make any other

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deductions therefrom than such as are expressly enumerated in the Act nor on account of diminution of capital employed or of loss sustained in any trade," &c. Now, it is not a diminution of capital to purchase an article which afterwards is sold at a profit; but a man's capital may be diminished by the destruction of his goods by an accidental fire, and that would be a loss or depreciation of the amount of his capital, but not an element in the calculation of his profits, and could not be set off against them. So also a trader may think that his capital is too large, and may reduce it from 20,000*l.* to 15,000*l.*; but such a diminution is not to be set off against the amount of his profits in calculating the income tax. It is one quite of another character, and is in no respect an element in the estimate of the balance of profits. From the produce of the articles a man deals in he has a right to deduct all the expenses which he has been put to in the purchase of the articles and by payments for work and labour or machinery, or of any other kind—all, in fact, that he has necessarily expended in order to acquire possession and the right to dispose of such articles—before the amount of his profit can be said to be ascertained. Under these circumstances, and for these reasons, I am of opinion that the deduction here claimed by the appellants is not forbidden by any section, rule, or provision of the Income Tax Acts, and that the appellants are therefore entitled to our judgment.

CLEASBY, B.—The present case, involving the application of the rules for assessing the Income Tax, appears to me to be of a class in which we must look at each case by itself, and be careful not to generalise, so as to appear to include other and different cases. This is not the case of a landowner opening a quarry or a mine, and letting it at a royalty, or working it himself. I do not say anything about such a case as that, for it must be understood, as far as I am concerned, that I am not dealing with or deciding any such case as that at all. Now I take it to be quite clear that, in the present case, sect. 8 of the 29 Vict. c. 36 places the assessment under "the rules prescribed in the Schedule D." of the 5 & 8 Vict. c. 35, of which the words are, "the several and respective cases described in No. 3 of Schedule A. of the 5 & 6 Vict. c. 35 (and that includes mines), shall be charged and assessed to the duties hereby granted in the manner in the said No. 3 mentioned according to the rules prescribed by Schedule D. of the said Act, so far as such rules are consistent with the said No. 3." Nothing can be possibly clearer, I think, than that language, and unless that enactment applies to the case of a colliery company formed for the purpose of carrying on the business of working coal mines, no case can be suggested, in my opinion, to which it could apply. This is a case to which it was intended to apply. I do not express any opinion whatever as to how far it applies to the case, as I before observed, of a landowner opening a quarry or mine, and letting it or working it himself. It is clear, however, that this colliery company came under Schedule D., and we have only to apply the words of that schedule, treating this, as it ought to be treated, as a trade or business. As soon then as we arrive at that point, the case, as it seems to me, is perfectly free from difficulty.

The first rule under Schedule D. says, "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade," &c. Now, as was well put by the learned counsel for the appellants, how can we get at the balance of the profits of a trade for a year without stock-taking at the commencement and at the end of the year? It is, I think, impossible to do so, and this indeed was hardly disputed. Now rule 1 ends with these words, "without any other deduction than is hereinafter allowed." The whole argument therefore turns upon the application of the language of rule 3 as correcting the necessary application of the language of rule 1, which prescribes that "the balance of the profits or gains" is to be taken. Some of these rules may perchance be somewhat inconsistent with the strict principles of political economy; but if there is anything in rule 3 applicable to the present case we are bound to apply it. Now, I can see nothing in rule 3 which is in the least degree inconsistent with the plan I have alluded to of stock-taking for the purpose of arriving at "the balance of the profits and gains." It is not necessary to go through the several branches or items of that rule to show that each part of it is inapplicable to the present case; the only part of it on which anything can turn on the present occasion is the following: "nor on account of any capital withdrawn from the concern." Now, to call the deduction here claimed "capital withdrawn from the concern" is entirely erroneous. It is rather "capital consumed in making the profits." As to the case of *Forder v. Handyside* (*ubi sup.*) which has been referred to, there is no doubt that the principle of the Income Tax Acts is to take the result of the trading for one year, or at an average of three years, and every person must pay something out of the profits of that year or average of three years; and a trader cannot put by a sum of money out of his yearly receipts for the purpose of meeting a depreciation of capital, in addition to the deduction which he is allowed to make in respect of the annual repairs of premises, and matters of that sort, which belong to the year or the average of years. It is obvious that if he did more than that he would depart from the principle of the Acts of Parliament which expressly forbid such things to be done. That case, I must say, seems to me to be so inapplicable to the one now before us that I almost wonder it was cited; at all events it has no bearing upon the present case at all, its principle being simply this, that a trader is not entitled to put by a sum for depreciation. I think therefore, under these circumstances, that the appellants are entitled to our judgment in their favour.

POLLOCK, B.—I entirely agree with my Lord and my brother Cleasby. The first point for us to determine is, under what Act of Parliament does this case come and is it governed by? It appears to me clearly to be governed by the 29 & 30 Vict. c. 36, s. 8, which provides that any concern such as this is to be charged and assessed with duty in the manner in No. 3 of Schedule A. mentioned, according to the rules prescribed by Schedule D. of the said Act, so far as such rules are consistent with the said No. 3. It has not been contended or assumed that there is any inconsistency between Schedule A. No. 3 and these rules. That being so, the rest of the case seems to me

CR. CAS. RES.]

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really to have arisen from a misapprehension, caused by reason of the company having in their first return made use of the word "depreciation," which, unexplained as it then was, not unnaturally or unreasonably suggested to the commissioners the idea that it was necessarily in diminution of the sum of the balance of profits or gains. It was afterwards corrected, and it was stated that "the amount claimed for depreciation was based on a calculation of the extent of coal available and the duration of existing leases, but that it might be modified as future circumstances required;" and further, that "the term depreciation was used to show to the shareholders the deterioration or difference in the value of their property at the end of a year and after the working out of a year's coal." Mr. Herschell, too, in his able argument to-day, further explained it as meaning that the company had in the year overworked the proportion of the whole quantity of coal in the time as compared with the whole lease of years—that is to say, in proportion to their term of thirty-two years. That turns us back, therefore, before going to the question of deduction at all, upon the question, What has been the balance of profits or gains of the concern? If they have any rent to pay, we must first ask what is that rent? It may or not be an annual rent, or it may be a small annual rent with a very large sum paid as premium. Of course in that case the premium must be distributed over the whole number of years. It could not be argued for a moment that, because a man paid 100,000*l.* as premium and only 500*l.* a year as rent, the 100,000*l.* should be treated as a nullity. So, again, in the present case, supposing a larger quantity of coal, having regard to the number of years, to be taken in any one year than would be taken if it were distributed over the whole number of years, there can be no doubt, I think, when these facts are apprehended, and when we ask what is the profit or gain of this adventure, that we must consider that term and estimate it, and therefore deduct it from the gross receipts of the sale of the coal before we can arrive at the balance of the profits or gains. That being determined, I think the whole question is at an end; and had the case been originally stated as it was afterwards amended, it would probably never have been before us at all. I quite agree that the appellants are entitled to judgment.

Judgment for the appellants with costs.

Solicitor for the appellants, *H. T. Chambers.*

Solicitor for the respondent, *Solicitor of Inland Revenue.*

CROWN CASES RESERVED.

Saturday, Jan. 19, 1878.

(Before COCKBURN, C.J., OLESBY, B., LINDLEY, MANISTY, and HAWKINS, JJ.)

REG. v. PAUL READ. (a)

Embezzlement—Wild rabbits—Taking, killing, and removing—One continuous action.

The prisoner was employed to look after a wood in which the game and rabbits, and rights of sporting, had been granted to his master by the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

owner. He was not at liberty to kill rabbits for his own use, but he did take, kill, remove, and sell eighteen rabbits in and from the wood, nevertheless. The taking, killing, removing, and selling were parts of one continuous action.

Held, that the criminal offence (if any) was not embezzlement.

CASE stated by the Vice-Chairman of the Berks Quarter Sessions for the opinion of this Court.

The prisoner was indicted at the Berks Epiphany Sessions, held 31st Dec. 1877, for stealing eighteen rabbits, the property of Arthur Smith, his master.

The evidence showed that the prisoner was the gamekeeper of Smith, and was employed to look after a wood in which the game and rabbits, and rights of sporting, had been granted to Smith by the owner.

The prisoner was not at liberty to kill or take rabbits in the wood for his own use.

He did take and kill and remove eighteen wild rabbits in and from the wood, and had bargained to sell them, when they were seized in the possession of the purchaser's agent; the capturing, killing, removing, and selling being parts of one continuous action.

Counsel for the defence required the Court to stop the case, because there was not any evidence to go to the jury; that the rabbits had never as subjects of larceny been in the possession of Smith; and that, therefore, the prisoner could not be guilty of stealing or embezzling them.

Counsel for the prosecution insisted that, when the rabbits were captured and killed by the prisoner, they were by that act reduced into the possession of his master, and became subjects of larceny or embezzlement.

Reg. v. Townley, L. Rep. 1 C. C. R. 315; 12 Cox C. C. 59; and *Reg. v. Oullum*, L. Rep. 2 C. C. R. 28; 12 Cox C. C. 469, were cited.

The case was left to the jury, the Court telling them that the criminal offence of the prisoner (if any) was embezzlement and not larceny, and that if, in their opinion, the prisoner being the servant of Smith captured and killed the rabbits, although against the orders of his master, and they so came into the possession of the prisoner for or on behalf of his master, and the prisoner converted them to his own use, he was guilty of embezzlement.

The jury found the prisoner guilty of embezzlement, and he was sentenced to four months' imprisonment with hard labour.

The Court reserved for the opinion of the Superior Court, which they now request, the question, whether the prisoner, by capturing and killing the rabbits against his master's orders, did so bring them into the possession of his master that he could, by appropriating them to himself, be guilty of embezzling them.

The Court respited the execution of the judgment on the conviction until such question has been decided.

GEORGE CHARLES CHENT,

Vice-Chairman of Berks Quarter Sessions.

Howard Smith for the prisoner.—It is submitted that the prisoner was not guilty of embezzlement. The case finds that the capturing, killing, removing, and selling the rabbits were parts of one continuous action, and therefore the rabbits, according to *Reg. v. Townley*, were not the subject of larceny. In that case Bovill, C.J., said:

"Now, the first question is as to the nature of the property in these rabbits. In animals *feræ naturæ* there is no absolute property; there is only a special or qualified right of property—a right *ratione soli* to take and kill them. When killed upon the soil they become the absolute property of the owner of the soil. This was decided in the case of rabbits by the House of Lords, in *Blades v. Higgs* (11 H. of L. Cas. 621; 34 L. J. 286, C. P.). And the same principle was applied in the case of grouse in *Lord Lonsdale v. Bigg* (1 H. & N. 923; 26 L. J. 196, Ex.). In this case therefore the rabbits being started and killed on land belonging to the Crown, might, if there were no other circumstance in the case, become the property of the Crown. But before there can be a conviction for larceny for taking anything not capable in its original state of being the subject of larceny—as for instance, things fixed to the soil—it is necessary that the act of taking away should not be one continuous act with the act of severance or other act by which the thing becomes a chattel, and so is brought within the law of larceny. This doctrine has been applied to stripping lead from the roof of a church, and in other cases of things affixed to the soil. And the present case must be governed by the same principle." As the rabbits were not the subject of larceny, so neither are they the subject of embezzlement. The 24 & 25 Vict. c. 96, s. 68, enacts that whosoever, being a servant or being employed for the purpose or in the capacity of a servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person, &c. employed." The rabbits here were not delivered to or received by or taken into the possession of the prisoner for or in the name or on the account of his master, but on his own account and for his own gain. The case is similar to that of *Reg. v. Oullum*, where the captain of a barge used the barge for his own purposes contrary to his master's orders, and so earned money which was paid to him and appropriated to his own use, and this was held not to amount to embezzlement. Then again the rabbits were not "chattels" at the time of killing, which was done that the prisoner might get the property for himself. [MANISTY, J.—It is clear that a dead rabbit is a chattel, and belongs to somebody. HAWKINS, J.—But here the prisoner had the rabbits in his possession before he killed them, and the taking, killing, and removing them were all one continuous act.] That is so. When the rabbits were taken into the possession of the prisoner they were not chattels. Suppose a wild rabbit ran into the hall of a house, and the servant caught and killed it then and there; would he be guilty either of larceny or embezzlement? It is submitted that he would not.

H. D. Greene for the prosecution.—The prisoner was properly convicted of embezzlement. That a chattel was received into the possession of the prisoner is clear from *Blades v. Higgs* (11 H. of L. Cas. 621.) In that case Lord Chelmsford said: "With respect to hwild and unreclaimed animals, there

can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain that, when killed or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property absolutely when they are killed, and in a qualified manner when they are reclaimed. Does the unauthorised act of a trespasser, by the very act of killing them, convert them at once to the use of the owner of the land? If the appellant is right in saying that the owner of the land has no property in game unless it is killed by him or by his authority, it will necessarily follow that a poacher reducing the game into possession, and thereby as possessor, though a wrong-doer, having a right to it against all the world but the true owner, there being no owner to challenge his possession, might maintain an action against the owner of the land for taking the game from him, even upon the land itself, when it was killed. It is much more reasonable to hold that the trespasser having no right at all to kill the game can give himself no property in it by his wrongful act, and that as game killed or reduced into possession is the subject of property, and must belong to somebody, there can be no other owner of it under these circumstances but the person on whose ground it is taken or killed." It is clear dead rabbits are the property of someone, and, according to *Higgs v. Blades*, of the owner of the land on which they are killed. [COCKBURN, C.J.—Suppose the rabbits are taken while asleep? MANISTY, C.J.—Or caught in a trap and taken away alive?] In this case they were killed on the land. The master had a constructive possession by the prisoner, his servant, killing them in the wood. [COCKBURN, C.J.—By the statute it must appear that the prisoner took the rabbits for or on account of his master. That is contrary to the fact, for the prisoner took the rabbits for himself. He intended to rob his master and took the rabbits for himself.] On that view the prisoner might be convicted for larceny. [COCKBURN, C.J.—But he was not, and the question reserved is as to embezzlement.] When a butler steals his master's plate or wine, in point of law they are in the master's possession at the time. Here the rabbits, when killed, became the master's property, but were not at the time in his possession. In *Reg. v. Oullum* Blackburn, J. said: "Without criticising the words of the Act, 24 & 25 Vict. c. 96, s. 68, let us look at the object of passing it. The common law requires, for the offence of larceny, not only *animus furandi*, but that there should be a taking, and it was held, on the narrow distinctions of the common law, that when the property only became the master's by coming into the hands of his servants, and not otherwise, the servant could not be said to take his master's property, because it came into his hands at the moment it was so received. It was to meet this difficulty that the Legislature said, 'He who embezzles shall be guilty of stealing, although the property has not become the master's, except by the possession of the servant.' And in the original Act were the words 'by virtue of his employment,' which have been expressly omitted from the more recent statute. Yet still the essence of the matter is, that the servant shall be deemed to have stolen the master's property, if it be his master's property, although not received otherwise than in the prisoner's capacity of clerk or

servant." Here the prisoner had his master's property when the rabbits had been killed by him. [HAWKINS, J.—In *Reg. v. Roe*, 11 Cox C. O. 557, Willes, J. said, "By the decision in *Blades v. Higgs* it was never intended that poachers should be put on the same footing with felons."]

COCKBURN, C.J.—We are all agreed that the conviction must be quashed.

Conviction quashed.

Solicitors for the prosecution, J. T. Dodd, Reading.

Solicitors for the prosecution, Parkers and Co.

Saturday, Jan. 19, 1878.

(Before COCKBURN, C.J., OLESBY, B., LINDLEY, MANISTY, and HAWKINS, JJ.)

REG. v. KNIGHT. (a)

Debtors Act 1869—Indictment—Aider by verdict—Obtaining credit by false pretences, and fraudulently disposing of goods within four months before liquidation—32 & 33 Vict. c. 62, s. 11, sub-sects. 14 and 15.

An indictment charged that the defendant, a trader, "did within four months next before the commencement of the liquidation by arrangement of his affairs obtain from W. goods upon credit under the false pretence, &c., with intent to defraud." And in another count in similar terms the defendant was charged with unlawfully disposing of the goods otherwise than in the ordinary way of his trade. Both counts were framed under sect. 11, sub-sects. 14 and 15, of 32 & 33 Vict. c. 62.

Held, that the counts were good after verdict, and sufficiently averred that the defendant was a person whose affairs were liquidated by arrangement within the meaning of sect. 11.

At the General Quarter Sessions of the Peace for the borough of Birmingham, held at Birmingham, before the Recorder, on the 22nd Oct. 1877, an indictment of which the following is a copy came on to be tried against the defendant, framed upon sub-sects. 14 and 15 of 32 & 33 Vict. c. 62 (The Debtors Act 1869).

Borough of Birmingham to wit.—The jurors for our Lady the Queen, upon their oaths present, that heretofore and before the committing of the offences by William Augustus Knight as herein-after mentioned, the said William Augustus Knight was a trader within the true intent and meaning of the laws then and now in force relating to bankrupts. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 12th April 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from Westwick and Co., spice merchants of London, five cases of Cochin Ginger upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

2nd count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was

such trader as aforesaid (to wit), on or about the 9th May 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), five cases of Cochin Ginger, which he had obtained on credit, and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

3rd count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 3rd May 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from Joseph Brook and Co., of Birmingham, twenty cads (or boxes) of Caper Tea upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

4th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 8th May 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), twenty cads (or boxes) of Caper Tea which he had obtained on credit and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

5th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit) on or about the 28th May 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from William Lloyd, of Birmingham aforesaid, three boxes of Toby and Booth's bacon and two boxes of Toby and Booth's hams, upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

6th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the said 28th May 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property, to wit, three boxes of Toby and Booth's bacon and two boxes of Toby and Booth's hams, which he had obtained upon credit and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

7th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 1st June 1877,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from H. H. and S. Budgett and Co., of Bristol, five boxes of bacon upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

8th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on the said 1st June 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), five boxes of bacon which he had obtained upon credit and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

9th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 7th June 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from Charles Wood and Co., of Liverpool, ten boxes of cheese upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

10th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the said 7th June 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), a large quantity of cheese which he had obtained upon credit, and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

In the course of the trial proof was duly made, by the production by an official of the County Court of Warwickshire, holden at Birmingham, of the proceedings under the seal of the said Court relating thereto:

1. That the said William Augustus Knight had, upon the 19th June 1877, filed in the said Court his petition for the liquidation of his affairs by arrangement under the provisions of 32 & 33 Vict. c. 71 (The Bankruptcy Act 1869).

2. That trustees under the said liquidation had been subsequently duly appointed.

3. That the liquidation proceedings under the said petition were still pending.

The defendant was acquitted on the third and fourth counts of the said indictment, and convicted on the remaining eight counts.

After the verdict was returned by the jury, but before sentence was passed, a motion was made by the counsel for the defendant in arrest of judgment to quash the counts of the said indictment on which the defendant had been convicted,

on the ground that they were bad on the face of them, and were not tured by the verdict inasmuch as:

1. The above-mentioned counts of the said indictment contained no averment of any offence under the Debtors Act 1869.

2. There was no averment in any of the above-mentioned counts of the said indictment that the defendant was a person adjudged bankrupt, or was a person whose affairs were or had been liquidated by arrangement in pursuance of the Bankruptcy Act 1869.

3. There was no averment in any of the above-mentioned counts of the said indictment of the filing of any petition for liquidation of his affairs by arrangement pursuant to the Bankruptcy Act 1869, by the said defendant or the appointment of a trustee under any such liquidation proceedings.

4. There was no substantive or certain averment of any liquidation proceedings whatever under the Bankruptcy Act 1869 in any of the above-mentioned counts of the said indictment.

Upon hearing counsel on both sides I overruled the objection, but on the application of the counsel for the defendant I stated my intention to send up a case for the decision of the Court for Crown Cases Reserved, and I therefore postponed judgment on the conviction and discharged the defendant on recognisance of bail to appear and receive judgment if called upon.

If the Court should be of opinion that all the above-mentioned counts of the said indictment are bad after verdict, then they are to be quashed; but if the Court should be of opinion that any of the said counts are good, then the verdict on those counts is to stand, and the defendant is to come up for judgment accordingly.

R. Harris (T. M. Colmore with him) for the defendant.—It is submitted that the indictment is bad after verdict. The 32 & 33 Vict. c. 62, s. 11, begins thus: "Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act 1869, shall in each of the cases following be deemed guilty of a misdemeanour." Then sub-sects. 14 and 15, on which the indictment is framed, enact: "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he being a trader obtains, upon the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud." Sub-sect. 15: "If within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he being a trader pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud." In order to convict a person under those sub-sections it must appear either that he has been adjudicated a bankrupt, or that his affairs have been liquidated by arrangement; and the indictment must show on the face of it that the defendant is a person on whom those sub-sections can operate. A man may file a petition for liquidation, but if the liquidation is not carried out and goes off, he is not within the purview of sect. 11:

Reg. v. Oliver and Austin, 13 Cox C. C. 588.

The principle of that case is applicable to this case. [COCKBURN, C.J.—You must read the indictment with reference to sect. 19, which seems to me to set at nought the rules of criminal pleading: "In an indictment for an offence under this Act it shall be sufficient to set forth the substance of the offence charged in the words of this Act, specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any contracting under, the Bankruptcy Act 1869.] In *Reg. v. Oliver and Austin*, Lush, J. said that sect. 19 only makes an indictment good when it states the offence in substance. This indictment does not state the offence in substance, for it nowhere avers that the defendant's affairs were liquidated by arrangement, which is a necessary ingredient to bring the defendant within the operation of sect. 11. The only difference between the present case and *Reg. v. Oliver and Austin* is, that that was a bankruptcy and the present a liquidation by arrangement. [MANISTY, J.—No; the indictment was very different. In that case Kelly, C.B. said: "I am of opinion that no such amendment or intentment as suggested can be made, when the contrary is alleged as here." We have not that difficulty to get over in this case. LINDLEY, J.—Do you contend that the words "are liquidated," in sect. 11, mean "have been liquidated," and that no offence can be committed by a person when the liquidation turns out abortive?] Yes. Again, the indictment does not show that the liquidation ever commenced, for by sect. 125, sub-sect. 4, of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), a liquidation by arrangement shall be deemed to commence from the date of the appointment of the trustee. It does not appear on the face of the indictment that a trustee was ever appointed. So that the most that can be inferred from the indictment is, that at some time proceedings for a liquidation had commenced, but what became of them does not appear; they may have dropped, or the defendant may have paid 20s. in the pound.

Rosher for the prosecution.—The indictment is good after verdict. In *Reg. v. Oliver and Austin* the motion to quash the indictment was expressly made on the ground that it was bad on the face of it, and repugnant; and the repugnancy was the chief difficulty in that case. Here there is no repugnancy, and according to sect. 19 it is sufficient, for it contains all the requisites to constitute the offences charged; it follows the words of sect. 11, and shows substantially the offence charged. Secondly, the objection was made too late. If it had been taken before verdict, an amendment might have been made. Again, this, if a defect at all, is one that is cured by the 7 Geo. 4, c. 64, s. 21, which enacts that, where the offence charged has been created by any statute, the indictment shall, after verdict, be held sufficient if it describe the offence in the words of the statute. Cases cited:

Nash v. The Queen, 4 Best & Sm. 935; 33 L. J. 94, M. C.;

Heyman v. The Queen, 8 L. Rep. Q. B. 102; 12 Cox C. C. 383;

Reg. v. Goldsmith, L. Rep. 2 Cr. Cas. Res. 74; 12 Cox C. C. 479.

Harris in reply.—No doubt a defective averment, as in the cases cited, may be cured by proof, and the objection is too late after verdict; but in the present case it is contended there was no aver-

ment at all of any offence. It is not enough to show that there has been a commencement of a liquidation, which is the utmost that can be inferred in the present case.

COCKBURN, C.J.—I am of opinion that this indictment should be upheld, and that the conviction should stand. In the first place, as to the case of *Reg. v. Oliver and Austin*, that is not an authority in point in this case. The indictment in that case contained an allegation not to be found in this indictment, viz., "that before the committing of the offence next hereinafter mentioned, to wit, on, &c., I. Oliver and T. Austin were adjudicated bankrupts, and that they afterwards, with intent to defraud, &c., within four months next before the presentation of a bankruptcy petition against them," committed the offence charged. The objection was that it was not stated in that indictment, in a form sufficient to satisfy the statute, that there was any adjudication of bankruptcy upon the petition within four months of which it was alleged that the bankrupts had committed the offence—the adjudication of bankruptcy being the *status à quo* the offence proceeds. It cannot be disputed that an adjudication in bankruptcy, or a liquidation by arrangement in pursuance of the Bankruptcy Act 1869, is essential to the completion of the offences created by sect. 11 of the Debtors Act 1869, and, as in this indictment, there is no express allegation that the defendant's affairs were being liquidated, the indictment would be defective unless the defect is cured by sect. 19 of the Act, which uses strong terms, or is aided by verdict. There is a difficulty in getting over that enactment, framed as it is in such general terms; but at the same time I am reluctant to disregard the rule of criminal pleading that an indictment must state all the matters that are essential to the charge contained in it. Sect. 19 may be construed, I think, not to do away with the necessity of the allegation of the essential matters which constitute the offence, but to prevent the necessity of alleging the details of the adjudication of bankruptcy or liquidation by arrangement; and I think it is sufficient to allege in the indictment that the defendant was adjudicated a bankrupt, or that his affairs were liquidated by arrangement, and that he committed the offence within four months before the presentation of the bankruptcy petition or the commencement of the liquidation. It is not necessary in the present case to decide whether the allegation in this indictment is sufficient upon demurrer, for we are dealing with an objection made to the indictment after verdict. Now, I think that, though it is informally stated in the indictment, yet that it may be implied by reasonable intendment from the indictment that the defendant's affairs were being liquidated by arrangement, and if so the indictment may be sustained. Now, the indictment states that the defendant did, within four months before the commencement of the liquidation by arrangement of his affairs, obtain, &c., which seems to me to amount, by necessary implication, to an allegation that there was a liquidation by arrangement of the defendant's affairs under the statute. That being so, I am of opinion that the averment may, after verdict, be treated as an informal one, and cured by necessary intendment. I give no opinion whether it was an objection or not which might have been taken before verdict.

[CR. CAS. RES.]

REG. v. KNIGHT.

[CR. CAS. RES.]

CLASBY, B.—I also think that the conviction should be affirmed. It appears to me that there was nothing in the objection to the indictment after it was proved, that trustees were duly appointed, for by sect. 125, sub-sect. 7, of the Bankruptcy Act 1869, the appointment of a trustee under a liquidation is to be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy, so that at no time can there be a liquidation by arrangement unless a trustee is duly appointed. Then as to the goodness of the indictment, we must look at sect. 19 of the Debtors Act 1869, which enacts that "in an indictment for an offence under this Act, it shall be sufficient to set forth the substance of the offence charged in the words of the Act," very general words. In the present indictment the words of the Act are followed, and the defect alleged is the want of a distinct allegation that there was a liquidation by arrangement of the defendant's affairs. Now, sect. 19 says that it shall not be necessary to allege or set forth any adjudication under the Bankruptcy Act 1869, or, what is the same thing, any liquidation by arrangement of the defendant's affairs. The words of the indictment "within four months next before the commencement of the liquidation by arrangement" are equivalent to within four months next before the appointment of trustees, which, by sect. 125, sub-sect. 7, of the Bankruptcy Act 1869, are "to be deemed equivalent, and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy." I think, therefore, that the averment was sufficient after verdict.

LINDLEY, J.—I also think that the conviction ought to be affirmed. After verdict it is unnecessary to say whether the indictment might or might not have been quashed if the objection had been taken by demurrer. It appears to me, I must confess, to be drawn in a lax form. There is a marked distinction between this indictment and that in *Reg. v. Oliver and Austin*, and that case, to my mind, appears to support our decision in this case. It is necessarily implied in the words "within four months next before the commencement of the liquidation by arrangement of the defendant's affairs," that the defendant had presented a petition for the liquidation of his affairs by arrangement, which must mean that the defendant was a person who had presented a petition for the liquidation of his affairs by arrangement, and that a trustee had been appointed. In correct legal language no proceedings for a liquidation of a debtor's affairs by arrangement do commence until a trustee has been appointed. Therefore the averment must mean that the liquidation proceedings had commenced and a trustee been appointed. In *Reg. v. Oliver and Austin* the indictment said that the "defendants were adjudicated bankrupts, and that afterwards, with intent to defraud, &c., within four months next before the presentation of a bankruptcy petition against them," they committed the offence charged, and the court held that they were unable to say whether the defendants had been adjudicated bankrupts at all upon the presentation of the petition mentioned. In the present case the averment necessarily involves that there was a liquidation by arrangement. The only other

point material to be noticed is that the statute (sect. 11) does not mean a person whose affairs have been liquidated by arrangement, but are being liquidated by arrangement. Construing it after verdict I think that this indictment does sufficiently set forth the substance of the offence charged.

MANISTY, J.—I also think that the conviction should be upheld. Liquidation of the affairs of a debtor by arrangement is the creation of the Bankruptcy Act 1869, s. 125, and it does not commence by the presentation of a petition, but by a meeting of creditors passing a special resolution, and appointing a trustee. The offence charged in this indictment is that the defendant, being a trader within the meaning of the bankrupt laws, "did within four months next before the commencement of the liquidation by arrangement of his affairs," commit the offence charged. All that is necessary to set out according to sect. 19 is the substance of the offence charged in the words of the Act specifying the offence. I agree with my brother Lindley that sect. 11 means a person whose affairs are being liquidated by arrangement. Then how could the offence be committed within four months next before the commencement of the liquidation, unless the act which constitutes the commencement had been done. As at present advised, I think the indictment is good upon the face of it, but after verdict I think it was clearly sufficient.

HAWKINS, J.—I also think that the conviction should be affirmed. I base my judgment on the ground that the objection to the indictment was not taken until after verdict. If the objection had been taken in time I doubt whether the indictment could be considered good. I find the rule on this subject thus laid down: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict by the common law:" (*Stennell v. Hogg*, Wms. Saun. 22.) Now what facts would it have been necessary to prove in support of the charge in the indictment? It would be necessary to prove, first, that the defendant was a trader; secondly, that his affairs were being liquidated by arrangement; thirdly, that he obtained goods on credit with intent to defraud; fourthly, within four months before the commencement of the liquidation. After verdict it must be taken that all these matters were found by the jury, and therefore I think that this indictment is sufficient after verdict.

Conviction affirmed.

[Ct. of App.]

MACKETT v. THE COMMISSIONERS OF HERNE BAY.

[Ct. of App.]

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Nov. 5, 6, and 9, 1877.

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

MACKETT v. THE COMMISSIONERS OF HERNE BAY. (a)

Private Act of Parliament—Dedication of lands for purposes of—Proposed roads, streets, and squares—Adverse possession—Injunction.

In 1830 A. projected the formation of a seaside town, to be built on his lands, and a plan was prepared which showed the sites of various streets, roads, and squares, proposed to be made and formed on such lands. In June 1833 a private Act of Parliament was obtained by which the lands described on the plan were made a distinct parish for the purposes of the Act, and by which commissioners were appointed in whom were vested all roads, streets, and ways, then made and used by the public, or thereafter to be made and adopted by the commissioners as public ways under the Act. The Act also conferred plenary powers on the commissioners with regard to the paving, lighting, draining, and repairing of such streets, roads, and ways.

In Feb. 1833 A. had sold and conveyed to B., who was one of the principal promoters of the Act, and one of the first commissioners appointed thereunder, several of the plots of land described on the plan, and on which were delineated the sites of certain of the proposed roads, streets, and squares. Previously and subsequently to the Act numerous houses had been built, and some of the roads, streets, and ways, shown on the plan, had been wholly or partially formed, and had been adopted by the commissioners, but no houses were at any time erected on the lands conveyed to B., and the same (including such parts as comprised the sites of the proposed roads, streets, and squares) were from 1833 to 1867 uninterruptedly held and enjoyed and cultivated as arable and pasture lands by B. and his lessees.

In 1868 the commissioners gave B.'s devisees notice of their intention to take possession of the sites of the proposed streets, roads, and squares shown on the plan, and in 1871 they proceeded to mark, grip up, and stump out such sites, on the grounds that the same had been dedicated to the purposes of the Act by the promoters of the Act, and that they were acting within their statutory powers. On a bill filed to restrain the commissioners from so doing:

Held (affirming the decision of Bacon, V.C.), that, upon the construction of the Act of 1833, the commissioners had no present right to enter upon the plaintiffs' land.

Held, also, that the powers of the commissioners could not be exercised over land scheduled in their Act and marked out as the site of intended roads and streets, until the roads had been made, laid out, and duly adopted by the commissioners.

An injunction in the terms of the Vice-Chancellor's order granted, with the addition of the following words: "Without prejudice to any ques-

tion as to the right of the commissioners in respect of any such street, road, or way as shall hereafter be duly made and laid out, and duly adopted by the commissioners."

This was an appeal by the defendants from a decision of Bacon, V.C. The case is fully reported 35 L. T. Rep. N. S. 202. In the court below the defendants, the Herne Bay Improvement Commissioners, were restrained from exercising their statutory powers over certain lands belonging to the plaintiffs, which were described in the schedule, and deposited plans of an Act of Parliament passed in 1833, for the formation and improvement of "the town of Herne Bay," and marked out as the sites of proposed streets and squares, but which had for the most part retained their aboriginal character of agricultural land. It was not disputed that, if the roads had been actually made and the streets built, the commissioners would have had full power over the roads under the provisions of their Act; but as, according to the evidence, many of the streets and squares which figured upon the plans had never advanced beyond the stage of projection, the case of the plaintiffs was that the powers of the commissioners had not come into operation, except as to lands duly laid out and formed as roads, streets, and squares, and adopted by the commissioners in accordance with the provisions of their Act; and, further, that the plaintiffs and their predecessors in title, by uninterrupted enjoyment of the lands in question for more than thirty years, had acquired an adverse statutory title, and were entitled to treat the commissioners as trespassers. The case put forth by the defendants was that, after the passing of the Act of 1833, all the roads, streets, and squares delineated on the plan were actually marked or laid out; that many had since been made and become highways, partially built upon, and that there had been a complete dedication to the public; that the occupation by the plaintiffs and their predecessors of the lands in question was entirely subject to the right of the commissioners and of the public to use the land for the purposes sanctioned by the Act of 1833, and consequently that no adverse statutory title had been acquired as against the defendants.

The commissioners appealed.

Benjamin, Q.C., Hemming, Q.C., and Colt for the appellants.

H. Matthews, Q.C., Everitt, and F. U. Bullen for the plaintiffs.—The following authorities were referred to:

- The Attorney-General v. Great Eastern Railway Company*, 23 L. T. Rep. N. S. 344; L. Rep. 6 E. & I. App. 367;
- Cubitt v. Lady Masse*, 29 L. T. Rep. N. S. 244; L. Rep. 8 C. P. 705;
- Corporation of Healy v. Batley*, 1 L. Rep. 19 Eq. 375;
- The Attorney-General v. Bishop of Manchester*, 15 L. T. Rep. N. S. 646; L. Rep. 3 Eq. 436;
- Beckett v. Corporation of Leeds*, L. Rep. 7 Ch. App. 421;
- Berridge v. Ward*, 10 C. B., N. S. 400;
- Lord v. Commissioners for the City of Sydney*, 12 Moo. P. C. 473;
- Poole v. Huskinson*, 11 M. & W. 827;
- Roberts v. Karr*, 1 Camp. 262 (n.);
- Res v. Inhabitants of Cumberworth*, 3 B. & Ad. 106;
- North British Railway Company v. Dodd*, 12 Cl. & F. 722;
- Squire v. Campbell*, 1 My. & Cr. 459;
- Barracrough v. Johnson*, 8 A. & E. 99.

JAMES, L.J.—In my view of the case, the construction of this Act, is, as to the main point of it,

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reasonably clear against the construction of the commissioners. To my mind it is impossible to hold that the Act with the map annexed operated to vest in the commissioners the things which were at that moment *de facto* sites of the proposed roads, and which merely had existence in the contemplation of the owners of the land and in the imagination of the framers of the map; that is to say, they existed on the map, but did not exist in any other way. With regard to things in that position, I am of opinion that there are no words in the Act which say that those lands are vested in the commissioners. If it were intended by the Legislature to transfer Sir H. Oxenden's rights, or any interest in those sites, to the commissioners, nothing could have been simpler or easier than to have said it in so many words. Nothing of the kind is said, and I am of opinion that there is nothing in the clauses which have been read to us from which any such transfer of property to the commissioners can be implied. The commissioners were a public body, who had no duties except as connected with the public expenditure. They were vested with what is called the police arrangements of the streets and the public places of the town, and their rights were correlative to the obligations cast upon them. There was, according to the general scheme, no right on the part of the commissioners to anything which they did not immediately take upon themselves an obligation with respect to. I am not now speaking of the right to make, but the right as to the vesting. What was vested in them by the Act was any existing road which was *de facto* existing as a public communication, and any future road which might be made either in the lines delineated on the map or afterwards, in certain other modes or lines. That is to say, according to my view, it must have become a carriage road or footway or passage actually made by somebody or another before any right whatever was vested in the commissioners. Now, as I understand it, there is no claim made in this suit by the plaintiff as to anything which can be described as *de facto* usable or used as an actual carriage road or footway or passage. Of course, if there is anything in the evidence to the contrary, we will hear it, but the parties will take our views of the law upon that. If that is so, and if there is no *de facto* carriage way, then it appears to me that the declaration in the decree of the Vice-Chancellor and the injunction granted by him, subject to some modification, are perfectly right; that is to say, that the commissioners have no right at present to enter upon the lands of the plaintiff. Assuming the plaintiff to be by himself or his tenants in such a position that he could have brought trespass against a mere stranger, the commissioners, with regard to him, are in exactly the same position as any other stranger would be who chose to walk on the ground of which the plaintiff was in possession. Then it is suggested that, although there might be no actual vesting of the sites, *quæ* sites, in the commissioners, still they have power by implication to make the roads along the lines that are marked on the map. It appears to me at present to be utterly unnecessary for us to determine whether they ever had, or, if they ever had, whether they now have, the right to enter and make a road on any such line, because, in order to give them any justification for entering under any such power,

if such power there be in the Act of Parliament, it appears to me that they must show affirmatively that they have, in the exercise of their jurisdiction and judgment as commissioners, arrived at the conclusion that the time had come for actually making such road on that line, and that their entry on the plaintiff's land was *bonâ fide* for the purpose of actually making and constructing forthwith a road in that way. Until they can show that, it appears to me they have no justification as against the plaintiff's complaint. If that is so, the declaration of the Vice-Chancellor that they have no right would mean any present right in the present state of circumstances. The injunction will be very much in the form in which it was suggested by Mr. Kay to the Vice-Chancellor, which the Vice-Chancellor did not adopt, namely, leaving the injunction to stand exactly as it is, but to add these words: "This decree and injunction to be without prejudice to any question as to any rights of the commissioners in respect of any such street, road, or way as shall be hereafter duly made or laid out and duly adopted by the commissioners."

BAGGALLAY, L.J.—I agree, in substance, with what has been said by the Lord Justice, and have therefore very little to add. This is an Act of Parliament which is very inartificially drawn. The same words have not always the same meaning in the different clauses, or indeed in the same clause, and certainly there is an omission of very many provisions which we should have reasonably expected to find in an Act passed for this purpose. I think the preamble is not immaterial as pointing to the construction which has just been enunciated. The object of the Act, as indicated in the preamble, is to properly pave, cleanse, light, watch, and improve the roads, streets, and so on, now formed and made, and hereafter to be formed and made; not for the making of any such streets, but for the improvement or proper dealing with those which may be made; and also for the removal of nuisances and providing for a proper police. We are told that those purposes could only be effected by means of an Act of Parliament, and then there is an allusion to a map or plan, which it has been admitted, in the course of the argument, was similar to that which has been called plan A. A great deal has been said with reference to the roads delineated on that plan A, and the effect of the Act of Parliament as regards those roads. In the preamble we are told that the map is merely referred to for the purpose of ascertaining the boundaries of the district within which the powers of the commissioners are to be exercised. If it had any further or ulterior meaning than that, I think we should have had an indication of it in the preamble, and it is to be observed that in only one section of the Act, namely the 31st, is that map referred to; and it appears to be referred to for this one purpose, which would be apart from the general scope of the Act, that all the existing public roads and streets, and those indicated on the map, supposing they should be hereafter made, were to be of the width of forty feet, except those which were already delineated on the map, which would be of thirty feet only. Then the question of the vesting of the sites of these various roads and streets in the commissioners depends, as it appears to me, upon the construction substantially of the 27th section of the Act. That provides for the vesting of two classes of roads, present roads used

by the public, future roads, and roads to be hereafter made; and the roads to be hereafter made are divided into two branches, those hereafter made and those hereafter adopted. I think the construction put on the words "made and adopted" by the Lord Justice is the correct one, namely that it points to roads hereafter made by the commissioners or hereafter adopted by them, having been made by any other person. It appears to me, therefore, that the making of the road, whether the making is by the commissioners themselves or by anybody else, and a subsequent adoption by the commissioners, is a condition precedent to the vesting in them of the roads or the sites of the roads themselves so made or adopted. I think that is borne out by the general clauses which point to the pavement and flag stones, which are also to vest, but which cannot vest in the commissioners before they are actually in existence. If this be the true construction of this clause—and I see nothing in any of the subsequent clauses to militate against it, but on the contrary they seem to support it—then the question is, have these roads or ways over which the commissioners have exercised a jurisdiction been made or adopted within the meaning of the 27th section? For the reasons already expressed by the Lord Justice, I think it is impossible to say they have been either so made or adopted. What we have to deal with now is, whether the commissioners were justified in the course they took at the time the bill was filed, or at the time the decree was pronounced. I think they were not justified in the course they took. It may be a question, and I desire to express no opinion upon that, whether they have any power to adopt any other roads or ways; but I am of opinion it is desirable that the injunction should be guarded in the way the Lord Justice has suggested, so that, if any such power does exist or any such power shall hereafter be properly exercised, effect may be given to it.

THE SHERIFF, L.J.—I am substantially of the same opinion; but, in order to explain my views of the case, it will be necessary for me to point out some of the passages that have been referred to in some of the sections of this Act of Parliament. Before I do so, I should like to point out what is the question that is to be determined between these parties. It is not a question whether the plaintiffs have an absolute title to the lands. It is admitted that they by themselves or by their tenants have *de facto* possession of those lands, and that such *de facto* possession would give them a right to maintain an action at law, or to support this bill in equity, against anybody who cannot show a better title, either to the possession of those lands, or to enter on those lands. Under these circumstances, it being admitted that the defendants have entered on the lands in question, it is for them to prove they have some title or authority under which they have entered for the purpose shown by the pleadings and the evidence shown in this bill. Now they rely, and must rely, on the clauses of this Act of Parliament, and in the main they rely on clause 27; but at the same time Mr. Hemming has very carefully pointed out parts of other sections which he says show that you must imply either a vesting of these lands in the commissioners, or an authority to do the acts which it is admitted they have done. Now, when sect. 27 has been commented on, I do not think

sufficient attention has been given to this fact, that it is not a section which gives any authority to the commissioners, but is purely and simply a vesting section; and therefore, in order to see to what that applies, and under what circumstances that vesting will take place, it is necessary to look to the other parts of the Act. Then as regards the vesting in the commissioners of any roads, we find there are three classes of roads which are to be vested. The first class is, present roads now used by the public; the second class is roads made; and here I adopt the view of Baggallay, L.J., that you must imply the words "by the commissioners"—roads made by the commissioners; and the third class is, roads adopted by the commissioners. That is all that the 27th section provides for, and in order to see what are roads made by the commissioners, and what are roads adopted by the commissioners, we must refer to other parts of the Act and see what authority is given to them. The 28th section has been much commented upon, and I cannot help thinking that, when we come to compare it with the 27th, the 28th becomes pretty plain, and shows clearly that the three classes of roads mentioned in sect. 27 are dealt with in sect. 28. In the first place, by sect. 28, a power is given to the commissioners to make a new road, which would therefore give, at all events, one instance—I do not say it is necessarily the only instance—of a road made by the commissioners; and then the section goes on to say that the road "shall be and the same is hereby vested in the commissioners." That seems to complete that part of the section which relates to the making of the road, in the sense of bringing it into existence, and the rest of the section seems to relate to the repair and mending of the roads. Then, again, we have the three classes of roads: first, the commissioners may amend or repair the road which they are authorised to make by the commencing part of the section; secondly, they are authorised to amend and repair, and so on, the roads which form the first part of sect. 27, namely, roads now used by the public; and, thirdly, they are authorised to amend and repair roads, which clearly must include the roads specified in the map, when made, because they are the only words which would include those roads. The words are, "all future roads, streets, ways, lanes, and other passages and places which shall be adopted by the commissioners under this Act." Therefore, stopping at sect. 28, it seems to me the Act assumes that, even in respect of roads which are placed on that deposited plan, there would have to be an adoption before any control could be exercised by the commissioners over those roads. I think we may pass over the next two or three sections until we come to sect. 31. Is there anything in that section which gives the commissioners authority to enter upon mere land—land merely to be used for agricultural purposes, and upon that land to exercise any jurisdiction in connection with road-making? I think not. Sect. 31 provides for two things: first, that existing roads and future roads, when made, shall be of the width of forty feet; and, secondly, it provides that the commissioners, when those roads are laid out, shall have jurisdiction over them for the purpose of preventing any obstruction—meaning by obstruction, buildings—within a certain distance of the centre of the road.

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But in that section, from beginning to end, there seems to be pre-supposed this, first, that before the commissioners can exercise any jurisdiction over these roads they shall not be mere roads existing, as has been rather happily termed "paper roads"—that is to say, roads merely looked at on the plan; but shall be roads, in the very words of the section, "laid out, made, or formed;" and in respect of those there is the jurisdiction given to the commissioners, and I think it is pretty plain that that cannot refer to roads which are being laid out, made, or formed by the commissioners themselves, because they have, under sect. 37, a complete power as regards those roads to allow them to be made of not less than twenty feet in width. If that be so, under what powers can the commissioners claim to do the acts which it is admitted they have done in this case? They say that sects. 32 and 37 do not apply to these roads on the map. Be it so. Then we still go back to sects. 27, 28, and 31. Where is the power that they claim to go on land which it is admitted has not been laid out as a road, and exercise jurisdiction over the road? I cannot see any power at all. But at the same time, as these sects. 32 and 37 have been referred to, I think it right that I should state my view upon them. They seem to me to be sections which we find in most of the Acts of this description. You will find similar sections in the Towns Improvement Acts and in the Metropolitan local Acts; and I have seen them in several local Acts, and the scheme of them seems to be this: It was thought by the Legislature that the purpose of repairing streets, certainly in towns or proposed towns—and I think it was carried out in the Highway Acts, into the country generally—should not be thrown on the local authorities until they had seen, first, that the road was a necessary road; and secondly, that the road had been made to their satisfaction, so that they had not the first expense of making it. Sect. 32 provides that they shall only be called on to declare any road to be a public highway, and I can see no limit to the words "new roads." It seems to me that the words are quite large enough to carry roads on the deposited plan, and also roads not so set out. And with respect to those roads it provides that, where any new road of the width of forty feet or upwards shall be laid out and made, and shall be paved, stoned, or put in good order and repair to the satisfaction of the commissioners, then it may be declared a public road upon the application of the landowner; and upon that declaration being made the commissioners shall take complete jurisdiction over the road and have the obligation of repairing it thrown upon them. Then there is a proviso in sect. 37 which seems to be this, that there might be some particular road which, in their discretion, they might think need not be so wide either as thirty or forty feet, and in that case they are entitled to take jurisdiction over it, and also, although it may not have been put in order and condition to their satisfaction, yet there would be circumstances under which they might like to take it. Sect. 37 enables them to do that. Sects. 33 and 35 seem to deal with a different matter, but at the same time intimately connected with sect. 32; and those three sections seem to provide for this: There may be, and often are, in towns new streets from time to time made by the builders, which are not taken to by the local authorities,

and which are left already opened, laid out, and formed in a very insufficient state of repair, or indeed of making. Some buildings may have been put up on the sides of those streets, and those houses may have been occupied; and the scheme of all these Acts seems to be that although the local authorities may not actually have taken jurisdiction over those streets and adopted them, yet that they should have some jurisdiction over them for the purpose of forcing the builder or landowner, as the case may be, to do their duty by those streets and put them in repair. As far as I can see, that is the meaning of sects. 33, 34, 35, and 36, to be carried out in this way, that wherever they find there is a road which is partly built upon but which is not finished, paved, flagged, or otherwise put into good order or condition, whether it be a road existing at the time of the Act, or then making, or thereafter to be made, the commissioners are given a power by sect. 34 to give notice to the occupiers that they wish to have that particular road paved and flagged, and put into proper order; and if, after that notice, it is not so done, then, under sect. 33, they are given themselves power to carry it out at the expense of the adjoining owners and occupiers. It also seems to have been thought proper that they might, even where there are not buildings at the side of the road, have a power to cause the road to be paved, flagged, and put into condition. But then it seems to have been considered proper that the adjoining owner should not be called on to pay the expense, at all events, except in the future; and therefore sect. 36 provides that in that case they may do the work, and they may incur the expense, and the adjoining owners shall be called on to pay their proper share of the expense when from time to time their portion of the road shall be built on. That seems to me to be the scheme of these sections, and again I may say that I cannot find in any of them any power in the commissioners to do what they have done in this case, namely, to enter upon land which is mere agricultural land, and take upon themselves to oust the plaintiffs who, at all events, it is admitted, have a possessing title to the land.

Solicitors for the plaintiffs, *Fidler and Sumner*.

Solicitors for the defendants, *Lumley and Lumley*.

SITTINGS AT WESTMINSTER.

Thursday, Jan. 24, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

LEYMAN v. LATIMER AND OTHERS. (a)

Libel—Calling a man "a convicted felon" and "a felon editor"—Justification, that he had been previously convicted—Reply, punishment undergone—Demurrers—Statute 9 Geo. 4, c. 32, s. 4.

It is no justification for a libel which calls a man "a felon editor" to show that he had been convicted of felony, and sentenced to a term of imprisonment on a certain charge. His actual guilt in fact must be shown, and also, since 9 Geo. 4, c. 32 (per Brett and Cotton, L.JJ., Bramwell, L.J. giving no opinion on the matter), that he has not undergone the punishment awarded him.

The same holds of a libel that calls a man "a con-

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

victed felon," if a jury should find that the libel meant anything more than merely that he had been convicted on a charge of felony at some past time.

Per Brett and Cotton, L.JJ.: 9 Geo. 4, c. 32, was passed, among other reasons, in order to restore convicts affected by it, after they had suffered the punishment awarded them, to their full civil rights and status.

Also (per same judges), demurrers which do not apply to the whole of the opponent's case ought not to be used.

Judgment of the Exchequer Division affirmed.

Cuddington v. Wilkins (Hob. Rep. 67, 81); and Hawkins P. C., bk. 2, c. 37, s. 48, approved.

This was an action for libel brought by the plaintiff, the proprietor and editor of a newspaper published at Dartmouth, called the *Dartmouth Advertiser*, against the defendants, the proprietors, printers, and publishers of a newspaper published at Plymouth, called the *Western Daily Mercury*. The alleged libels, two in number, appeared in the latter paper, and were shortly as follows:

"The history of the *Advertiser* too must stand over. . . its present editor is a convicted felon." This appeared in defendants' paper of the 24th April 1876.

The second libel appeared on the 1st May 1876: "There still remain to be recorded Mr. Foster's controversies with the town council of Dartmouth . . . and the facts regarding his newspaper" (meaning the plaintiff's newspaper) "and its bankrupt and felon editors" meaning the plaintiff. The statement of claim contained the usual allegations of falsity of the libels and damage.

The material part of the statement of defence was as follows:

3. The defendants deny that the word "bankrupt" in the quotation from their said newspaper, in the fifth paragraph of the statement of claim set out, was intended to, or did refer to the plaintiff.

4. And the defendants further say that the plaintiff has been convicted of felony, and was sentenced to twelve months' hard labour for stealing feathers.

5. The words in the fourth and fifth paragraphs of the statement of claim complained of were and are part of certain articles printed and published in the defendants' said newspaper, each of which articles was and is a fair and *bona fide* comment upon the conduct of the plaintiff in his public character, and as the nominal editor and proprietor of the *Dartmouth Advertiser*, a public newspaper, and was printed and published by the defendants as and for such comment, and without any malicious motive or intent whatever.

Plaintiff's reply and demurrer:

1. The plaintiff joins issue upon the first, second, and fifth paragraphs of the defendants' statement of defence.

2. As to the third paragraph of the statement of defence, the plaintiff admits the allegations in such third paragraph contained.

3. As to the fourth paragraph of the said statement of defence, the plaintiff (so that such admission be not in any way extended or taken to mean that he ever was, in fact, guilty of the offence referred to) admits the allegations contained in such fourth paragraph. But the plaintiff further says that he has never been convicted of felony save on that

one occasion, which is the occasion mentioned in the said third paragraph of the statement of defence. On that occasion he was convicted of the supposed felony by a court duly having jurisdiction on that behalf, the Court of Quarter Sessions for the county of Cornwall; and the said court, having jurisdiction as aforesaid, in the exercise of such jurisdiction, adjudged that, as a punishment for the said supposed felony, the plaintiff should be imprisoned and kept to hard labour for twelve calendar months. The said conviction took place several years ago, and the plaintiff, as the defendants very well knew, duly endured the punishment to which he was so adjudged as aforesaid, for the said supposed felony, and thereby became, and was, and has ever since been, and is, in the same situation as if a pardon under the great seal had been granted to him as to the said supposed felony whereof he was convicted as aforesaid.

4. The plaintiff demurs to the said fourth paragraph of the statement of defence, on the ground that, while the statement of defence admits the publication of the whole of the libels alleged in the statement of claim, and the said paragraph is pleaded to the whole of the said libels, and a part of the libel charges that the plaintiff is a convicted felon, nevertheless the said fourth paragraph contains nothing which justifies, or is otherwise a defence to, that portion of the said libel; and the plaintiff also demurs upon other grounds sufficient in law to maintain this demurrer.

Demurrer by the defendants to the third paragraph of the plaintiff's reply.

This was an appeal from a decision of the Exchequer Division (consisting of Cleasby and Pollock, BB.), making absolute a rule for a *re w* trial obtained by the plaintiff, and giving judgment for the plaintiff on the demurrers in the action.

The case below is reported 37 L. T. Rep. N. S. 360, where the pleadings and facts in the case are very fully set out. The facts of the case, however, sufficiently appear from the above statement of the pleadings, and from the judgments which follow.

Cole, Q.C. and Bullen for defendants, appellants. —In addition to the arguments urged by them in the court below, they distinguished *Cuddington v. Wilkins* (1 Hob. 67) on the ground that, in that case, there had been no conviction, and also subsequently a general pardon, which had a different operation to a special pardon:

Sir Henry Fine's case, Godbolt, 288.

In this case the statute 9 Geo. 4, c. 32, s. 3, (a) was equivalent, at most, to a special pardon. The definition of a "felon" in all the dictions—

(a) 9 Geo. 4, c. 32, s. 3.—And whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged: Be it therefore enacted, that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted: Provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony.

aries seems to be the same, viz., "One who has committed a felony."

Collins, Q.C. (Pitt Lewis with him), for the plaintiff, had proceeded but a very short way in his argument when, on saying he was content to rest his case on the second libel, he was stopped by the Court, which delivered the following judgments:—

BRAMWELL, L.J.—I am of opinion that this appeal must fail; and I come to that opinion on a careful investigation of the allegations contained in the alleged libels, and of the way they are dealt with in the pleadings. I am aware that may seem a very narrow ground on which to arrive at a conclusion, and I do not myself like to decide a question on what looks like mere technicalities, but if I do so, it is not my fault; the law is technical. Now the reason I come to this opinion is because I cannot agree with Lord Blackburn that the whole alleged libel (whether it was rightly for the judge or the jury) merely amounted to a statement that the plaintiff had been convicted of a felony, and meant nothing more. If that was all it meant, I should agree with him that the justification was made out. But, to come to that conclusion, it is clear Lord Blackburn could not have had his notice attracted to the second allegation in plaintiff's statement of claim—the alleged libel of the 1st May—where the plaintiff is called "a felon editor." Now how does the matter stand before us? As to all the facts that it was on the plaintiff to make out, he has done so. The allegation that the statements were "false" it was not necessary that he should specifically make out for this purpose; nor the allegation of damage in paragraph 8 of his claim. The defendants, on the other hand, fail to make out all they must make out before they can win; in the fourth paragraph of the defence they allege, by way of showing the truth of their allegation, that "the plaintiff has been convicted of felony, and was sentenced to twelve months' hard labour." That plaintiff in his reply, paragraph 3, admits; but defendants have not alleged, and plaintiff consequently has not admitted—nay expressly guarded himself from admitting—that the plaintiff was actually guilty of the felony. Therefore, so far as it is necessary to decide the issues of fact, plaintiff is entitled to have them found for him. Now as to the issues in law, how do they stand? Paragraph 4 of plaintiff's reply contains his demurrer, which demurs to paragraph 4 of the statement of defence. As to the first alleged libel, perhaps the demurrer means that it is no justification of a libel which says of a man that he is a convicted felon, to show merely that he was at some time past convicted of felony. But if that is all the demurrer means, then, as to that portion of the libel, I am inclined to the opinion it does not show enough, and should fail. But as to the other portion of the libel, that of the 1st May, I think it is not met by the defence, and as to it at any rate the demurrer is good. The words are "felon editor." Before defendants can justify the words "felon editor" they must show that plaintiff actually committed a felony; to show merely a conviction on a charge of felony is not enough. I was of that opinion in the course of the argument, and I find authority for it in Taylor on Evidence, 6th edit. § 1505: "It has been determined that a judgment in a criminal prosecution—unless ad-

missible as evidence in the nature of reputation—cannot be received in a civil action to establish the truth of the facts on which it was rendered." That is, such a conviction is no evidence of the commission of a felony in a civil suit like this, and, being "*res inter alios acta*," is not admissible. All the dictionaries, too, that have been cited support this view; therefore it is no sufficient justification of such a libel to show merely conviction. And on the broad ground of good policy, too, it is desirable to come to this conclusion; for, if a man will bring charges of this sort against others, he should be required to fully prove them; and it should always be open to a man, so attacked, to show his innocence, if he can. As to this portion of the libel, therefore, plaintiff's demurrer is clearly good. Then, there is defendants' demurrer. The plaintiff says he has been convicted, it is true, but he has endured the punishment; and to that defendants demur. I am of opinion that defendants fail on that demurrer too; but that part of the libel having been wisely abandoned by Mr. Collins, it is of no importance to consider whether I am right in that opinion. As yet, it will be seen, I have not said a word on the question whether, where a man is called a felon, and he owns that he was prosecuted and convicted on a charge of felony, but says he has suffered the punishment awarded him, he can rightly say, "I was a felon, but am one no longer." On that point, I myself express no opinion at all, as it seems to me to be in the present case, as I view it, unnecessary to do so. If one were to consider it, there would be a good deal to be said on either side. On the one hand, there is the great desirability that a man, who has been unfortunate or unhappy enough to commit a criminal offence of this sort, should, at some time or other, be so far freed from the stigma and disgrace which inevitably follow on such an act as to make it an offence in others wantonly to cast the fact in his teeth; but then, again, on the other hand, it certainly cannot entirely be put out of sight that a part of a man's natural punishment is the future opprobrium consequent on his guilt. However that may be, this, at least, is certain, that lightly and for personal reasons to publish such a charge of another man, whether it be true or false, is an act of gross and unwarranted cruelty. I do not say that was the case here. I do not know whether it was so or not, but often it is so; and, where it is, I should be glad if it could be punished.

BRETT, L.J.—There are two things here for our consideration, the rule for a new trial, and the demurrers; and, as they require different treatment, they must not be confused. Now, on the rule for a new trial, I think the point which Bramwell, L.J. has not decided did arise, and that therefore we must consider and decide it. Now, it is clear that this case was not tried at all by Lord Blackburn; he said he knew all the facts, and if a jury were sworn he should direct them to find a verdict for the defendants. But if a jury had been sworn, and the facts proved as we must take them to stand upon the pleadings before us now, he would have had no right to direct the jury to find such a verdict. What are the facts? The libels set out in the pleadings are published. It is undeniable that their meaning is a question for the jury; but Lord Blackburn, in effect, says: "Whatever they may find their mean-

ing to be, I shall still direct a verdict for the defendants." Therefore, to test the learned judge's right to so direct them, we must take the extreme possible finding of the jury. Now, the jury might find the first libel to mean, "is a convicted felon now," and not merely that plaintiff was one at some past time. And if they had found so, then the same question would have arisen on this libel as on the second; for, on that certainly they might have found very easily that a "felon editor" implied plaintiff was a felon then, at the time the libel was published. Then supposing the jury to have found so, on both libels, how does it stand? The plaintiff does not and could not dispute the conviction. I assume the facts most strongly against the plaintiff; I assume he was rightly convicted, in all probability it was so. But still I am of opinion that, even on these facts, the plea would show no justification, if the punishment had been proved to have been served. After that, the man was no longer a "felon," and he would have an action against whomsoever called him one. For that proposition there is distinct authority. I think *Cuddington v. Wilkins* (Hob. Rep. 81) is good law, and is distinctly an authority for saying that a pardon, granted to a man who has committed a felony, purges him subsequently of the character of a felon. And the reason is good—it is founded on public policy, which will do all in its power to disfavour men who choose to commit such wicked and malignant acts as these. *Searle v. Williams* (Hob. Rep. 293) is also an authority for the same proposition; and so is *Hawkins' Pleas of the Crown* (bk. 2, c. 37, s. 48), and a most direct authority. And, if any were wanting, public policy would be an ample ground for upholding those decisions. And since the passing of the Act of 9 Geo. 4, c. 32, the case is much stronger against the defendants. It is not true that that Act was passed merely for the purpose of effecting some alterations in the law of evidence; it was drawn up, I have no doubt at all, with these very authorities full and immediately in view, and amounted to a deliberate adoption of that view of the law by the Legislature. I say it was the deliberate intention of the Legislature, when it passed that Act, to put a stop to these unwarrantable acts, and to debar men from continuing to crucify their fellows in this unjustifiable manner. It was felt that such acts were abhorrent to justice and totally opposed to any view of the policy of peace. On the second libel, at all events, this is clear; and so far from the judge being entitled to direct a verdict for the defendants on it, it would have been his duty, in my opinion, if the jury had found it to mean what I am supposing they would have found it to mean, to have directed them to find a verdict for the plaintiff. Then as to the demurrers. As to them I must first say that they are both bad, as being against the spirit, if not the letter, of the Judicature Acts. Demurrers are now an idle waste of time, and if warranted in any shape, it is only when they are in the largest and most general form, and demur to the whole of the opponent's case. But if these demurrers are to be considered, we must take the facts as the jury might have found them—i.e., we must take the libels to mean now a felon. But even if they should be taken to mean merely that plaintiff had been a felon, still the defence is bad, since it does not allege guilt in fact. But if the libels mean

"at present a felon," the defence must be bad, because it does not allege that the past felony was not since purged. To be a good defence it should have gone on to add, "and plaintiff is now undergoing the punishment for the same," or to say that the plaintiff had not undergone the punishment awarded. Therefore, even technically on the demurrers, we must find for the plaintiff. I agree most fully with Cleasby, B., that public policy is all against people who make such unjustifiable statements as these; but, in doing so, I wish to guard myself against being supposed to say there is anything which should prevent inquiry into a man's past conduct and character on a proper and justifiable occasion. There are many such, and in those cases, both in motive and reason, the inquiry is justifiable. But people who will rake up all that is against a man in his past history, for their private purposes, and to gratify personal or professional spite, have nothing whatever to be said on their behalf.

COTTON, L.J.—I am of the same opinion. The first question is, as to whether there should be a new trial. Now it is clear what occurred at the trial. Lord Blackburn, when the case was called on, informed plaintiff's counsel that he knew all the facts, and that if a jury were to be sworn he should still direct a verdict for the defendants; and that being so, and there being, moreover, no jury to be got that evening, plaintiff's counsel determined on not incurring the delay and expense of waiting for a jury and having them sworn. But it is not the case that the learned judge was both judge and jury in deciding the matter; he never tried it at all. Therefore the question arises, if there had been a trial before a jury, would the learned judge have been right in so directing the jury? Clearly in my opinion he would not. "Libel or no libel" is a question for the jury, except in the case where it is impossible that the words used should amount to a libel. If that could be said of the first libel here, certainly it could not be said of the second; therefore clearly on that ground there ought to be a new trial. For myself, I should be inclined to say that the first libel meant that the plaintiff had been, at some time previous, convicted of felony; and therefore, on that point, I should be inclined to differ from the court below; but I am clear that the second libel might mean—if indeed it can be read otherwise than meaning—that the plaintiff was then, at the time the libel was published, a felon. That being so, the question arises, what is the effect of a punishment undergone, or a pardon granted? We must refer to the Act of 9 Geo. 4, c. 32, s. 3, which has been cited. It begins by reciting that "it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies, &c.," from which recital it is clear that the section was not passed solely to affect the law of evidence in certain cases, but to affect also the "civil rights" of persons in the position of the plaintiff here. Therefore, notwithstanding its primary object being alien to the plaintiff's case, the Act does entitle the plaintiff, in my opinion, to say, "Having suffered my punishment I am in all respects as though pardoned"; i.e. (on the authority of the passage in *Hawkins* and the other authorities cited), "I am an entirely new man, and you cannot justify a libel that calls me a felon." The arguments to be derived from considerations of public policy

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strengthen this view. A man should not make these statements unless he is under the obligation of some duty public or private to do so, and in such case he is fully protected as the law at present stands. In other cases he deserves no protection. As to the demurrers, I entirely concur with what Brett, L.J. has said as to the present procedure with regard to demurrers. There should be no demurrer except to the whole pleadings, and to the entire action; otherwise a demurrer does no good, but only embarrasses. They ought only to be used where the entire question can be so decided.

Rule for new trial made absolute. Judgment for plaintiff on demurrer. Appeal dismissed with costs.

Solicitors for the plaintiff, Ooode, Kingdon, and Cotton, agents for John Daw and Son, Exeter.

Solicitors for the defendants, Surr, Gribble, and Banton, agents for J. W. Wilson, Plymouth.

Jan. 16 and 17, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

BAKER v. THE MAYOR AND CORPORATION OF PORTSMOUTH. (a)

Local Government Act 1858—Bye-laws—Powers of local board—Pulling down buildings erected contrary to bye-laws.

By the Local Government Act 1858 (21 & 22 Vict. c. 98) s. 34, power was given to local boards to make bye-laws with respect to (among other things) "the construction of new streets," and they might "further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws."

Defendants, a local board, made certain bye-laws.

By the 3rd bye-law, no building was to be "erected by the side of any new street. . . . until such street has been constructed to the approval of such urban sanitary authority."

By the 32nd bye-law "every person who shall intend to erect any new building shall give twenty-one days' notice to the urban authority of such intention . . . and shall leave at the surveyor's office detail plans and sections," &c.

By the 37th bye-law "if the owner or person intending to . . . construct any new building fail to give the notices herein required, or if any owner or person shall construct or cause to be constructed any works or buildings . . . contrary to the provisions of any or either of the hereinbefore contained bye-laws . . . the urban sanitary authority may, if they shall think fit, at any time after the expiration of the time of forty-eight hours from the service of a notice in writing . . . expressing their intention to do so, in default of such owner or person showing good cause to the contrary in the meantime, cause any work begun or done in contravention of any or either of the said bye-laws to be removed, altered, or pulled down, as the case may require."

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

Plaintiff erected houses beside a new street without giving notice or depositing plans or sections.

Defendants pulled down the houses under the 37th bye-law.

Held (affirming the judgment of the Exchequer Division), that the bye-laws were valid, and defendants were justified.

"Construction of new streets" in the Act applies to the houses as well as to the roadway.

APPEAL by the plaintiff from the judgment of the Exchequer Division (Pollock and Huddleston, BB.), reported 37 L. T. Rep. N. S. 381, where the facts of the case, the pleadings, the statutory provisions, (a) and bye-laws, which are material to the decision of the case, are fully set out.

The appeal was argued by Kingdon, Q.C. and Petheram (Cole, Q.C. with them) for the plaintiff, and by Charles, Q.C. and A. L. Smith for the defendants.

The arguments were similar to those used in the court below, and the same authorities were cited.

BRAMWELL, L.J.—I think the judgment ought to be affirmed. No doubt great power is given to local boards, and therefore we should construe the Acts of Parliament with regard to such powers carefully. My conclusion is that subsect. 1 of sect. 34 of the Local Government Act 1858 includes construction of buildings, and the word "streets" in that clause means the ways and the buildings that are built beside the ways. If we look at the Act I think that is the right meaning. No authority that can be cited has much bearing on this point, except to show that it may mean this. I think it does for many reasons: first, if the meaning is otherwise there is no power of regulating new streets so far as the construction of buildings is concerned; secondly, the word "construction" is properly applicable to buildings and not to the laying of the way; thirdly, the general words which come after the fourth sub-section are favourable to this view of the meaning of the clause. For these reasons I think the first sub-section refers to the buildings as well as to the way. I think the defendants have a right to say that until approved no new building shall be erected by the side of any new street. I can see why the local board should say, "Until we see the street and approve of it no building shall be erected." Another reason is that, until the street is properly made with the necessary drains, it would be inconvenient to have buildings erected. Therefore they had power to make the 3rd bye-law, and that is enough to affirm the decision of the court below. As to the other matter, a subtle argument was addressed to us, that, suppose the local board may make bye-laws for the four objects provided for by sect. 34, and may make another bye-law to enforce these, yet they cannot make a further bye-law to enforce any objects not included in these four sub-sections. That is ingenious, but I doubt if it has any application to the present case. I think, for these considerations, the judgment ought to be affirmed.

BRETT, L.J.—I am of the same opinion. The defendants justify what they have done on the

(a) The section of the Local Government Act 1858 set out in the report in the court below is 34 (not 14). The Local Government Act 1858 is repealed by the Public Health Act 1875, but the provisions of sect. 34 of the former Act are re-enacted, with some additions, by sect. 157 of the latter Act.

ground that there has been a contravention of bye-laws 3 and 32, either of both or of one of them, and therefore under the other bye-laws they were entitled to pull down the plaintiff's houses. If either of these two bye-laws is good, and if that one which is good has been contravened, they are justified. It is a question as to the construction of the statute, whether the words "new streets" in sub-sect. 1 of sect. 34 includes buildings. In dealing with this question we have a right to consider this Act, and the state of the law at the time of the passing of the Act, and how the Act dealt with the law then existing. One of the sections in the former Act (11 & 12 Vict. c. 63, s. 53), dealing with sanitary matters, dealt with houses, and in its place power was given by this Act to make bye-laws. The intention was to give the local boards a further power of dealing with the matters intrusted to them by the Act. They have power to make bye-laws "with respect to" the different subjects, which is a larger phrase than any that had been used before by the Legislature. By the use of the words "new street" was it meant to exclude houses? If there is nothing to exclude houses, the expression should include them; street, according to the ordinary meaning of the word, includes houses, as Lord Chelmsford observed in *Galloway v. The Mayor and Commonalty of London* (14 L. T. Rep. N. S. at page 871; 1. Rep. 1 H. of L. Cas. at page 55). For roadway the more proper expression would be to "lay out." I do not mean to say that the word "construction" does not include the way, but it is more properly applicable to the buildings. Therefore there is nothing to exclude buildings from the operation of a bye-law with regard to the construction of new streets, and there is nothing to prevent the expression "new streets" from applying to the buildings by the side of the road. The local board are entitled to make bye-laws with regard to the construction of new streets. Have they done so? The 3rd is obviously such a bye-law, and so is the 5th. It was argued that the 32nd bye-law was not made under the previous sub-sections, but under the general part at the end of sect. 34, and therefore that the 37th bye-law was not one to enforce a bye-law made under any of the four sub-sections. I think that argument cannot prevail; if we look at the general part at the end of the section, it is clear that the moment the local board have made bye-laws under the sub-sections, they may enact provisions as to notice and plans, and that part of the bye-laws may be enforced. Therefore, Mr. Petheram's argument does not apply. The 32nd bye-law is made under sub-sect. 1 as much as the 3rd or the 5th; and if so, the 37th bye-law gives power to pull down houses for contravention of the 3rd and the 5th, and therefore the defendants were legally justified.

COTTON, L.J.—The power claimed by the defendant here is a large one, and before we decide in their favour we must be satisfied that it is really given by Parliament. I have had some doubt, but the argument has cleared it away. I think the 3rd bye-law is made with respect to matters dealt with by sub-sect. 1. The expression in that part of the Act, is "construction of new streets," and the question is whether the 3rd bye-law is made with regard to that purpose. The word "streets" is ambiguous, so we must look at the context and consider the purpose of the Act. We must con-

strue the Act and then see whether what is done by the bye-laws comes within the power which the Act gives. "Street" may mean the mere roadway, but, considering that the word "construction" is used, does it not also include the houses on both sides of the road? The local boards have power to control matters with reference to houses, and by sect. 35 they have power to lay down the line in which buildings that have been taken down shall be rebuilt. There is no power beyond that given by sub-sects. 2, 3, and 4 of sect. 34, to put a limit as to the construction of buildings, unless sub-sect. 1 does so. Therefore I think that in this sub-section the words are used as meaning not merely the construction of the road, but the clause fairly means the houses, which in one sense are part of the street. Therefore we can hardly say that the 3rd bye-law is not made with respect to the construction of the street.

Judgment affirmed.

Solicitors: For plaintiff, *Saunders, Hawksford, and Bennett*; for defendants, *Gregory, Rowcliffe, and Co.*, for *Howard*, town clerk, Portsmouth.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Saturday, Dec. 8, 1877.

(Before JESSEL, M.R.)

Re MERCERSON'S TRUSTS. (a)

Metropolitan Paving Act (57 Geo. 3, c. 39)—*Powers of compulsory purchase—Costs of interim investments—"All purchases from time to time."* Under an Act of Parliament it was made lawful for the Court of Chancery to order the corporation to pay the costs of "all purchases from time to time made," with the moneys arising from the sale of lands compulsorily taken by the corporation under the powers of the Act.

Held, that the costs of an interim investment in consols, and of the petition for that purpose, were included in the costs of "purchases from time to time made."

Re Saunders' Estate (L. Rep. 8 Eq. 681) discussed and questioned.

Re The Vicar and Churchwardens of St. Sepulchre's (9 L. T. Rep. N. S. 819) followed.

THIS was a petition for the investment in consols of a sum of 600*l.* which had been paid into court by the board of works for the Limehouse district as the purchase money of real estate taken by the board under the powers of the General Metropolitan Paving Act 1817 (57 Geo. 3, c. 29). The only question was as to the costs of the investment and of the petition. The board of works claimed to be exempt from liability on the ground that the Act provided only for the costs of purchases of lands. The provisions of the Lands Clauses Consolidation Act did not apply to compulsory sales under this Act.

A. F. Watson, for the petitioners, relied on

Re Saunders' Estate, L. Rep. 8 Eq. 681;

Re The Vicar of St. Sepulchre's, 9 L. T. Rep. N. S. 819.

Ratcliff, for the board, argued that the word "purchase" in the Act did not refer to an investment in consols.

Re Harrison's Estate, 23 L. T. Rep. N. S. 654; L. Rep. 10 Eq. 532.

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

CHAN. DIV.]

Re MERCERSON'S TRUSTS.

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JESSEL, M.R.—The real question in this case is as to the construction of the Act of Parliament. This is the first time as far as I am aware when a respondent to such a petition as this has asked for costs with a view to the literal construction of an Act of Parliament. On the other hand, there are a number of cases in which the literal construction has been departed from owing to the anxiety of the courts to do justice to the parties; but I do not know of any case when the words literally meant that the respondent should not pay costs, and he has not done so. It is necessary to see what the Act says. Sect. 84 enacts that when any money arises from the purchase of land by the board, such money shall be applied under the direction and with the approbation of the said court (the Court of Chancery), to be signified by an order made upon a petition to be preferred in a summary way by the person or persons who would have been entitled to the rents and profits of the said lands, and in the purchase of land tax, or the discharge of any debt or debts, or such other incumbrances or part thereof as the said court shall authorise to be paid affecting the said lands, &c., or affecting other lands, &c., standing settled therewith to the same or the like uses, intents, or purposes; or where such money shall not be so applied, then the same shall be laid out and invested under the like direction and approbation of the said court in the purchase of other messuages, lands, &c., which shall be conveyed and settled to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner as the messuages, &c., which shall be so purchased, taken, or used as aforesaid stood settled or limited, or such of them as at the time of making such conveyance and settlement shall be existing undetermined and capable of taking effect; and in the meantime, and until such purchase shall be made, the said money shall by order of the Court of Chancery, upon application thereto, be invested by the said Accountant-General in his name in the purchase of three pounds per centum consolidated or three pounds per centum reduced bank annuities." Therefore the Act directs for two purposes two kinds of purchase, viz., of lands, and in the meantime of consols. Then we come to sect. 89, which provides that "when by means of any disability or incapacity of the person or persons, or corporation entitled to any lands, tenements, or hereditaments, to be purchased under the authority of this Act, the purchase-money for the same shall be required to be paid into the Court of Chancery, and to be applied in the purchase of other lands, &c., to be settled to the like uses in pursuance of this Act, it shall be lawful for the said Court of Chancery to order the expenses of all purchases from time to time to be made in pursuance of this Act, or so much of such expenses as the said court shall deem reasonable, to be paid by the said commissioners or trustees or other persons as aforesaid, who shall from time to time pay such sums of money for such purposes as the said court shall direct." Now those first words of course apply as a description of what property is taken by the company on which the money arises; i.e., property belonging to persons who are under a disability, so that the money cannot be paid to them but to the Court of Chancery. It shall be lawful, the Act says, that the expenses of all purchases (not purchases of land only), or so much as

the court shall direct, shall be paid by the commissioners. Why should I restrict the word? "All purchases from time to time:" why the purchase of consols just applies to the expression "from time to time." That is a literal interpretation and good sense. It is objected that the term "purchase" only applies to a reinvestment in land. Why so? They must purchase consols. The whole transaction is a prolonged method of purchasing lands. This is a fair reading—a literal, and I think a right, construction. Then it is said I am bound by some of the cases, especially by the case of *Re Saunders' Estate* (L. Rep. 8 Eq. 681). That case is open in the first place to the observation that no reason was given. I do not say that the case is not binding upon me because there are no reasons given. There are many cases, especially old ones, in which no reasons are given. But still a great difficulty is caused. One does not know on what principle the judgment is founded, and may suspect that the judge could not find a good reason for his decision. The same section as I have before me is read by James, V.C. as meaning that a purchase made in pursuance of the Act means a purchase made by the commissioners as well as purchases made by order of the Court of Chancery. I am afraid the Vice-Chancellor's sense of what ought to have been enacted persuaded him to think it had been enacted. It obviously did not apply to that, and it was only his strong sense of abstract justice which made him decide as he did. But I do not think that case is binding upon me for another reason. It is opposed to a decision of a Lord Chancellor overruling another Vice-Chancellor. The other case is that of the *Vicar and Churchwardens of St. Sepulchre's* (9 L.T. Rep. N. S. 819), in which the Lord Chancellor (Westbury) decides the very point the other way. There is another case which has a considerable bearing upon the question, *Re Strachan's Estate* (9 Hare, 185), which is a decision of Turner, V.C. Though I see Sir William James was counsel in the case, he does not seem subsequently to have remembered it: it was not cited before him. *Re Saunders' Estate*, therefore, is not binding upon me. I was told there is a case in L. Rep. 10 Eq., *Re Harrison's Estate*, opposed to this. But I do not think that case is in the contrary direction. That was a case in which by the Act the corporation was to pay the costs of investments in lands. There were no words which could apply to the purchase of bank annuities. That case is no decision, and the words here do not admit of the same construction. The reasonable tendency of the court has been to make the Act rational and just, not to endeavour so to read the Act as to exclude persons from receiving the costs to which they are fairly entitled. The order will be made as prayed by the petition.

Solicitors: *Fisher and Fisher; Batcliff and Son.*

(Before FRY, J.)

Nov. 14, 15, and 16, 1877.

THE ATTORNEY-GENERAL v. THE GAS LIGHT AND COKE COMPANY. (a)

*Gas company—Nuisance—Gas Clauses Act (10 Vict. c. 15)—Metropolis Gas Act (23 & 24 Vict. c. 125)—Injunction.**In an action to restrain a gas company from creating a nuisance at their gas manufactory:**Held, that the Gasworks Clauses Act 1847 is incorporated with the Metropolis Gas Act 1860, except so far as its provisions are inconsistent with that Act; and a company performing the obligations of the Act of 1860 cannot justify creating a nuisance by setting up incapacity to make or supply gas without so doing.**Held also, that, even if the company were at liberty to justify themselves, the burden of proof rested on them both by the ordinary law and by the Act of 1860, sect. 52, and that they had failed to discharge that burden by their evidence.*

THIS was an action brought by the Attorney-General at the relation of the Local Board of Health for the district of West Ham, in the county of Essex, against the Gas Light and Coke Company, for an injunction to restrain them from creating a nuisance at their gas manufactory at Canning Town, which is in the district of West Ham.

From the statement of claim it appeared that in 1874 the Imperial Gas Company erected certain premises at Canning Town, and began to manufacture gas there. On the 1st Jan. 1876 the Imperial Gas Company was amalgamated with the defendant company under the title of the "Gas Light and Coke Company," and the manufactory at Canning Town was transferred to the latter. From the time when the manufacture of gas was commenced in 1874 at this manufactory, the surrounding inhabitants have been annoyed on various occasions, more or less frequent, by a very bad smell, which came from thence in such volume and intensity as to be a nuisance; it also affected their comfort and health. In 1876 three occasions were specially mentioned when the smell was very bad indeed—viz., the 20th, 21st, and 27th April. It appeared that it was caused by the escape of sulphuretted hydrogen, which was given off by the substances used to purify the gas when the vessels in which the gas was purified were emptied. They also discharged from their works sulphurous and other vapours and noxious and offensive smells. The plaintiffs complained frequently to the company of the nuisance, but, as they did not abate it, they now brought this action, and claimed an injunction to restrain the defendants "from carrying on business at the said manufactory at Canning Town, or any of the processes there carried on by them, in such a manner as to cause a nuisance."

By the statement of defence the nuisance was denied, and it was alleged that there were in the immediate neighbourhood of the works sewage pumping works, a tar distillery, chemical works, a manufactory of vesuvians, cement works, soap works, and other gasworks; and, moreover, that the site on which the defendants' works were erected had been selected and approved of by Parliament as a suitable place for the purpose.

Moreover, under the provisions of the Metropolitan Gas Act 1860, and the Imperial Gas Act 1869, the defendants alleged that they are compelled under heavy penalties to supply gas of such purity as is prescribed by certain officers appointed by the Board of Trade, and known as "gas referees." In order to produce gas of the purity and illuminating power required by the above-mentioned Acts, the defendants are obliged to adopt certain processes for purifying the gas made by them. The processes in use at the defendants' manufactory are the best, and, in fact, the only processes known to science for this purpose.

The defendants also denied that the health of the surrounding inhabitants was at all affected by the way in which they carried on their manufacture at the works.

Several witnesses were examined, and it was proved that from 1874 to 1876 the lime which had been used at three other works belonging to the defendant company to purify the gas was brought to the manufactory at Canning Town and shot there. This caused about half the nuisance of which the plaintiffs complained, and the defendant company did not maintain that they were authorised or compelled by their Acts to do this.

During the trial it was admitted at the bar that there was what in law amounted to a nuisance, but that it was of an intermittent character and caused by the manner in which the gas was purified, though the process used was the best that is known. The Acts which affect the company are, the Gas Clauses Act of 1847 (10 Vict. c. 15), the Imperial Gas Act 1854 (17 & 18 Vict. c. 55), the Metropolitan Gas Act of 1860 (23 & 24 Vict. c. 125), the Metropolis Gas Act 1860 (24 & 25 Vict. c. 79), the Imperial Gas Company's Act of 1866 (29 & 30 Vict. c. 352), the Imperial Gas Act of 1869 (32 & 33 Vict. c. 128), and the Gas Light and Coke Company's Act 1876 (39 & 40 Vict. c. 225).

Kay, Q.C., Aston, Q.C., Bardwell, and B. E. Webster for the plaintiffs.—This company is not a public body in any sense, but simply a trading company associated for the purpose of profit. We challenge them to show, if they can, that they are under any obligation to make gas, or that they are obliged to make it where they do. They have the liberty, which every trading company has, to choose where to make it, and having chosen the place, they must make it in such a manner as not to create a nuisance. Under the Gas Clauses Act, where the Act is of such a nature as to distinctly contemplate a nuisance being created, then, of course, the nuisance is legalised. But there is the onus of showing that the Act is of that nature, and that the work cannot be carried on without producing a nuisance. The decisions have been very much indeed against trading companies who assert that they cannot carry on their work without creating a nuisance and are obliged by Act of Parliament to carry it on, creating such nuisance. *The Attorney-General v. The Corporation of Leeds* (22 L. T. Rep. N. S. 330; L. Rep. 5 Ch. 583) shows that an authority to do an act gives no authority to create a nuisance, and that the persons so creating the nuisance are liable to be indicted. The Act of 1860 provides for the appointment of "referees," whose duty it is to require the gas supplied to be of a certain purity; but sect. 52 provides that the standard shall be such as can be made "without occasioning a nuisance to the

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

neighbourhood in which the works are situate." Every part of these Acts keeps the rights of the public with regard to nuisance intact. The defendants are under no obligation to supply gas. Sect. 88 of the Act of 1869 provides "that nothing in this Act shall prevent the company from being liable to an indictment or information for nuisance, or to any other legal proceedings to which they may be liable in consequence of any such operations." The case of the *St. Helen's Smelting Company v. Tipping* (12 L. T. Rep. N. S. 776; 11 H. of L. Cas. 642, 650) establishes the doctrine that the great powers which are given to companies, although given for public purposes, are not really given for public purposes, but really to a private company, and must be exercised so as not to create a nuisance. The words of the Lord Chancellor in that case mean simply this: "When you are considering the question of nuisance by interference with the personal comfort, it is quite right and proper to consider all the surrounding circumstances, and in fact the court does not interfere on account of merely trivial annoyance. It is no justification of this kind of nuisance that there are other works in the same neighbourhood which produce nothing like the same nuisance; or, even if they did produce considerable nuisance, it is clear law that another company is not at liberty to come into the same neighbourhood and add another nuisance equal to or greater than anything already existing, and thereby make life still more uncomfortable." Large volumes of sulphuretted hydrogen issue from these works, which is very injurious to health. The emission is not accidental and on rare occasions, but very constant, though not continuous. In *Saltan v. Du Held* (2 Sim. N. S. 183) there is a definition of a public nuisance which covers this case.

Benjamin, Q.C., Davey, Q.C., A. L. Smith, and Hornell, for the defendants.—We are in precisely the same position as if we were ordered by Act of Parliament to supply gas, within the limits of our district, of a certain degree of purity. We are also bound to make it at Bromley, because we have no authority to go elsewhere. *The Attorney-General v. The Conservators of the Thames* (1 H. & M. 1) shows that a parliamentary authority to do what could not otherwise be done without committing a nuisance, implies an authority to commit the nuisance. [*Fay, J.* referred to *Rees v. Pease* (4 B. & Ad. 30) as an earlier case on the subject.] By the Act of 1854, sect. 6, we are directed to supply gas in our district if required. The Act of 1860 stands higher than a private Act, because it is a public Act, and certain public duties are imposed on the gas companies by it. Sect. 2 incorporates the Gasworks Clauses Act of 1847, except so far as the provisions are inconsistent with the Act; sect. 6 assigns the limits of the districts, enables the Secretary of State for the Home Department to alter the districts, and creates a monopoly for each company in its district; sect. 14 makes it obligatory on the company to supply gas as long as it is a going concern. It is not necessary now to consider what would be the consequences if the company brought themselves within the provisions of the Winding-up Act. Sect. 17 obliges the company to supply gas where required, and sect. 22 obliges them to light all public lamps where required to do so

by the local authority. The Imperial Gas Company's Act of 1869 recites, that under the provisions of the Metropolis Gas Act 1860, the company is under an obligation to supply gas to the district confided to them. Sect. 44 provides for the appointment of "referees," and sect. 52 provides that they shall ascertain and prescribe a degree of purity for the gas supplied by the company which may be attained without causing a nuisance to the neighbourhood in which the works are situate. If they make a mistake, and order us to supply gas of a purity which we cannot do without committing a nuisance, nevertheless we must obey their orders. We are under a statutory obligation to supply gas, and if in order to comply with the directions of the statute, it is necessary to create a nuisance, we are at liberty to do so: (*Rees v. Pease*, 5 B. & Ad. 30.) The words of Blackburn, J., in the *Mersey Docks v. Gibbs* (14 L. T. Rep. N. S. 671; L. Rep. 1 H. L. 93), show that it does not make any difference that we are a company established for the purpose of making a profit for our shareholders, and not a public body. The case of *The Attorney-General v. The Corporation of Leeds* turned upon a special Act, and was referred to by the Master of the Rolls in *The Attorney-General v. Ockermouth Local Board* (L. Rep. 18 Eq. 172; 30 L. T. Rep. N. S. 590). [*Kay, Q.C.* called attention to the 29th section of the Gasworks Clauses Act 1847, which provides that "Nothing in this present or the special Act contained shall prevent the undertakers from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable in consequence of making or supplying gas." In *Broadbent v. The Imperial Gas Company* (7 H. of L. Cas. 600), an injunction was granted on this section, and it was held that, in consequence of that section being introduced, the right of action against the company was not taken away: (*The Hammersmith Railway Company v. Brand*, 21 L. T. Rep. N. S. 238; L. Rep. 4 H. L. 171.)] That provision means that nothing in the Act shall exempt the company from indictment, but it does not take away any defence they had before. There is no obligation to make gas in the Act of 1847. The Act of 1860 compels us to make gas in such a way as to cause a nuisance; and it would be inconsistent with the Act to make us liable to indictment at the same time.

Fay, J. did not call for a reply, and, after stating the facts, continued:—This information is filed upon the ground of public nuisance to Her Majesty's subjects. Now, it was admitted by the learned counsel for the defendants that a public nuisance had been created; and therefore it would appear at first sight a matter of course that an injunction should go in terms of the prayer. But then the learned counsel for the defendants justified that nuisance; and their argument was this. They said: "We are under an obligation to supply gas to a given metropolitan district, which is defined by the Gas Metropolis Act of 1860." They said, by the effect of the Act of 1869—that is, the Imperial Gas Act of 1869—we are further under an obligation to supply that gas with not more than twenty grains for every 100 cubic feet of sulphur compounds other than sulphuretted hydrogen for every 100 cubic feet of gas manufactured and supplied." They say further, that under the Act of

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1869 they had authority to take the land by which they are carrying on their manufacture at Canning Town, and they said: 'As a matter of fact, we undertake to prove that we cannot perform the obligations cast upon us by the Acts of 1860 and 1869 without creating a nuisance, and therefore we are justified.' Now, I think that to that line of argument two answers—and sufficient answers—have been given. In the first place, it is to be borne in mind, as has been recently pointed out by Mr. Kay, that the General Consolidating Statute of the Gasworks Clauses Act of 1847 contains an express provision that nothing in that Act or in the Special Act shall prevent the undertakers from being liable to legal proceedings to which they may be liable in consequence of the making or supplying gas. It is to be borne in mind that that Act, except so far as its provisions are inconsistent with the Act I am about to refer to, was incorporated with the Metropolis Gas Act of 1860. Therefore, I take it to be clear that the whole of the obligations imposed by the Act of 1860 were made liable to that condition, and that a company performing the obligations of that Act of 1860 could not justify themselves from proceedings on the ground of nuisance by setting up incapacity to make or supply gas without creating a nuisance. I therefore think that the foundation of that argument fails as a question of construction. But, even if it did not do so, I am of opinion that the defendants have not succeeded in their justification. It is to be borne in mind that the full burden of proof in this case rests entirely upon those who say that they cannot do what they are bound to do without creating a nuisance. That would be the result of the ordinary law upon the subject, and in this case it is especially true, because the provisions which fixes the maximum of impurity allowed, which is to be found in the Act of 1869, is in these terms. The Act appoints referees, who are to consider the means to be adopted for purifying gas and preventing nuisance. Having done so, it provides (sect. 52) that the "referees shall from time to time ascertain with what degree of purity the company can reasonably be required to make and supply gas continuously without occasioning a nuisance to the neighbourhood in which the works are situate, and shall thereupon prescribe and certify the maximum amount of impurity in each form with which gas supplied by the company should be allowed to be charged." Gentlemen of eminence and skill have been appointed referees. They have, in the discharge of their duty fixed a maximum, and they have fixed it at an amount which, in their judgment, may be reasonably required without occasioning a nuisance to the neighbourhood in which the works are carried out. This is therefore the judgment of public officers appointed for the purpose, to the effect that this maximum can be attained without occasioning a nuisance to the neighbourhood. The defendants say, and say truly, that in this court the judgment of those referees is not binding, and that they are at liberty to show that the referees have fallen into error. They have accordingly had an opportunity of so convincing me if they could do so. They have given abundant evidence with that view; but they have failed, in my judgment, to discharge the burden of proof cast upon them by the general law, and cast upon them by the particular section

to which I have referred. It is not necessary for me to say whether, if the affirmative had been on the plaintiffs, I should have come to the conclusion that the gas might be manufactured at the required degree of purity without committing a nuisance. It is enough for me to say that the defendants, on whom the burden rests, having to convince me, have failed so to convince me. [His Lordship then went through the evidence, and continued:] It follows that I am of opinion from what I have already said that the injunction must go. But there is one other fact to which it is impossible I should not advert, which, in my opinion, is conclusive of this litigation, irrespective of the conclusion I have arrived at with regard to the general process. It is this: From some time in the year 1874 down to about the month of Sept. 1876 the whole of the refuse lime from three other works of the defendant company was brought in barges to the dock upon this land; was transhipped from the barges to trucks without being covered over with breeze or anything else to protect it from the operation of the air, and was then carried from those trucks. It was tipped out on the land, where no doubt it was covered; and the evidence before me to my mind is conclusive to show that that operation must have been attended with a great increase of the nuisance from the works, estimated at something like half of the whole smell and nuisance which resulted from the operations carried on there. Now it is not pretended there was any obligation to do that upon this land; and with regard to that, it appears to me the defendants' case is really an undefended one, and that the suggestion that the injunction should be limited because this Act was not itself connected with the immediate process of manufacture on the land is not well founded. It appears to me enough to justify the injunction during the period in controversy. The defendants were committing upon their land that which is admitted to be a public nuisance, and they were not doing that under any statutory obligation. The injunction must therefore go in the terms asked for; and, of course, the costs must be paid by the defendants.

At the request of the defendants, his Lordship suspended the injunction for three months, with liberty to apply to himself, as, under the general order of the Lord Chancellor, interlocutory applications are not to be made to him (Fry, J.) unless he so directs.

Solicitors for the plaintiff, *Hillearys*.

Solicitors for the defendants, *Willoughby and Coz*.

QUEEN'S BENCH DIVISION.

Friday, Dec. 21, 1877.

(Before LUSH, J.)

HALL AND OTHERS v. MAYOR OF BATLEY. (a)

Urban sanitary authority—Liability of—Negligence in executing work instead of and for owner—Public Health Act 1875, ss. 21, 22, 23.

By sect. 23 of the Public Health Act, in the case of a house being insufficiently drained, the local authority "shall by written notice require" the owner to make a covered drain emptying into any sewer which they may use; and, if the notice be not complied with, may do the work required,

(a) Reported by J. M. LELT, Esq., Barrister-at-Law

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and recover in a summary manner the expenses incurred by them in so doing from the owner.

Held, that, if the owner waive his prima facie right to make the drain himself, and procure it to be made by the servants of the local authority with their consent, the local authority, in their public capacity, are liable for the negligence of their servants.

THIS was a case reserved for further consideration by Lush, J. The facts appear from the written judgment.

Waddy, Q.C. and Forbes for the plaintiff.

Wills, Q.C. and Cave, Q.C. for the defendants.

Our. adv. vult.

Dec. 21.—LUSH, J.—The question reserved by me at the trial, and which was argued a short time ago, is whether the defendants, being the urban authority of the borough of Batley under the Public Health Act 1875, are liable for the negligence of their servants in the mode of constructing a drain for the plaintiffs leading from their mill to a common sewer, whereby the front wall of the mill sank, and considerable damage was caused to the building. The facts are these: In May 1876 the defendants constructed a sewer in Wellington-street in the borough, and, in so doing, they came across an old drain of the plaintiffs which led from their mill, and which emptied into an ancient common drain which ran along that street. On opening out the plaintiffs' drain it was found to be choking up; and, at the instance of the plaintiffs, and with a view to the future construction of a new drain in substitution for the old one, the foreman of the defendants, who had charge of this description of work done by them, as the urban authority, put in an elbow, so as to connect the drain with the newly-constructed sewer. The expense of this communication between the drain and the sewer was charged to the plaintiffs, and paid by them to the corporation. In the following November it was found that the time had arrived when the new drain must be made. The foreman of the defendants, by whom the elbow had been put in, was sent for by the plaintiffs, and told that they wished the drain to be made by the defendants; and after some inquiries as to the quality and size of the pipes which would be required, and the probable cost of the work, it was arranged that the foreman should apply to the engineer of the defendants for his sanction, and that being obtained should proceed at once with the work. Shortly afterwards the work was commenced by and under the direction of the foreman, and was done by workmen in the employ and pay of the defendants. The drain was commenced at the point of junction with the sewer, and carried up under the street for a part of the way. It then diverged towards and was carried on to the mill under the paved footway, and the trench dug for it, opposite to the mill, was dug close up to and was considerably deeper than the foundation of the building. The digging of this trench along the whole line of frontage at once, instead of opening it by degrees and undermining the wall as it proceeded, was the negligence complained of, and it caused the front of the mill to sink. There was considerable contest at the trial as to whether the line of the drain was selected by the plaintiffs or by the foreman; also whether the foreman had been misled by any representation of the plaintiffs as to the depth of the foundation. The ques-

tions put to the jury, which were agreed by the counsel on both sides to be the questions raised by the evidence, were, first, whether the foreman was misled, and prevented from taking such precautions as he otherwise would have taken; and, secondly, if he was, whether, in the course of the digging, the foundations were disclosed so that it could be seen what their depth and character were. The jury found against the defendants; and it was agreed that the damages should be referred to arbitration if the verdict was sustainable in point of law. The objection taken at the trial, and which has been elaborately argued before me, was that the act of the urban authority in doing such work as volunteers at the request of the plaintiffs was *ultra vires*, and therefore, although the individuals who did or who sanctioned the doing of it might be responsible in their own persons, this action, which sought to charge the liability upon the rates, could not be maintained. Agreeing as I do with the general scope of the argument on the part of the defendants, I am of opinion that it is not applicable to this particular work. It is not like the case put of the urban authority entering into a contract to build a house, or a wall, or to do any other work unconnected with their functions as a sanitary body. The 21st section of the Act gives a right to every owner of property in the district to construct his drain so as to cause it to empty into the sewer, on giving notice and complying with the requisition of the urban authority in respect of the mode of communication; and the 23rd section makes it the duty of the urban authority, when a house is without a drain sufficient for effectual drainage (which was the case here), to require the owner to make a drain so as to carry off the sewage from his premises. It is true that they could not have compelled the plaintiffs to carry their drain as far as Wellington-street, because the sewer there was more than one hundred yards distant from the mill; but if the plaintiffs had refused to do so, they might have compelled them to empty into some cesspool. By some means or other they might have compelled them to carry off the drainage from the mill, so that it should not become a nuisance, and in the event of their not complying with such a requisition, might have done what they actually did—namely, make the drain themselves and charge the plaintiffs with the cost of the work. The conditions prescribed by the 23rd section as a preliminary to the sanitary body taking the work out of the hands of the owner have regard solely to his rights. It is not permitted to them arbitrarily to interfere and do the work at the owner's expense without first giving him the opportunity of doing it himself. But if they were to do so, he is the only person who could complain. The Act requires that the work shall be done by the one party or the other, and surely the owner may waive the option given him by the Act if he pleases, and agree with the urban authority that the drain shall be made by them as if the preliminaries had been observed. So far from this being work implicitly forbidden by the Act to be done by the urban authority, which is the point of the argument, it is precisely the work which they are required to do in the event of the owner declining to do it himself. The objection therefore certainly fails. It is too late to contend, after the cases cited in the argument, that the defendants

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are not responsible for this negligence. The persons who were guilty of it were the servants employed by them to do this particular work. If damage ensues as the consequence of work properly done, it must be sought for by a claim for compensation; but if as the result of negligence in the doing of it, it is properly the subject for an action. My judgment therefore is for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Layton and Jaques*;
Solicitor for the defendant, *J. A. Dean*.

Thursday, Jan. 24, 1878.

(Before COCKBURN, C.J. and MANISTY, J.)

GREAT YARMOUTH (apps.) v. CLERK OF THE PEACE
OF THE CITY OF LONDON (resp.) (a)

Poor law—Derivative settlement—Wife—39 & 40
Vict. c. 61, s. 35.

A criminal lunatic pauper was adjudged to be settled in the appellants' parish, in which her husband was born. The husband had acquired no settlement; but his derivative settlement, which his father had acquired, was elsewhere than in the appellants' parish.

Held that, by the 35th section of the Divided Parishes and Poor Law Amendment Act 1876, this was a case excepted from the operation of that Act, and that the pauper's settlement was her husband's derivative, and not his birth, settlement.

This was an appeal from the adjudication of a legal settlement between the parish of Great Yarmouth (apps.) and the Clerk of the Peace of the City of London (resp.); in which a special case was stated between the parties by consent and by order, under the 12 & 13 Vict. c. 45, s. 11.

1. On the 5th Feb. 1877 Hannah Louisa Fisk was indicted at the Central Criminal Court for the wilful murder of James Day.

2. Upon her being arraigned, evidence was given of insanity, and she was found by the jury not to be in a fit state of mind to plead to the indictment, whereupon the court ordered her to be kept in strict custody until Her Majesty's pleasure should be known.

3. On the 8th Dec. 1872 the said Hannah Louisa Fisk, then Hannah Louisa Day (spinster), married James Fisk.

4. James Fisk was born on the 9th Dec. 1843 at Great Yarmouth, in the appellants' parish, and is the son of George and Mary Fisk, but the said James Fisk never acquired a legal settlement in his own right.

5. A few weeks after the birth of James Fisk his parents George and Mary Fisk, taking him with them, went to reside in the parish of Gorleston, in the county of Suffolk.

6. George and Mary Fisk, with their son James Fisk, continued to reside in that parish until Michaelmas 1859, when they returned to Great Yarmouth.

7. During his residence in the parish of Gorleston, and before the said James Fisk was sixteen years of age, the said George Fisk acquired a settlement in Gorleston parish, and did not before the said James Fisk attained the age of sixteen years acquire any subsequent legal settlement.

8. James Fisk was not emancipated until about two months after George Fisk returned to Great

Yarmouth in 1859, when he attained the age of sixteen years, and he has never acquired an independent settlement, nor has his wife, the said Hannah Louisa Fisk, ever acquired a settlement in her own right.

9. On the 15th Feb. 1877, Hannah Louisa Fisk was in custody by order of the court as aforesaid in the gaol of Newgate, which is in the city of London.

10. On the said 15th Feb. 1877 two justices of the city of London, by authority of the 7th section of 3 & 4 Vict. c. 54, made an order by which they adjudged Hannah Louisa Fisk to be legally settled in the parish of Great Yarmouth, on the ground that her husband was born in Great Yarmouth, and directed the appellants, the guardians of the poor of that parish, to pay weekly to the superintendent of the Broadmoor Lunatic Asylum, to which Hannah Louisa Fisk was about to be removed, the sum of 14s.

11. The appellants have appealed to the quarter sessions for the city of London against the above order, upon the ground that Hannah Louisa Fisk's settlement is the settlement of George Fisk, as her husband James Fisk never did acquire any settlement apart and distinct from his father's settlement, and that the 35th section of the Divided Parishes and Poor Law Amendment Act 1876 by its proviso exempts from the operation of that section the case of a wife, and the status of a wife as to settlement is unaltered. The appellants further allege that the Act of 1876 not being retrospective can have no application to this case.

12. The respondent on the other hand contends that, as sect. 35 of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) abolishes derivative settlements subject to certain exceptions within which this case does not fall, the said James Fisk cannot take the settlement of his father George Fisk, which he had acquired in Gorleston, but can only take his presumptive birth settlement in the appellants' parish of Great Yarmouth. The respondent, therefore, contends that the order appealed against was rightly made.

13. The opinion of this court was sought as to whether the order was rightly made upon the parish of Great Yarmouth, and it was agreed between the parties that a judgment in conformity with the decision of this court, and for such costs as this court should adjudge, should be entered on motion by either party at the next quarter sessions to be held for the city of London after the decision of this court shall have been given.

The Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) was passed on the 15th Aug. 1876.

By sect. 35:

No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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or female shall be deemed to be settled in the parish in which he or she was born.

By sect. 36:

The provisions relating to settlement shall not apply to any pauper removed under any order of removal, or without such order under the provision in that behalf contained in the Union Chargeability Act 1865, before the passing of this Act, or in receipt of non-resident relief lawfully given, or in respect of whom any order of removal shall be pending at the passing of this Act.

Besley and Poyser appeared for the appellants, but were stopped by the Court.

Poland (with him Mead) argued for the respondent.—Here the criminal lunatic had derived a settlement from her husband, and that settlement, whatever it is, must be her legal settlement, whether the Act of 1876 applies or not. If that Act does not apply in any way, then the respondent must fail on this appeal; but the first words of sect. 35 provide that no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in two specified cases: no doubt the first exception applies to this woman so far as the derivation of her settlement from her husband extends, but that settlement cannot be derived from anybody else. As, therefore, James Fisk acquired no settlement, his wife's settlement must be his birth settlement. By the last clause of the 35th section, James Fisk's children, if he had any, would be settled where they were born, unless they took their father's birth settlement. It never could have been intended to separate children from their parents.

COCKBURN, C.J.—When that anomaly becomes manifest, perhaps we shall have another statute on the subject, and it is to be hoped that it may be more easy to interpret than this Act of 1876. The present case, however, is clearly excepted from its operation, and the lunatic's settlement is that of her husband, as it was before the Act passed. The appeal must be allowed.

MANISTY, J.—I am of the same opinion.

Judgment for appellants.

Solicitor for appellants, *Alfred F. Barnard.*
Solicitor for respondent, the *City Solicitor.*

Thursday, Jan. 24, 1878.

(Before COCKBURN, C.J. and MANISTY, J.)

BARTON REGIS (apps.) v. LIVERPOOL (resps.) (a)

Poor law—Derivative settlement—Child—Pending order—Quashed order—39 & 40 Vict. c. 61, ss. 35 and 36.

By an order of removal from the respondents' parish to the appellants' union, made in 1875, a pauper's settlement was adjudged to be his father's birth settlement. After the passing of the Divided Parishes and Poor Law Amendment Act 1876, this order was quashed on appeal by the High Court of Justice on the ground that the pauper's settlement was that acquired by his grandfather, neither he nor his father having acquired any settlement. An exactly similar order was then made between the same parties, which was admittedly in pursuance of the 35th section of the Act of 1876.

Held that, notwithstanding the alteration of the

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

law, the parties were concluded by the quashing of the previous order of removal; and further, that the previous order was pending in respect of this pauper at the time of the passing of the Act of 1876, and therefore his settlement was not subject to the operation of the Act.

THIS was a special case reserved at quarter sessions, and stated by the parties in an appeal from an order of removal of a pauper, in which the guardians of the poor of the Barton Regis Poor Law Union, partly in the city and county of Bristol, and partly in the county of Gloucester, were appellants; and the churchwardens and overseers of the poor of the parish of Liverpool, in the borough of Liverpool and county of Lancaster, were respondents.

On the 15th May 1877 an order for the removal of the pauper, John Davis, from the respondents' parish to the appellants' union was made under the hands and seals of two justices of the borough of Liverpool, and was duly served on the appellants on or about the 23rd May 1877, together with a statement of the grounds of removal signed by the respondents.

On or about the 19th June 1877 the appellants gave notice and delivered grounds of appeal to the respondents.

The said appeal came on for hearing before the Recorder of Liverpool at the quarter sessions holden in and for the borough of Liverpool on the 7th July 1877, and it appearing that no facts were in dispute, and that the case turned upon questions of law only, it was then agreed by and between the appellants and respondents that the said appeal should be respited upon certain terms not material to be set forth, and that in the meantime the present special case should be stated, and the opinion of this court obtained thereon.

The appellants and respondents admitted respectively the several allegations in various grounds of removal and appeal, which included the following facts:—

In 1795 Richard Davis, the pauper's grandfather, acquired a settlement by apprenticeship in the parish of Bedminster, which is no part of the appellants' union.

In 1809 John Davis, the pauper's father, was born in the appellants' union.

In 1810 the last legal settlement of Richard Davis was, at the instance of a parish in the appellants' union, adjudicated to be in the parish of Bedminster; and Richard Davis and his son John Davis, the pauper's father, were ordered to be removed to Bedminster from the appellants' union. No appeal was made against the order, but it appeared that Richard Davis and his son, John Davis, the pauper's father, afterwards received out-door relief in that parish of the appellants' union from which they had been ordered to be removed, such relief being by consent and at the expense of the Bedminster parish.

John Davis, the pauper's father, has acquired no settlement to the present time.

On the 17th Nov. 1842 the pauper was born in the appellants' union.

On the 30th Nov. 1875 an order was made, at the instance of the respondents, by two justices of the borough of Liverpool, by which the last legal settlement of the pauper was adjudicated to be in the appellants' union, and the pauper was ordered to be removed thereto from the respondents' parish.

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In Jan. 1876 the appellants appealed against this order to the Liverpool Quarter Sessions, when the recorder found as a fact that the removal order of 1810 was never executed, excepting so far as acquiescence by the payment and relief aforesaid was an execution of the order. The recorder held that the parish of Liverpool, not being a party to the said order of 1810, was not bound by it under the circumstances, and therefore affirmed the said order of 30th Nov. 1875, subject to a special case.

On the 21st April 1877 this special case came on to be argued in this court, and was reported as *Clifton Union (apps.) v. Overseers of Liverpool (resps.)* (L. Rep. 2 Q. B. Div. 540); the appellants' union, which is now called Barton Regis, being then known as the Clifton union. The Court held that the arrangement for the relief of the pauper and his father amounted to an execution of the order of removal of 1810, and that the order was therefore binding upon all the world. The order of removal of the 30th Nov. 1875 was accordingly quashed.

The order of removal in the present appeal was made subsequently to the quashing of the previous order.

The Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) was passed and came into operation on the 15th Aug. 1876; sects. 35 and 36 are to be found set out in the report of the last case (*Great Yarmouth v. City of London*).

The appellants affirmed, and the respondents denied, that, at the time of the passing and coming into operation of the said Act, the said order of the 30th Nov. 1875, and the said order of sessions, and the said order of the High Court of Justice made quashing the same respectively, were or one of them was a pending order of removal within the true intent and meaning of the 36th section of the said Act.

The respondents affirmed, and the appellants denied, that, under the circumstances of the quashing of the said order of the 30th Nov. 1875 at the time and in the manner aforesaid, and of the passing and coming into operation of the said Act, and of the said pauper being chargeable to the respondents' parish on the said 15th May 1875, it was competent according to law for the justices to make the order of removal of the said 15th May 1877; and that under and notwithstanding the facts respectively admitted as aforesaid the said order of removal of the said 15th May 1877 was and is a good and valid order of removal according to law.

In case the High Court of Justice should be of opinion that the said order of the 30th Nov. 1875 was not a pending order of removal within the true intent and meaning of the said Act, and that the said order of the said 15th May 1877 was and is a good and valid order of removal according to law, the said appeal of the 19th June 1877 was to be dismissed with costs, such costs to include all costs of the appeal to the Liverpool Quarter Sessions, except the costs of the day of hearing at such sessions. In case the said court be of the contrary opinion on either of the above-mentioned points, the said order of the 15th May 1877 was to be quashed with costs, such costs to include all costs of the appeal to the Liverpool Quarter Sessions, except the costs of the day of hearing at such sessions.

The question for the opinion of the court was,

whether the respondents' order of the 15th May 1877, under the circumstances above detailed, was a valid order.

Charles, Q.C. and *Greene* argued for the appellants.—There are two questions to be considered: first, whether the order of this court quashing the previous order of removal is conclusive between these parties, who are the same as before; and, secondly, whether this is a pauper in respect of whom any order of removal was pending at the passing of the Act of 1876. According to *Burn's Justice*, vol. iv. "Poor," pp. 822, 825, and 831 "Order confirmed binds all the world;" and "Order quashed binds the parties;" although "Order quashed does not bind third parties." This is so without reference to the Act of 1876, sect. 36 of which expressly excepts from the provisions relating to settlement in that Act "any pauper removed under any order of removal," "or in respect of whom any order of removal shall be pending at the passing of this Act." The quashed order must be binding on the parties thereto, notwithstanding that the existing law has abolished the derivative settlement upon which it was based. This must be the effect under any circumstances, but *a fortiori* when the pauper is one in respect of whom, as in this case, an order of removal was pending on the 15th Aug. 1876, and in consequence the case is expressly excepted from the operation of the Act.

E. Clarke for the respondents.—The appellants must show that the present order is in contravention of the decision of this court before the respondents can be estopped. The effect of the order of removal of the 30th Nov. 1875, which has been quashed, was merely that the last legal settlement of the pauper was in the appellants' union. This division of the High Court has said that under the then existing law that settlement was not in the appellants' union. Since then, however, the derivative settlement, upon which that decision was based, has been abolished by sect. 35. The decision of 21st April 1877 was given with respect to the old law existing before the passing of the statute of 1876, and is not necessarily conclusive, even between the same parties, under the changed circumstances of the new law. In *Beg. v. Wye* (7 A. & E. 761) it was held competent to give in evidence the dissolution of a marriage as void *ab initio*, subsequent to a previous order of removal, for the purpose of upsetting an order based on the previous order, although the previous order had been confirmed on appeal. [*COCKBURN, C.J.*—That was an alteration of fact, not of law.] It is admitted that if the previous order had never existed this one would have been valid, and sect. 35 now clearly prevents the respondents from removing the pauper to Bedminster, as they might have done under the old law. The 36th section was not intended to protect from the operation of the Act every pauper about whose settlement there happened to be a discussion at a particular moment. At the passing of the Act the order then under appeal was not pending.

COCKBURN, C.J.—I am of opinion that this order cannot be upheld, and must be quashed. An order in respect of this pauper was made in 1875, on behalf of the respondent parish, directing removal to the appellants' union. There was an appeal to quarter sessions, and afterwards to this court, the effect of which was to quash the order.

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Whether the determination of that appeal was in accordance with a subsequent statute or not, it must be binding and conclusive for ever between the parties thereto: it could not have been intended that a settlement should be determined otherwise than under the law existing at the time of an order of removal; and when judicially determined, or not appealed against, the settlement cannot be altered by any subsequent change of the law. When an order is quashed, that decision is conclusive between the parties to the order, although it is not binding upon any one else. As to the 36th section of the Act of 1876, I think a similar distinction may perhaps be drawn. I would guard myself from saying that a pending order is free from the operation of the Act, if questioned by parties not concerned by the order. I would not say that the existence of an order of removal, not yet finally determined on appeal, is sufficient to hedge the pauper, to whom it relates, from the application of the principles of the new law: it is enough that in this case an order concerning this pauper was pending between these parties at the time of the passing of this Act, which of itself would be sufficient to exempt this second order from the operation of the Act. The decision of that first order is conclusive between these parties; but independently of the estoppel, there was litigation pending within the meaning of the 36th section, and the present order must be set aside. I merely add that, if Mr. Clarke's argument were good, and a fresh state of circumstances were created by an alteration of the law, the monstrous consequence would ensue, that any settlement, which has at any time been determined, might be called in dispute, if not according to the provisions enunciated for the first time by the 35th section of the Act of 1876. I think the appellants are right on both grounds.

MANISTY, J.—I am quite of the same opinion. The Legislature seems to have contemplated just such a case as this in the last part of the 36th section. But even without that provision, I do not think the 35th section was intended to alter any settlement determined by an order of removal made before the Act passed. The quashing of the previous order is, between the parties concerned, conclusive, notwithstanding the alteration of the law.

Judgment for appellants.

Solicitors for appellants, *Gregory, Bowcliffes, and Co.*, for *William Benson*, Bristol.

Solicitor for respondent, *S. O. H. Sadler*, for *Bellringer and Ounlife*, Liverpool.

Thursday, Jan. 24, 1878.

(Before COCKBURN, C.J. and MANISTY, J.)

BENTHAM (app.) v. HOYLE (resp.)

Railway—Bye-law—Travelling by a class superior to ticket—Intention to defraud—8 Vict. c. 20, ss. 103, 108, 109.

A bye-law of a railway company provided that a person travelling in a carriage of a superior class to that for which his ticket was issued should be subject to a penalty not exceeding 40s.; and should, in addition, be liable to pay his fare according to the class of carriage in which he was travelling from the station whence the train originally started, unless he showed that he had no intention to defraud.

The appellant was convicted of this offence, and fined 10s. and costs, although he showed to the satisfaction of the justices that he had no intention to defraud.

Held, upon a case stated, that unless the proviso at the end applied to the whole, the bye-law was inconsistent with sect. 103 of the Railways Clauses Act, and bad; and that the conviction could not be sustained.

THIS was a case stated by two of Her Majesty's justices of the peace, acting in and for the Bacup and Rawtenstall Petty Sessional Division in the county of Lancaster, under the statute 20 & 21 Vict. c. 45, for the purpose of obtaining the opinion of the court on questions of law, which arose as hereinafter stated.

At a petty sessions holden at Bacup aforesaid on the 16th May 1877, an information and complaint preferred by John Butterworth Hoyle, of the township of Newchurch, in the said county, ticket collector on behalf of the Lancashire and Yorkshire Railway Company (hereinafter called the respondent), against William Bentham (hereinafter called the appellant), charging for that he (the appellant) on the 12th April 1877, at the township of Newchurch, in the said county, unlawfully did travel on the Ramsbotham and Bacup line of the said company without permission in a certain carriage of a superior class to that for which he (the appellant) had obtained a ticket, that was to say, by travelling from Stacksteads to Bacup in a first-class carriage, he (the appellant) having then only a ticket for a second-class carriage, contrary to the 8th bye-law of the said company, and contrary to the form of the statute in such case made and provided, were heard and determined, the said parties respectively being then present; and upon such hearing the justices convicted the appellant in the mitigated penalty of 10s. and costs.

The said justices, in compliance with the application of the appellant and the provisions of the said statute, stated and signed the following case:—

The appellant is the holder of a second-class contract ticket between Bacup and Manchester, available at intermediate stations.

Upon the hearing of the said information and complaint it was proved on the part of the respondent, and admitted as a fact, that the appellant did on the day in question get into a first-class carriage in company with his daughter, who had a first-class ticket from Stacksteads to Bacup, and that he (the appellant) passed through the Bacup station without showing his contract ticket or tendering the difference between the first and second class fare, namely, one penny.

It was contended on the part of the appellant, and found as a fact, that the appellant had no intention to defraud the company.

By the 8 Vict. c. 20 (the Railways Clauses Consolidation Act 1843), s. 103, it is enacted that

If any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof, or if any person having paid his fare for a certain distance knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect on arriving at the point to which he has paid his fare to quit such carriage, every such person shall

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for every such offence forfeit to the company a sum not exceeding 40s.

By sect. 108, it is enacted that

It shall be lawful for the company from time to time, subject to the provisions and restrictions in this and the special Act contained, to make regulations for the following purposes, that is to say (*inter alia*), and generally for regulating the travelling upon, or using and working of the said railway.

By sect. 109 it is enacted,

For better enforcing the observance of all or any of such regulations it shall be lawful for the company, subject to the provisions of an Act passed in the 4th year of the reign of Her present Majesty, intituled "An Act for regulating railways," to make bye-laws, and from time to time to repeal and alter such bye-laws, and make others, provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act, and such bye-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company, and any person offending any such bye-law shall forfeit for every such offence any sum not exceeding 5l. to be imposed by the company in such bye-laws as a penalty for every such offence.

The Lancashire and Yorkshire Railway Company made certain bye-laws, the 8th of which was as follows:

Any person travelling without the special permission of some duly authorised servant to the company in a carriage or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40s., and shall in addition be liable to pay his fare according to the class of carriage in which he is travelling from the station whence the train originally started, unless he shows that he has no intention to defraud.

It was admitted by the appellant that the bye-laws were duly made by and sealed with the common seal of the company, that they were duly allowed and certified by the Board of Trade, and were duly published by the company.

It was contended on behalf of the respondent that the bye-law constituted by inference two distinct offences and two penalties, viz. (first offence), that of a person travelling without permission in a superior class of carriage to that for which his ticket was issued, where the person so travelling had no intention to defraud; and (second offence), that of a person doing the same thing with an intention to defraud; and (1st penalty) not exceeding 40s.; and (second penalty) in addition to a penalty not exceeding 40s., to pay the fare from whence the train started; and whilst it was admitted that the appellant could not be liable to pay the fare from whence the train started unless there was intention to defraud, yet it was urged he was subjected to a penalty not exceeding 40s., though he had no intention to defraud, and that the words at the end of the bye-law, "unless he shows that he had no intention to defraud," were applicable only to the latter part of the bye-law.

On behalf of the appellant it was contended that the bye-law only created one offence in which the intention of the person was made an essential ingredient.

It was further contended on behalf of the appellant that, if the construction sought to be put upon this bye-law by the respondent was the literal and correct one, the bye-law had the effect of making that an offence without any intention to defraud which the Act only makes an offence when the intention to defraud exists, and therefore the bye-law would be "repugnant" within the

meaning of the 8 & 9 Vict. c. 20, s. 109, and *ultra vires*, and that the bye-laws could only be used for carrying out the Act, and not going beyond it.

The justices however were of opinion that the construction of the bye-law contended for on behalf of the respondent was the correct one, and that the appellant was legally liable to a penalty not exceeding 40s., notwithstanding that they found, as a fact, that he had no intention to defraud, and they thereupon gave their determination against the appellant as before stated.

The questions of law arising on the above statement for the opinion of this court therefore were—

1. Whether or not the construction put upon the said bye-law on behalf of the respondent is the correct one.

2. If it be the correct construction, is the bye-law bad as being *ultra vires*, or on any other ground?

3. If the constructions urged by the respondent and appellant be both incorrect, what is the correct construction thereof?

If the court be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information and complaint are to be dismissed.

Beesley argued for the appellant.—The effect of this company's bye-laws was considered in *Dearden v. Townsend* (L. Rep. 1 Q. B. 10); and although this particular bye-law was not that against which the defendant in that case was charged with offending, the judgment of the court applies equally to all of them. There the respondent was a passenger who travelled beyond the station for which he had a ticket, without any intention to defraud; and the collector demanded his fare from the original starting place of the train. Cockburn, C.J. pointed out in his judgment, that sect. 103 of the Railways Clauses Act made the fraudulent intention the gist and essential ingredient of the offence; and if the company, he said, "were by a bye-law to constitute the same facts an offence, striking out the ingredient of intention to defraud, they would be altering an enactment of the statute, and legislating in a sense repugnant to the provisions of the statute." [COCKBURN, C.J.—That, however, was not necessary for the determination of that case, for I see another ground of our decision was the construction of the bye-law.] So here the bye-law can only be interpreted to make the offence depend upon the intention to defraud. [COCKBURN, C.J.—The proviso at the end of the bye-law imposes the burden of proving the absence of fraudulent intention upon the person charged.] To that extent the bye-law may be bad; but, if it be good, it must apply to the whole paragraph.

E. Clarke for the respondent.—*Dearden v. Townsend* was a decision applicable only to the facts of that case. There are no words in the bye-law to make the exception at the end applicable to any part of it beyond the liability to pay the fare from the original starting place. Moreover this bye-law cannot be said to be repugnant to the provisions of the statute. A bye-law which supplements them, or carries them further, is not necessarily rendered invalid.

Beesley was not heard in reply.

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COCKBURN, C.J.—I think this conviction cannot stand, and must be quashed. Mr. Clarke is, as it seems to me, on the horns of a dilemma; for either the last words of the bye-law, which exempt a passenger who shows that he had no intention to defraud, must apply to the whole bye-law, or that bye-law is unreasonable, and cannot be upheld. If, by the natural construction of the language, those words apply to all that goes before them in the paragraph, the appellant cannot be liable to the penalty imposed upon him, because he has shown that he had no intention to defraud. As to the meaning of the sentence, I admit there may be some doubt, but if it be other than to give a general application of the proviso to the whole, then I have no hesitation in saying that the bye-law is unreasonable. There must be a *mens rea* to constitute the guilt of a person charged with any offence, unless the words are very definite to the contrary. Here, in addition, we have the further assurance that such a mind must be an ingredient of this offence. The Act of Parliament cannot have intended to leave the companies to create offences as they might think fit, when the Legislature itself has taken the initiative, and described the circumstances which shall constitute those offences. Sect. 103 of the Railways Clauses Act makes it an offence to proceed in a carriage beyond the distance for which a fare is paid only if the passenger does so knowingly and wilfully, and with intent to avoid payment of the further fare. It is not competent to this railway company to alter by a bye-law the nature and quality of this offence. If, therefore, the words forming the proviso to the bye-law do not include the qualification contained in this 103rd section, the whole of the bye-law is inconsistent with the Act of Parliament, is *ultra vires* and bad. A company has no power, even with the sanction of the Board of Trade, to supersede the statutory provisions.

MANISTY, J.—I am of the same opinion. This conviction cannot be supported. It is not necessary to decide whether the words of the proviso are to be applied to the whole of the bye-law, although I have myself no such doubt as that suggested by my Lord. The bye-law contains something like sense, if the exception applies to the whole of it; but the notion of imposing a penalty in a case which may be fraudulent or not, and adding an indefinite and uncertain amount to that penalty if fraud be established, seems to me to be contrary to any reasonable construction of the sentence. It is not necessary, however, to discuss this, for I think that with any other meaning the bye-law would be unreasonable and *ultra vires*.

Judgment for appellant.

Solicitors for appellant, *Shaw and Tremellen*, for G. H. Phillips, Bacup.

Solicitor for respondent, *Clark, Woodcock, and Ryland*.

Thursday, Jan. 31.

(Before COCKBURN, C.J. and MANISTY, J.)

PALMER (app.) v. THATCHER (resp.) (a)

Sale of wine—Merchant—Dealer—Licence—6 Geo. 4, c. 81, s. 2—23 Vict. c. 27, ss. 3 and 4—32 & 33 Vict. c. 27, s. 4—35 & 36 Vict. c. 94, ss. 3 and 73.

The appellant was convicted under the Licensing Act 1872, sect. 3, for selling beer and wine without being duly licensed. He held a licence from the Inland Revenue (under 6 Geo. 4, c. 81, s. 2) to exercise the trades of dealer in foreign wine and in sweets or made wine, for which he paid 5l. 5s. a half year, and of dealer in beer, for which he paid 1l. 13s. 0½d. a half year; but he had no licence either under the Refreshment Houses Act 1860 or any other Act, nor any certificate from justices under the Wine and Beer-house Act 1869 or the Licensing Act 1872. He kept a grocer's shop, and had never been in a wine merchant's business except in connection with the grocery trade; it was not proved that he ever sold so much as two gallons of foreign wine at one time. He was in the habit of selling foreign wine by retail not to be consumed on the premises, and never sold less than three dozen pints of beer at one time.

Held, upon a case stated, that the appellant was a wine merchant, who sold wine in pursuance of a wine dealer's licence within the words of sect. 73 of the said Act of 1872; that the licence he had was sufficient; and that the conviction was wrong.

THIS was a case stated by two of Her Majesty's justices of the peace in and for the city and county of Bristol, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who had duly entered into a recognisance to prosecute the appeal.

1. At a petty sessions held at the council house in the said city and county, on 10th July 1877, the appellant, Richard Arnold Palmer, appeared in answer to a summons issued upon the information of the respondent, William Thatcher, a superintendent of the police of the said city and county under the third section of the Licensing Act 1872, for that he the said appellant (in the said summons named Robert Arnold Palmer) at Regent-street, in the parish of Clifton, in the said city and county, unlawfully did sell and expose for sale by retail certain intoxicating liquor, to wit, a quantity of beer and wine without being then and there duly licensed to sell the same, contrary to the statute, &c.

2. After hearing the evidence hereinafter stated, which was adduced by and on behalf of the said respondent and appellant, the justices adjourned the said summons to the 14th July, 1877, in order to consider their decision on the legal points raised by the appellant's solicitor as hereinafter stated, on which day they convicted the appellant for selling on the 6th of July 1877, by retail one bottle of sherry without being duly licensed, and the justices inflicted the penalty of 5s. with 12s. for costs.

3. The information was laid under the third section of the Licensing Act 1872, which enacts as follows:—

No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his licence to sell the same. Any person selling or exposing

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorised by his licence to sell the same, shall be subject to the following penalty, that is to say:

For the first offence he shall be liable to a penalty not exceeding 50*l.*, or to be imprisoned with or without hard labour for a term not exceeding one month.

The following sections of other statutes were referred to in the course of the argument.

Sects. 3 and 4 of 23rd Vict. cap. 27 (the Refreshment Houses Act):

3. Every person who shall keep a shop for the sale of any goods or commodities other than foreign wine, or who shall have taken out a licence as a dealer in wine (except persons expressly disqualified by this Act) shall, without producing or having any other licence or authority, be entitled to take out a licence under this Act to sell by retail and in reputed quart or pint bottles only in such shop, foreign wine not to be consumed on the premises where sold, anything in any former Act to the contrary notwithstanding.

4. Every sale of foreign wine in any less quantity than two gallons, or in less than one dozen reputed quart bottles at one time, shall be deemed to be a selling by retail.

The licence of a dealer in wine is authorised by the statute 6 Geo. 4, c. 81, which merely describes the business as that of a "dealer in wine," without any restriction as to the quantity dealt in, except when the wine is consumed on the premises.

By sect. 73 of the Licensing Act 1872,

A licence, as defined by this Act, shall not be required for

(1) The sale of wine by retail, not to be consumed on the premises, by a wine merchant, in pursuance of a wine dealer's licence granted by the Commissioners of Inland Revenue; or

(2) The sale of liquors or spirits by retail, not to be consumed on the premises, by a wholesale spirit dealer, whose premises are exclusively used for the sale of intoxicating liquors, in pursuance of a retail licence granted by the Commissioners of Inland Revenue, under the provisions of the 24th & 25th of her present Majesty, cap. 21, intitled, "An Act for granting to Her Majesty certain Duties of Excise and Stamps."

Sect. 4 of the Wine and Beerhouse Act 1869 enacts:

That from and after the 15th July 1869, no license or renewal of a licence for the sale by retail of beer, cider, or wine, or any of such articles, under the provisions of any of the recited Acts [including the Refreshment House Act, 23 Vict. cap. 27] shall (save as in this Act otherwise provided) be granted, except upon the production and in pursuance of the authority of a certificate granted under this Act. Any licence granted or renewed in contravention of this enactment shall be void.

In sect. 74 of the Licensing Act 1872 the words "licence," "sale by retail," and "intoxicating liquor," are severally defined as follows:

Licence means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act 1828, including a certificate of justices granted under the Wine and Beerhouse Acts, and including a licence for the sale of sweets which is hereby authorised to be granted in the same manner as if sweets were wine, and including a licence for the retail of spirits granted to a wholesale spirit dealer by the justices in pursuance of this Act.

Sale by retail in respect of any intoxicating liquor means the sale of that liquor in such quantities as is declared to be sale by retail by any Acts relating to the sale of intoxicating liquors.

Intoxicating liquor means spirits, wine, beer, porter, cider, perry, and sweets, and any fermented, distilled, spirituous liquor which cannot, according to any law for the time being in force, be legally sold without a licence from the Commissioners of Inland Revenue.

The appellant carries on business as a grocer at

7, Regent-street, Clifton, in the city and county of Bristol.

On the 6th of July a constable, acting under the orders of the respondent, a police superintendent, went to appellant's shop, in which there were several cards relating to the sale of various foreign wines, and pointing to one bearing the following words:

Sherry 21*s.* per dozen.

" 1*s.* 9*d.* per bottle.

The constable asked for a bottle, for which he paid 1*s.* 11*d.*, of which 2*d.* was charged for the bottle. The bottle was a reputed quart bottle, and when opened was found to contain sherry. The sale of the said bottle of sherry was made for consumption not on the premises.

5. The constable, after making the said purchase, asked the appellant if he had a licence; and he produced one which had been granted to him under 6 Geo. 4, c. 81, of which the following is a copy:

No. 112.

Great Britain.

Dealer's Licence No. 312.

I, the undersigned, duly authorised by the Commissioners of Inland Revenue, hereby grant licence to Richard A. Palmer to exercise and carry on the trades, and to sell the intoxicating liquors undermentioned, in the manner hereinafter described, at a house situated at 7, Regent-street, in the parish of Clifton, in the county of Bristol, from the day of the date hereof until and including the 5th of July next ensuing, he having paid for this licence the undermentioned duties in respect of the several licences to exercise the said trades, and which amount altogether to the sum of 6*l.* 18*s.* 0*d.*

Dated this 29th of Jan. 1877.

	£	s.	d.
Dealer in foreign wine and in sweets or made wines	5	5	0
Dealer in beer	1	13	0
	6	18	0

J. DRINKWATER,

Collector of Inland Revenue.

Note.—Any authority granted by this licence, which is founded upon a magisterial certificate, will cease if the magisterial certificate is forfeited, in pursuance of the Licensing Act 1872, or become void under any other provisions of that Act: (See 35 & 36 Vict. c. 94, s. 63.)

- (1) The spirit dealer's licence does not authorise the sale of less than two gallons of spirits of the same denomination at a time to the same person.
- (2) The beer dealer's licence does not authorise the sale of less than four gallons and a half, or two dozen reputed quart bottles.

6. There were also cards in the shop announcing the sale of ale and stout in quantities of not less than three dozen imperial pint bottles. There were also bottles of ale and stout, as well as foreign wine in bins in the shop, which was otherwise fitted up as an ordinary grocer's shop with tea, sugar, eggs, and dried fruits exposed for sale.

7. After this, on the same day, 6th July, the respondent laid an information on oath before one of the justices for the said city and county, and obtained a search warrant under the provisions of the 17th section of the Licensing Act 1874.

8. The warrant was put in force the same evening, and in the shop about three dozen bottles of foreign wine were found, in the house in upstairs rooms over twenty dozen bottles of champagne, fifty dozen of port, sherry, and claret, and about five dozen of ginger, orange, and other British wines were found, and in the basement seventeen casks of ale, beer, and stout, and 209

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dozen of bottled ale and stout were found. These liquors with the vessels containing the same were seized by the police, and were removed from the premises under the warrant.

9. Subsequently the appellant was summoned as hereinbefore mentioned, and on the hearing on 10th July, himself gave evidence, and called witnesses, who proved that a new licence was ready for delivery to the appellant to enable him to sell, as a dealer in foreign wines, from the 6th July 1877, similar to the licence which expired on the 5th July; that it was not usual to renew on the 6th July, and, for the convenience of the Inland Revenue officer, notice had been given to the appellant requesting him to attend at the Inland Revenue office, Bristol, and pay his duties on the 18th July 1877.

10. The appellant had been informed by the Excise officers that, having a licence as a dealer in foreign wines, he could sell such wines for consumption off the premises in any quantity, however large or small; and the justices found he had an honest belief he could do so. It was also proved that the Inland Revenue office was in the habit of granting a wine dealer's licence to any keeper of a shop who applied for it, and informing the holder thereof that it authorised the sale of wine in any quantity, however small, although he had not previously obtained any licence from justices.

11. It was not proved that the appellant ever sold so much as two gallons of foreign wine at one time or so much as one dozen reputed quart bottles at one time; and the justices found as a fact that he was in the habit of selling foreign wine by retail, not to be consumed on the premises.

12. The appellant never sold less than three dozen imperial pint bottles of beer at one time.

13. The appellant was brought up as a grocer from his fourteenth year, and had never been in a wine merchant's business, except in connection with the grocery trade.

14. The appellant would have to pay to the Revenue 10*l.* 10*s.* for an annual licence as a dealer in foreign wines; but for a retail licence, under the 23rd Vict. c. 27, s. 3, he would have to pay to the Revenue 3*l.* 3*s.*

15. He had no such retail licence, and he had no licence or certificate from the justices.

16. The appellant contended that he was entitled to sell by retail foreign wines, although he had no other licence except a "dealer's licence" before described, and that he must be considered as having such a licence at the time he sold to the constable the bottle of sherry, because the new licence was in existence, and it was not through any negligence of his that it was not in his actual possession.

17. The appellant also contended that every person who deals in wine, although dealing at the same time in other commodities, is a wine merchant within the meaning of sub-sect. 1 of the 73rd section of the Licensing Act 1872, and that, provided he holds a wine dealer's licence, no licence from the magistrates was required.

18. And, further, the appellant contended that, having a licence as a dealer in foreign wines under the 6 Geo. 4, c. 81, he did not require any other licence or authority under the 23 Vict. c. 27, s. 3; and, in support of his contention, he referred to the said statute of 6 Geo. 4, c. 81, and to the following documents and opinions of the Inland

Revenue Commissioners, and forming the instructions of the Commissioners to their officers, to wit:

Somerset House, London,
5th March 1863.

Ordered,—That the several officers of the Revenue take notice that licensed dealers in foreign wine are not required to take out a licence under 23 Vict. c. 27, for the sale of such wines by retail, and that they may sell in any quantity in the same manner as they did previously to the passing of that Act. THOMAS DOBSON.

(By the Board.)

Somerset House, London,
31st Aug. 1872.

Ordered,—No justices' or Excise licence is required for the sale of spruce or black beer; neither is a justices' licence required for the retail of wine not to be consumed on the premises under an Excise wine dealer's licence at 10*l.* 10*s.* ADAM YOUNG.

(By the Board.)

19. The justices decided, so far as it was a question of fact and material, that the appellant was not a wine merchant within the meaning of sect. 73 of the Licensing Act 1872, but that he was a grocer, and kept a shop for the sale of goods and commodities other than foreign wine within the meaning of sect. 3 of 23 Vict. c. 27; and that on the day in question he sold foreign wine by retail according to the definition contained in sect. 4 of the same Act; and that his trade in wine consisted in selling wine by retail as so defined.

20. The justices considered that the appellant had a wine dealer's licence on the 6th July, although he had not actual possession of it on that day; but they convicted him of selling intoxicating liquors—to wit, foreign wine—by retail without a licence, contrary to sect. 3 of the Licensing Act 1872, because they were of opinion that the dealer's licence did not justify such sale by retail, as he was not a wine merchant.

21. The justices were of opinion that, under the circumstances stated in this case, he ought to have obtained a licence from the justices as contended by the respondent, and were referred, in support of such contention, to 32 & 33 Vict. c. 27, s. 4, and the definition of "licence" in sect. 74 of the Licensing Act 1872.

22. If the justices had any discretion as to the forfeiture of the intoxicating liquor seized by the police, they would not have ordered it to be forfeited; but, having regard to sect. 17 of the Licensing Act 1874, they made no order on the subject.

23. The questions of law for the decision of this court were: (1) Whether the appellant was a wine merchant within the meaning of the 73rd section of the Licensing Act 1872? (2) Whether, upon the facts stated, the justices were right in holding that the appellant was not entitled, under the wine dealer's licence alone, to sell foreign wine by retail in his shop, to be consumed not on the premises?

24. If the justices were right in so holding that the appellant was not a wine merchant, and was not authorised to sell wine by retail for consumption not on the premises under his wine dealer's licence, this conviction is to be affirmed, otherwise to be quashed.

On the 17th Dec. 1877, before this case had been stated, J. Paterson obtained a rule nisi on behalf of the appellant, calling upon the justices of Bristol and the respondent, to show cause why a *certiorari* should not issue to bring up this conviction to be

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quashed, on the ground that the justices had exceeded their jurisdiction.

The rule was subsequently directed to be argued with the special case.

Herschell, Q.C. (with him *J. Paterson* and *Petheram*) argued for the appellant.—This was a prosecution at the instance of the police, and the conviction is opposed to the view of the excise and revenue authorities, who have always considered that the holders of these grocers' licences required no certificate or licence from the justices. No doubt sect. 3 of the Act of 1872 requires a person selling by retail any intoxicating liquor to be duly licensed to sell the same; but the question arises whether the appellant was not duly licensed under the circumstances. There is nothing in this Act specifically referring to licences granted under the Act of 1825, unless, as the appellant contends, they are intended to be exempted from the operation of the Act by sect. 73. Now the words imposing excise duties, of 6 Geo. 4, c. 81, s. 2, under the head "Wines," are: "Every dealer in foreign wine who shall not have an excise licence for retailing spirits, and a licence for retailing beer, 10*l.*" [afterwards altered to 10*l.* 10*s.*]; "every retailer of foreign wine who shall have taken out a licence for retailing beer to be drunk or consumed on his, her, or their premises, but shall not have taken out an excise licence for retailing spirits to be so drunk or consumed, 4*l.* 4*s.*; every retailer of foreign wine who shall have taken out excise licences for retailing beer and spirits respectively, to be so drunk or consumed, 2*l.* 2*s.*" A dealer in foreign wines with a licence from the Inland Revenue Commissioners under this Act might, until the passing of the Act of 1872, even if he carried on any other business, sell foreign wines in any quantity, whether large or small, provided they were not consumed on the premises. The first sub-section of sect. 73 of the Act of 1872 can only refer to this licence; and although the words "wine merchant" may not perhaps accurately represent a retail dealer, it cannot be supposed that they mean to exclude persons who carry on any other trade, and to refer only to a person who, when the Legislature comes to allude to a person similarly situated with respect to the sale of spirits in the following sub-section, is described as "a wholesale [spirit] dealer whose premises are exclusively used for the sale of intoxicating liquors." Sect. 68 contains a regulation as to the retail licences of wholesale spirit dealers which does not apply to wine dealers. There is nothing in the Refreshment Houses Act 1860, which touches the particular licence which the appellant holds.

Charles, Q.C. (with him *Greene*) for the respondent.—The interpretation of sect. 73 of the Act of 1872 should be considered with reference to the double object of legislation in respect of licensing. The Act of 1825 had revenue only for its object, and the Act of 1828 (9 Geo. 4, c. 61), which, for the sake of order, placed the retail trade under the control of the justices, did not touch wine dealers' and retailers' licences under the previous Act. In 1860 facilities for retail licences, without regard to the justices, were further increased; but retail licences were more strictly limited and defined, and even a wholesale dealer was, by the Refreshment Houses Act of that year, required to have a separate retail licence, if he sold foreign wine in less quantity than two gallons or one dozen

reputed quart bottles at one time. This, no doubt, is not the view of the revenue authorities, but it is the necessary meaning of the 3rd section, supported by other provisions in the same Act. If this be so, sect. 4 of the Act of 1869 must include all persons, even if they have wine dealers' licences, who sell by retail; and a justice's certificate thereby became a condition precedent to the due licensing of such sale. The meaning of sect. 73, sub-sect. 1, is explained by this interpretation of the previous Acts; it was not intended by that Act to make any alteration in those licences under which persons, having shops for other commodities, sold wine by retail for consumption away from the shops. Those licences were to continue subject to the certificate of justices, but relief was given to persons selling intoxicating liquors only, who, with a dealer's licence under 6 Geo. 4, c. 81, were compelled to obtain a further licence, under the Act of 1860, to sell a sample bottle or any retail quantity. Such persons are accurately described as wine merchants who sell wine by retail in pursuance of a wine dealer's licence granted by the Commissioners of Inland Revenue, the words used in the first sub-section of sect. 73. And even if the words "wine merchant" in this sub-section were not intended to have this restricted limitation, it cannot be that they should have been used for the purpose of describing a person who, like the appellant, has never sold more than two gallons of wine at a time, and whose habit it is to sell by retail. The words can only refer to a person whose primary business, at all events, is that of a wine merchant, not to one who finds it convenient to sell odd bottles of wine as a secondary part of his trade in groceries.

Poland appeared on behalf of the justices to show cause against the rule for *certiorari*.—He followed in support of the respondent's argument, and further contended that, even if the conviction were quashed, the court should in their discretion discharge the rule for *certiorari* with costs, the justices, as he submitted, having fulfilled their duty in stating the case.

Greene, for the respondent, also asked to have the rule discharged with costs in any event.

J. Paterson, for the appellant, pointed out that the case was stated only after the rule was granted, and five months had then elapsed since the conviction and the arbitrary seizure of the appellant's stock.

COCKBURN, C.J.—This case has been the subject of a most exhaustive argument, but the whole matter for our consideration lies in a nutshell. We have only to look at what the Legislature says in this Licensing Act of 1872, and we have nothing to do with what may be inferred as to its intentions beyond its words. The Act of 6 Geo. 4, c. 81, provides licences for dealers and retailers in foreign wines; and it seems that a dealer with a 10*l.* licence, whether his trade was limited to intoxicating liquors or not, might sell a quantity however small, provided it was not consumed on the premises. This was admittedly the law until the passing of the Act of 1860, sect. 3 of which gives a person keeping a shop or licensed as a dealer in wine, a right to a licence of three guineas a year to sell in reputed quart or pint bottles foreign wine not to be consumed on the premises. This looks at first sight as if it was intended to make a licence under this Act necessary even for a wine dealer in order to enable him to sell by

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retail. It is true that at first the section seems capable of a double construction; but I do not think the existing rights of a dealer would be taken away by any such mere inference from the words employed. My view is, that a man holding a dealer's licence at that time was by that provision to be thenceforth entitled to give up his 10l. licence and sell by retail in pints and quarts under a 3l. 3s. licence created by that Act. This construction of the Act of 1860 would leave a dealer with a 10l. licence under the Act of 1825 in the same position as before, if he chose to continue that licence; and that was his position at the time of the passing of the Act of 1869, which by the 4th section requires a licence for the sale by retail of wine, under certain recited Acts, to be granted only upon a justices' certificate. Now amongst these recited Acts is the Refreshment Houses Act 1860, but not the Excise Act of 1825; the 10l. dealer therefore was not touched by this Act of 1869, and he continued to have, when the Act of 1872 came to be passed, the same position as he had from the year 1825. This being so, it becomes necessary to consider whether since the Act of 1872 the appellant has been duly licensed under the 3rd section. No doubt the object of that Act, and also the previous one of 1869, was to extend the authority of the justices over the granting of licences; but we must observe the limits to which their authority has been extended, and we find not only that the interpretation of the word "licence" omits any reference to this Act of 1825, but also that sect. 73 expressly provides that a licence as defined by the Act shall not be required for the sale of wine by retail not to be consumed on the premises by a wine merchant in pursuance of a wine dealer's licence granted by the Commissioners of Inland Revenue. It has been said that this exception was intended to apply only to a person who is a wine merchant in the restricted sense of one who carries on exclusively a trade in intoxicating liquors; but it seems to me that in words the section exempts from the operation of the Act everybody having a wine dealer's licence. I think the construction put by the Excise Commissioners upon these two Acts of 1860 and 1872 was the right one; licensed dealers were not required by the Act of 1860 to take out retail licences in order to sell by retail, and no justices' licence is required by the Act of 1872 for the retail of wine not to be consumed on the premises under an excise wine dealer's licence at 10l. 10s. The magistrates were wrong, and the conviction will be quashed. As to the *certiorari* which was obtained by the appellant whilst this case was pending, I think that in the exercise of our discretion the rule should not be made absolute; but as five months were allowed to elapse before the magistrates stated the case, and they seem to have unnecessarily granted a seizure of all the appellant's stock by their warrant, we refuse to allow their costs.

MANISTY, J.—I am of the same opinion on both matters. It can scarcely be contended that the appellant would not have been a wine merchant before the Act of 1860, even although he was also a grocer, and he is not less a wine merchant now because he can retail wines without a further retail licence.

Judgment for appellant on special case. Rule for certiorari discharged without costs.

Solicitors for appellant, *Darley and Cumberland* for J. H. Clifton, Bristol.

Solicitors for respondent, *Gregory, Roscoe, and Co.*, for Wm. Benson, Bristol.
Solicitor for justices, *H. M. Phillips*, for T. H. Gore, Bristol.

Thursday, Feb. 7, 1878.

(Before COCKBURN, C.J. and MELLOR, J.)

REG. v. ALCOCK; *Ex parte* CHILTON. (a)

Justice of the peace—Disqualification by interest—Epping Forest Commissioners—24 & 25 Vict. c. 97, s. 52—35 & 36 Vict. c. 95, s. 3.

The applicant, a commoner of Epping Forest, who objected to the proceedings of the Corporation of London as owners of the forest, removed and destroyed their notice boards and gave them warning that he should remove their fences and other obstructions. The corporation promptly commenced an action against him and obtained an injunction to restrain him from carrying out his threats. They also summoned him under 24 & 25 Vict. c. 97, s. 52 for destroying their boards. At the hearing of the summons before two justices, the applicant objected to one of them on the ground that he was disqualified by interest in adjudicating on the summons. This justice had made an affidavit on behalf of the corporation in the said action, in which he stated that he was a commoner, and that the corporation had by their proceedings rendered the forest better fitted for the use of the commoners and the public. The applicant also objected that no leave of the Epping Forest Commissioners had been obtained under 35 & 36 Vict. c. 95, s. 3 for this prosecution. The justices overruled these objections and convicted the applicant.

Held, upon a rule for *certiorari*, that the justice was not disqualified from adjudicating on this summons; that no leave of the commissioners was required for a criminal prosecution; and that the conviction was right.

On the 24th Jan. Tindal Atkinson, on behalf of John Chilton the younger, obtained a rule nisi calling upon the Corporation of London and the Justices of Essex to show cause why a *certiorari* should not issue to bring up and quash a conviction of the said John Chilton by the said justices on the prosecution of the said corporation for doing malicious injury to property belonging to the said corporation under 24 & 25 Vict. c. 97, s. 52. The rule was granted on two grounds, viz., that one of the convicting justices was disqualified by interest; and that no leave had been obtained from the Epping Forest Commissioners under 35 & 36 Vict. c. 95, s. 3, before these proceedings were commenced.

The rule was applied for on the further ground that the said John Chilton did the acts with which he was charged as a *bona fide* claim of a reasonable right; but on this ground the rule was not granted.

On the 4th Dec. 1877 the said John Chilton appeared, and the said summons came on to be heard before two Essex justices, to one of whom, Charles Alcock, Esq., the said John Chilton's solicitor objected, on the ground that he was an interested party; the solicitor maintained, therefore, that the said Charles Alcock was disqualified from hearing and determining the said summons.

This objection was founded on the fact that the said Charles Alcock had made an affidavit on

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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behalf of the said corporation in an action in the Chancery Division to restrain the defendant from doing threatened damage.

Powell, Q.C. and *Edwyn Jones* appeared for the Corporation of London and showed cause against the rule.—*Mr. Alcock* was not in any way interested in the property injured, or at all events not so interested as to entertain any bias against the defendant *Chilton* with respect to these proceedings. Indeed, the bias of the magistrate, if any, would necessarily be in favour of the defendant, their interests being exactly the same, as commoners. The fact that a magistrate has given evidence in another matter against a person charged before him, or expressed an opinion about the policy of his proceedings, has never been considered sufficient to oust the magistrate's jurisdiction. As to the second ground for the rule, it cannot be maintained that sect. 3 of the Act of 1872 has any application to criminal proceedings. [*COCKBURN, C.J.*—There is nothing in the Act to support such a contention.]

E. Clarke, for *Mr. Alcock*, followed on the same side.

J. O. Griffiths, Q.C. and *Tindal Atkinson* argued in support of the rule.—It must be borne in mind that this is a matter which might have been determined by a single justice under 24 & 25 Vict. c. 97, s. 52; and the words of the proviso to that section are: "Provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of." [*COCKBURN, C.J.*—But the rule is not granted on that ground.] It is, however, important with reference to the interest of the justice. The rule with regard to the disqualification of a justice by interest was considered in *Reg. v. Meyer* (L. Rep. 1 Q. B. Div. 173), where *Blackburn, J.* said (p. 177): "The question is, was *Mr. Meyer* really substantially interested, though not in a pecuniary sense, in the proceedings as to which these informations were one step, so as to be likely to have a real bias in the matter?" He afterwards referred to a previous case in which the court said, "that we must not be understood to say that where there is a real bias this court would not interfere." He proceeded: "In the present case there is such a real bias. *Mr. Meyer* was sitting as a judge in an information arising out of a matter in which he was a litigant party with the defendant; and although he states he took no part in the conviction, yet he clearly ought not to have been on the bench; and we have no doubt that the rule must be made absolute." Here, if not an actual litigant, one of the justices who took an active part in the conviction had, just before the hearing, made an affidavit in behalf of the plaintiff in an action by the prosecutor against the defendant in respect of the same matter as that upon which the prosecution was based. The community of interest between the justice and the defendant does not lessen the disqualification.

COCKBURN, C.J.—The only question, for us is, whether one of these two convicting magistrates was disqualified by interest from adjudicating upon the charge against the defendant. The interest, such as it was, was that of a commoner with rights over the waste of Epping Forest, and was exactly the same in the magistrate and in the defendant. They had an identity of interest, and therefore the tendency to bias, if it

existed, would naturally be in the defendant's favour. But it is said the magistrate, as appears from his affidavit in the Chancery suit, takes a view opposite to that of the defendant as to the corporation proceedings, which are avowedly in the commoners' interests. It is contended that therefore the magistrate is disqualified by his interest from adjudicating in a matter in which the defendant is concerned. It is preposterous to suppose that any one in the position of a magistrate would be biased in his administration of justice by the mere expression of his views as to what is for the advantage of a defendant's interests. There is not in this case the slightest appearance of a tendency to bias. There is no authority for saying that an expressed opinion is sufficient to oust a magistrate's jurisdiction. This seems to me to be but a sorry squabble; if a question of right be really desired to be raised, it should be done without violence, and in a dignified manner. The rule will be discharged.

MELLOR, J.—I am of the same opinion. There are two points to be considered, one as to the magistrate's interest, the other as to the leave of the commissioners. The second point has not been seriously argued, and indeed it is impossible to maintain that there was any intention in the Act of 1872 to interfere with criminal charges arising within or in respect of Epping Forest. The other point must be decided equally against the defendant. Both he and the magistrate are commoners, but his rights of common were not injured by the erection of these notice-boards, nor were the magistrate's rights injured by their being knocked down. The demolition of so many as twenty-three posts was certainly evidence of malice, and sufficient in my opinion to justify the exclusion of defendant's claim of right. The only remaining interest in *Mr. Alcock* is that suggested on the ground of his affidavit; but I know of no reason for saying that the expression of a man's opinion on any subject should render him unfit to adjudicate upon it. I agree with the case of *Reg. v. Meyer*, which has been cited, but I fail to see its application here. It must be necessary or probable that his interest in the subject matter of his adjudication should bias the magistrates in order to disqualify him.

Rule discharged.

Solicitor for the applicant for the rule, *C. J. Rawlings*.

Solicitors for the justices, *Bell, Brodrick, and Gray*.

Solicitor for the Corporation of London, *The City Solicitor*.

EXCHEQUER DIVISION.

Tuesday, Jan. 22, 1878.

(Before *CLEASBY, B.* and *HAWKINS, J.*)

K— v. RASCHEN AND ANOTHER.(a)

APPEAL FROM INFERIOR COURT.

Contract of service—Servant absenting himself through illness—Illness caused by misconduct of servant before contract—Dismissal—Right of servant to sue for wages due during his absence.

Plaintiff was engaged by the defendants as a clerk at 120l. per annum, and was to have one month's notice of dismissal. He began his duties on the

(a) Reported by *H. LEIGH* and *E. RINGWOOD, Esqrs.*, Barristers-at-Law.

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2nd July, and served till the 1st Aug. He was then obliged by illness to be absent till the 2nd Sept., when he tendered his services, which were refused. He had in the meantime received on the 20th Aug. a letter from the defendants terminating the engagement. In an action brought by him for wages from the 1st Aug. to the 20th Sept., it was

Held, that the plaintiff was entitled to wages for that period, and that it was no answer to his claim that the illness was caused by an act of misconduct on his part, which occurred before the contract, and which he did not know, at the time of the contract, would lead to his illness, and render him incapable of performing his work.

THIS was an action brought in the Lord Mayor's Court of London by the plaintiff, who was a mercantile clerk, to recover the sum of 16l. 13s. 4d., alleged to be due to him from the defendants, his employers, and the particulars stated the claim to be for the amount of his wages and salary at 120l. a year, from the 1st Aug. to the 20th Sept. 1877, according to an agreement between them dated the 27th June 1877. The plaintiff had been employed under that agreement at the above-mentioned salary of 120l., subject to increase in events which did not occur, and the employment was to be determinable on either side by one month's notice. He served under the contract from the 2nd until the 30th July, when he was unwell. He obtained the permission of his employers to absent himself from work until the 6th Aug. He remained away, however, and was under medical treatment, and was unable to return to his employment until the first week in September, when he returned and tendered his services, which the defendants refused; and they had moreover, in the meantime, namely, on the 20th Aug., given him notice, by letter of that date, terminating the employment, and stating that, as they could not do without a clerk to fill his place, they had engaged another person. They refused to pay him the amount claimed by him for wages during his absence, on the ground that he had, by his own misconduct, rendered himself incapable of performing his duties, and therefore was not entitled to any remuneration. The illness under which the plaintiff was suffering arose from venereal disease. The learned Common Serjeant of the City of London nonsuited the plaintiff, but a rule was afterwards obtained on his behalf calling upon the defendants to show cause why a verdict should not be entered for the plaintiff for the sum claimed, on the ground that there was no evidence at the trial in support of the defendants' plea.

The defendants' pleas were as follows:—First, denying that they agreed as alleged. Second, that the defendants were always ready and willing to continue to employ the plaintiff in the capacity of clerk until the plaintiff misconducted himself as hereinafter mentioned. Yet the plaintiff wrongfully absented himself from the defendants' service for a long and unreasonable time, namely, for three weeks or thereabouts, without any just, sufficient, or reasonable cause or excuse for such absence, and without the consent and against the will of the defendants, whereby the defendants were greatly delayed and injured in respect of divers matters and businesses in which they would otherwise have employed the plaintiff in his capacity aforesaid, and were forced to procure

another person to serve them in the capacity aforesaid in place and stead of the plaintiff; and thereupon it became and was lawful and necessary for the defendants to discharge and dismiss the plaintiff from their service, and thereupon the defendants refused to suffer the plaintiff to continue in their employ, and discharged him therefrom, being the supposed breach. Third, that the plaintiff was not during any part of the time for and in respect of which wages are claimed ready and willing to render, and did not in fact during any part of such time render, to the defendants the alleged agreed or any services. Fourth, never indebted as alleged.

The following is a copy of the notes of the judge taken at the trial:

The plaintiff on being examined said: On the 2nd July I entered the defendants' service at 120l. a year and a month's notice. Towards the end of July I told my employers that I must consult a doctor, and they expressed their sympathy. On the 2nd Aug. I was ordered by my doctor to remain at home, but went on the 7th, 11th, and 14th in a cab to see my doctor, and on two of these occasions I called and told defendants, and they said, "We hope you will soon get better." Afterwards, on the 15th Aug., I wrote and told them I had to undergo an operation. On the 20th Aug. I got a letter (produced) terminating the agreement. I answered it the same day, and got an answer on the 21st Aug. On the 24th Aug. I wrote again, saying my doctor insisted on my going to the seaside. This letter was answered on the 2nd Sept. I called and offered my services for the remainder of the period of notice.

Cross-examined.—I served until 30th July, then I went away until 2nd Sept. My illness was originally caused by my own imprudence.

Re-examined.—I cannot trace the cause, but it occurred in the middle of June.

George Lichtenberg, surgeon to the German Hospital, said: I saw plaintiff towards the end of July, his glands were swollen, I advised his remaining at home, and on the 24th Aug. I sent him to the seaside.

Cross-examined.—The ailment arose from venereal disease.

The plaintiff was nonsuited, but leave was given him to move to enter the verdict for 16l. 13s. 4d.

THOMAS CHAMBERS.

Reed now showed cause on behalf of the defendants, and contended that in a contract of service capacity to serve is a condition precedent to the right to sue, and there is no right to sue unless the service is performed, or the inability to perform it arises otherwise than through the plaintiff's own act or default, as, for instance, by accident or the act of God. Even if the defendants did not know at the time they dismissed him that he had himself put it out of his power to serve, they may rely on that defence at the trial. See *Spotswood v. Barrow* (5 Ex. 110; 19 L. J. 226, Ex.) If the plaintiff put it out of his own power and rendered himself unable to continue his services, the defendants were at liberty to rescind the contract, or to sue for a breach of it. It seems to be assumed in all the cases that, though temporary illness which arises through the act of God is an excuse for the non-performance of services, the servant would not be excused where it arises, as it did in the present case, through his own misconduct. [HAWKINS, J.—The misconduct of the plaintiff

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in the present case occurred before the contract.] The incapacity to work followed immediately upon, and could be traced to, the misconduct. In *Cuckson v. Stones* (28 L. J. 25, Q. B.; 1 El. & El. 248), a plea similar to that in the present case was held good, Lord Campbell, C.J. there saying: "The plea is that the plaintiff was not, during any part of the time for and in respect of which such wages are claimed, ready and willing or able to render, and did not, in fact, during any part of such time render the agreed or any service! We think the gist of the plea is that the plaintiff, during the time in question, was not ready and willing to render, and did not render, any service in the sense that he voluntarily or wilfully refused or omitted to serve. If so, he could not claim his wages in consideration of his service, for the breach goes to the whole consideration. He could recover if he were ready and willing to serve, if he had been able to do so and was only temporarily prevented by the visitation of God." So in *Boast v. Firth* (19 L. T. Rep. N. S. 264; L. Rep. 4. C. P. 1; 38 L. J. 1, C. P.), the learned judges (M. Smith and Brett, JJ.) confine the cases where illness excuses performance to those in which the illness is caused by the visitation of God. No doubt a temporary illness without the servant's own default would not suspend his right to wages, or constitute a breach of contract. But here this is not such a case, for the illness was caused by the plaintiff's own act, not to put it even as his own misconduct. In fact, all the cases support the proposition that to excuse performance the illness must arise without any default on the servant's part. The defendants were entitled to dismiss him the moment he absented himself beyond the six days' leave, as it was then equivalent to intentional absence, which, together with the moral misconduct, justified the dismissal. He cited also

De Bernardy v. Harding, 8 Ex. 822; 22 L. J. 340, Ex.;

Chandler v. Grieves, 2 H. Bl. 666 (note);

Taylor v. Caldwell, 8 L. T. Rep. N. S. 356; 32 L. J. 164, Q. B.; 3 B. & S. 82;

Oort v. The Ambergate, &c., Railway Company, 17 Q. B. Rep. 144; 20 L. J. 460, Q. B.

Glyn, for the plaintiff, *contra*, submitted that the defence was not raised by the plea. The misconduct alleged in the second plea is that the plaintiff absented himself for an unreasonable time without a sufficient or reasonable cause. His illness which came upon him unexpectedly is a reasonable cause, and the plea set up by the defendants is no answer to the plaintiff's claim. [He was here stopped by the Court.]

CLEASBY, B.—Some little difficulty has arisen here owing to the form of the pleading. The plaintiff in this case entered into the service of the defendants and was employed by them under an agreement by which he was to be paid a salary of 120*l.* per annum, and by the agreement he was to have one month's notice in case of dismissal. The plaintiff entered upon his duties on the 2nd July, and there is nothing to show that, at the time he entered into the agreement and subsequently thereto upon his duties under it, he concealed from his employers anything which he ought to have disclosed, or that he knew that he would not be able to perform his duties in the defendants' service. Therefore the contract is not tainted by a knowledge on his part of any circumstances which

would render him unable to perform it. After a month's service illness supervened, and the plaintiff was unable to continue his attendance at the defendants' office. The question is whether or not illness is such an excuse as to disentitle him to recover wages during his absence from the employment in consequence of it. I think, *prima facie*, illness is to be attributed to the act of God, and we are not justified in going back for any length of time, and entering into an investigation as to what may have been the cause of it. We ought not, I think, to extend the effect of disability arising from illness. The illness which rendered him unable to perform his duties for a time came upon him unexpectedly, and we cannot go back to first causes and into the question of how it arose. The maxim "*causa proxima non remota spectatur*" is applicable here. As to how precisely the disease arose, there may be various different opinions, and there might be the greatest uncertainty as to the cause or matter which originally brought it about. It was a misfortune which could not have been foreseen at the time the contract was made, and I think the plaintiff is entitled to say that it is a reasonable excuse for his absence from his duties, and that our judgment should be given for the plaintiff, setting aside the nonsuit, and entering the verdict for him for the 16*l.* 13*s.* 4*d.*, the amount of damages claimed by him in this action.

HAWKINS, J.—I am of the same opinion. If the plaintiff had been aware, at the time of the making of the contract, that he would be incapacitated by illness from performing his duties, I am not prepared to say that he could recover in this action. But there is nothing to show that he knew anything of the illness which he subsequently suffered from until after the agreement had been entered into. There was no cross-examination on that point, and no question was put to get out of him, and there was no evidence to show that he had any suspicion of the misfortune which subsequently overtook him, or that he was aware that the seeds of the disease existed in him at that time. Now I base my opinion upon that fact, and I think, under these circumstances, that he is entitled to the amount claimed. The misconduct alleged in the pleadings is his staying away without a reasonable excuse. How can it be called misconduct if a man stays away, on the advice of a doctor, in order to get himself cured? The third plea is similar to the one set up in *Cuckson v. Stones* (*ubi sup.*); and as to that Lord Campbell, C.J. says: "We think that the gist of the plea is that the plaintiff, during the time in question, was not ready and willing to render, and did not render, any service, in the sense that he voluntarily and wilfully refused or omitted to serve. If so, we think he could not claim the wages to be paid to him in consideration of his service." Now, in the present case, the plaintiff did not voluntarily and wilfully refuse to serve, but was compelled to absent himself by an illness which came upon him during the time of service, and which was not the result of any misconduct that occurred after the agreement was made. As a matter of fact, I conclude that the malady was contracted before he entered into the defendants' service; and he did not improperly obtain admission there. At the time that he entered into the contract, which he did honestly, he neither believed nor knew that he would not be

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able to fulfil it. In my opinion, therefore, the plaintiff is entitled to have the verdict for the amount claimed entered for him.

Nonsuit set aside, and judgment entered for the plaintiff.

Leave to appeal was refused.

Solicitors for the plaintiff, *Anthony Carr and Son.*

Solicitors for the defendants, *Reed and Lovell.*

Jan. 22 and 29, and Feb. 4, 1878.

(Before CLEASBY, B. and HAWKINS, J.)

BODY AND ANOTHER (apps.) v. JEFFERY (resp.) (a)

Turnpike roads—Steam locomotives used on highways—Construction of wheels of—"Shoes or other bearing surface"—Continuous pressure or "bearing surface"—Width of shoes—Locomotive Act 1861 (24 & 25 Vict. c. 70), s. 3.

Sect. 3 of the Locomotive Act 1861 (24 & 25 Vict. c. 70), enacts that "every locomotive drawing any waggon or carriage shall have the tires of the wheels thereof not less than 9in. wide . . . and the wheels of every locomotive shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width of not less than 9in.

The appellants used on a highway a locomotive with wheels the tires of which were 18in. wide, and upon and across the tires were placed, on each side of the tire alternately, "shoes" or bars of iron 1in. thick, and 9½in. wide measuring across the tire, and 3in. wide measuring parallel to the circumference of the wheel, the space or interval between each shoe being 3in. except in the centre of the wheel where the tires met and overlapped each other by about 1½in. There was thus, as the appellants contended, never less than a width of 9in. of continuous "bearing surface," because, as soon as the bearing surface on one side of the wheel was exhausted, it was taken up by that on the other side. But, on appeal against a conviction of the appellants by justices, for contravening the requirements of sect. 3 of the Locomotive Act 1861, by using the locomotive on a highway, it was

Held (affirming the conviction, and following the decision in Stringer v. Sykes, 36 L. T. Rep. N. S. 152), that the wheels in question did not satisfy the statute, which required one uniform uninterrupted pressure of 9in. measured across the wheel; and (going further than that decision) that such "uniform uninterrupted pressure" must be continuous throughout the whole circumference of the wheel, save in so far as the joints of the material used may render perfect continuity impossible; and that no "shoes or other bearing surface" will satisfy the requirements of the statute, unless they are similar to the tires of such wheels as the statute has prescribed, namely, uniform, continuous, unbroken (save as aforesaid) and smooth-surfaced bands of the width of 9in. round the whole circumference of the wheel.

Quare, whether the deviation of a quarter of an inch from a flat surface, allowed by the statute of Geo. 4, in the "felles or tires" of wheels, would be permitted if a question arose as to the wheels of a locomotive being "smooth-soled" within the meaning of the Act of 1861.

(a) Reported by H. LNEIG, Esq., Barrister-at-Law.

THIS was a case stated by justices in and for the county of Sussex, pursuant to the statute 20 & 21 Vict. c. 43.

At a petty session held in Rye, in the said county, before three of Her Majesty's justices of the peace for the said county, on 21st Dec. 1877, John Body the elder and John Body the younger were charged in and by a certain information, for that on the 25th Oct. then last, at Beckley, in the county of Sussex, they being the owners of a certain locomotive engine, did use the said locomotive on a certain highway there situated, the wheels of the said locomotive engine not being constructed in conformity with the statute in that case made and provided.

At the hearing of the said information the following evidence was given on oath:—

William Elphick: I am a sergeant in the East Sussex Constabulary, stationed at Beckley. On the 25th Oct., I saw a locomotive belonging to Body and Son, Wittersham, in Beckley-street; it was passing along the road towards Northiam, at about 11 a.m. It stopped to water, and the driver told me they were going to Sandhurst. I took the dimensions of the wheel. There were four wheels, the tires of the two driving wheels were 18in. wide, the shoes 10in. from outside to inside—they lapped 1in., and were 3in. wide and 1in. thick. There were 3½in. between each shoe. The engine went on towards Northiam. I took the dimensions the Saturday afterwards at Wittersham. Mr. Body, jun., told me it was the same engine that I had seen, and that I could do what I liked with it. The sketch now produced by Mr. Langham is, I believe, right. One shoe goes between the other, the uncoloured part on the sketch is an inch lower than the coloured.

Cross examined: When the shoes overlap they come up level, they are level so far as shown; where the 3in. are shown on the plan.

For the defence:

Robert William Eddison: I am a member of the firm of John Fowler and Co., manufacturers of steam ploughing machines at Leeds. Mr. Body's engine was made by our firm. I produce a drawing showing a section of the wheel (drawing put in and signed by chairman). I know it is correct; I have practical knowledge of these engines; there is always a bearing surface of 9in. width on the road, and a continuous surface, and it can never be less measured from side to side of the wheel in the ordinary way; the space of the lap is about 2½in., the space between the shoes is 3in.

Cross-examined by the bench: If the shoes went straight across the wheel leaving 2½in. between each shoe, it would be of advantage to the engine, but contrary to the Act of Parliament; on the soft road there would be an uneven pressure where the wheel touched the road.

It was therefore contended on the part of the defendants that the 24 & 25 Vict. c. 70, s. 3 (which was the statute and section under which the information had been laid), had been strictly complied with, and that the wheels of the engine in question, although not smooth-soled, were used with a bearing surface of a width of not less than 9in., and that as the wheel rotated there was never less than a width of 9in. of continuous bearing surface, because, as soon as the bearing surface on one side of the wheel was exhausted, it was immediately taken up by the bearing surface on the other side. But the said justices being of opinion that the aforesaid wheels were not constructed in accordance with the statute, and the so-called shoes were not such as were contemplated by the Act, and were not a bearing surface with "one uniform uninterrupted line from side to side of the wheel," as laid down in the case of *Stringer v. Sykes* (L. Rep. 2 Ex. Div. 240), held that the offence had been committed, and accordingly the defendants were convicted and fined 10s. and 10s. 9d. for costs.

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The question for the opinion of this court is whether the said determination was correct in point of law.

S. Tennant, for the appellants, contended that the magistrates had wrongfully convicted them, inasmuch as, in the construction of the wheels of their locomotive, they had strictly complied with the terms of the statute of 1861, and had properly therein conformed to the decision of this court upon the subject in the case of *Stringer v. Sykes* (30 L. T. Rep. N. S. 152; L. Rep. 2 Ex. Div. 240; 46 L. J. 139, Mag. Cas.), since which case the locomotive now in question had been constructed. In the locomotive in *Stringer v. Sykes* the tires of the wheels were, as here, 18in. broad, and the shoes were 4½in. wide measuring parallel to the circumference of the wheels, and 20in. in length or breadth, measuring across the tire from one edge of it to the other, and were bolted on transversely across the tires, in an oblique direction, with an interval of 3in. between each shoe; and this court there held that the 9in. in width required by the Act could not be made up of separate and interrupted portions of pressure, or by adding the 4½in. of one shoe to the 4½in. of the other; but that it must be the pressure of one uniform and uninterrupted "bearing surface" from one side of the tire of the wheel to the other of a width not less than 9in. in itself, such width being a portion of the circumference of the wheel. In that case the "bearing surface" was not continuous, the wheels having a space between any two shoes. Here, on the contrary, the "bearing surface" is perfectly continuous, though it is on alternate sides of the wheel. Were the wheels to be perfectly smooth-soled, or the "bearing surface" to be perfectly continuous and unbroken over the whole outside of the tire, the consequence would be that the engine would not work on a smooth road, but would come to a standstill, and do injury to the road by digging holes in it. If the roads are out up or damaged by these wheels, as now used, the remedy at common law for a nuisance is reserved by the Act, and the common law liability of the appellants remains.

Lumley Smith, for the respondent, *contra*.—A "shoe" is nothing more or less than an additional tire, and by sect. 3 it is required that the shoes or other bearing surface should be, as the tire is, a continuous bend round the circumference of the wheel. By sect. 1 of the Act toll is to be paid according to the width of the shoes, which would seem to show that what the Act means is a shoe going right round the wheel. If the respondent's construction of the Act is not correct, then cog-wheels would be allowable—a construction of tire that would utterly destroy the surface of the roads. The 4th section of the Act, which classes "shoes" with "fellies and tires," may be referred to as supporting the contention of the respondent.

S. Tennant replied. *Our. adv. vult.*

Feb. 4.—*HAWKINS, J.*—We are of opinion that the determination of the justices was correct, and that this conviction ought to be affirmed. The sole question in this case is, whether the driving wheels of the locomotive used by the appellants upon a certain highway rested upon such shoes or other bearings as are required by the 3rd section of the Locomotive Act 1861. In considering this question we have derived considerable assistance from a reference to older legislation upon the same

subject, to be found in the General Turnpike Acts passed in the reigns of George III. and George IV. By sect. 69 of the General Turnpike Act (13 Geo. 3, c. 84), it is enacted that "the tire of the wheels of all waggons, &c., to be used upon any turnpike road, shall be countersunk in placing the same upon the fellies in such manner that the nails shall not rise above the surface, and that the soles or surface of the wheels shall be quite flat." By the 2nd section of 16 Geo. 3, c. 39, after reciting the above provision, and that, according to the strict sense of the words, that provision could not be complied with, it is enacted, "that all wheels of the breadth or gauge of 6in. or upwards, the fellies or tires whereof shall not deviate more than 1in. from a flat surface, shall be deemed and taken to be flat according to the true meaning of the said Act." The 55 Geo. 3 c. 119, authorised the trustees of roads to exempt from certain tolls such waggons, &c., as should have the soles or bottoms of the fellies of all the wheels thereof of the breadth of 6in., or of 9in., or of 16in., or upwards, and be cylindrical, that is to say, of the same diameter on the inside next the carriage as on the outside, so that when such wheels shall be rolling on a flat or level surface, the whole breadth thereof shall bear equally on such flat or level surface. A similar provision is contained in the subsequent Act, 3 Geo. 4, c. 126, s. 9. The 2nd section of the General Turnpike Act (4 Geo. 4, c. 95) enacts "that the nails of the tires of the wheels of any waggons, &c. used on a turnpike road, shall be so countersunk as not to project more than one quarter of an inch above any part of the surface of such tires." Throughout these statutes will be found numerous provisions respecting the breadth or gauge of waggons, &c., used on turnpike roads. When those Acts were passed, it is probable that no waggons or carriages of the weight and with the breadth of wheel of the modern locomotive, travelled upon an ordinary road. In the year 1861, however, the use of locomotives being likely to become common on turnpike and other roads, it was deemed by the Legislature necessary to make provisions for regulating the use of them, and accordingly, by the 3rd section of the 24 & 25 Vict. c. 70 (the Locomotive Act 1861), it is enacted that, "every locomotive drawing any waggon or carriage shall have the tires of the wheels thereof not less than 9in. in width, and the wheels of every locomotive shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width of not less than 9in.;" and it goes on to subject the owner of any locomotive used contrary to the foregoing provisions to a penalty not exceeding 5*l*. It is clear to us that the object of the Legislature in passing this enactment was to protect, as far as possible, the surface of roads travelled over by locomotives, by insisting upon the wheels thereof being cylindrical within the meaning of the older enactments, and upon the tires of the wheels being smooth-soled and of a minimum breadth or gauge of 9in., so that, to use the language of the statute 55 Geo. 3, c. 119, "when such wheels shall be rolling on a flat or level surface, the whole breadth thereof shall bear equally on such flat or level surface." The use of shoes, or other bearing surface, is not mentioned in any of the earlier statutes, and we have no doubt that the proviso respecting them was introduced into the Act we are now called upon to construe in ease and favour of the owners of locomotives, by

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not insisting on the wheels themselves being smooth-soled (which might be very inconvenient in their general use), nor upon the wheels themselves coming in contact with the surface of the road travelled over, provided they are used either with shoes, by which we understand a smooth-surfaced shoe covering the whole surface of the tire, or, at the option of the owners, some other bearing surface of the minimum breadth of 9in., which shall in substance represent a smooth-soled wheel of that width, so that, when travelling along the road, the substituted bearing surface, as it comes in contact with the surface of the road, shall produce the same even, uniform, and continuous pressure which a wheel of the same dimensions and character would produce. In other words, we think that the Legislature, in permitting the use of shoes or other bearing surface, did not intend to confer upon the owners the privilege of using any but those which would produce upon the road travelled on the same pressure and effect as the wheels they had prescribed in the event of their being used without shoes or other bearing surface. We do not think the bearing surfaces used by the appellants upon the occasion in question were such as the statute intended to allow as a substitute for smooth-soled wheels, nor do we think that they would produce the same or similar pressure or effect upon the road travelled over. In *Stringer v. Sykes* (36 L. T. Rep. N. S. 152; L. Rep. 2 Ex. Div. 240; 46 L. J. 139, Mag. Cas.), this court decided that the bearing surface must be of a continuous width of 9in. across the wheel, and that a bearing surface of a width of 9in. made up of two flat bars each of the width of 4in., but with a break between them of 3in., bolted obliquely across the whole breadth of the wheel, was not sufficient to satisfy the statute, but that the statute required one uniform uninterrupted line of 9in. from side to side of the wheel; that is, that there should be one uninterrupted pressure of 9in. measured across the wheel. We entirely abide by that decision, and we go further and hold that such uninterrupted pressure must be continuous throughout the whole circumference of the wheel, save in so far as the joints of the material used may render perfect continuity impossible; for we do not intend to say that the bearing surface should throughout the whole circumference consist of one piece of material only, and we think that no shoes or bearing surfaces will be sufficient to satisfy the requirements of the statute unless they are similar to the tires of such wheels as the statute has prescribed, viz., uniform, continuous, unbroken (save as aforesaid), and smooth-surfaced bands, of the width of 9in. at least round the whole circumference of the wheels. It is not necessary for us to pronounce any opinion as to the degree of smoothness required in the surface of the wheels, shoes, or bearing surface, nor do we intend to do so; but we may observe that, although in the early part of the reign of Geo. III. it was enacted that so long as the felloes or tires did not deviate more than 1in. from a flat surface, the wheels should be deemed to be flat according to the meaning of the Act, a deviation of a quarter of an inch only was allowed by the statute 4 Geo. 4; and it may well be that even that deviation would not be permitted if the question should hereafter arise whether the wheels of a locomotive are smooth-soled within

the meaning of the Locomotive Act 1861. Our opinion being that the conviction was right, this appeal will be dismissed with costs.

Conviction affirmed with costs.

Solicitors for the appellants, *Langham and Sons*, agents for *Langham*, Hastings.

Solicitors for the respondent, *Kingsford and Dorman*, agents for *Dawes*, Rye.

CROWN CASES RESERVED.

Saturday, Feb. 23, 1878.

(Before COCKBURN, C.J., CLEARY, B., LINDLEY, MANISTY, and HAWKINS, JJ.)

REG. v. THE INHABITANTS OF ARDSLEY. (a)

Highway — Non-repair — Parish — Township — Repairs by adjoining township.

The parish of D. is divided into seven townships, each of which has repaired its own highways with two exceptions, and there is an immemorial custom for each to repair all highways with the two exceptions within its limits. Each township has its own surveyors and highway rates, and the parish at large had never done any highway repairs, nor levied any rates, nor had any surveyors of highways.

The two exceptions were the piece of road in the defendants' township mentioned in the indictment which had been repaired by the adjoining township W., but for so doing there was no evidence of any consideration, and another piece of road in the defendants' township which had been repaired by sums of money paid by turnpike trustees and another township.

Held, that the Chairman of Quarter Sessions was right in directing the jury to convict the defendants, there being no legal liability on the township of W. to repair; the proper inference from the facts being that the defendants' township was liable by custom to repair its own highways.

At the General Quarter Sessions for the West Riding of the county of York, held at Doncaster, on the 19th Oct. 1877, the defendants, the inhabitants of the township of Ardsley, were tried on the following indictment, which charged that a certain part of a highway within the said township of Ardsley, which said township is one of seven townships which together form the parish of Darfield, in the said riding, was out of repair, and that by an immemorial custom it was the duty of the defendants to repair the said highway.

West Riding of Yorkshire to wit.—The jurors for our Lady the Queen, upon their oath, present that from the time whereof the memory of man is not to the contrary, there was and yet is a certain common and ancient Queen's highway leading from Wombwell, in the West Riding of the county of York, towards and unto Barnsley, in the said riding, used by and for all the liege subjects of our said Lady the Queen, and her predecessors, by themselves, and with horses, coaches, carts, and other carriages, to go, return, pass, repass, ride, and labour at their free will and pleasure; and that a certain part of the said common and ancient Queen's highway, being part of a highway called Wombwell-lane, situate in the township of Ardsley, in the riding aforesaid, commencing at the boundary between the said town-

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

ship of Ardsley and the township of Wombwell, in the said riding, such a boundary being at a point in the said highway distant 145yds. in a north-westerly direction from a bridge over the river Dove called Oldham, otherwise Oldham Bridge, on the said highway, where there are two gateways, the one on the south side of the said highway giving access to an accommodation road leading to a house called Quarry House, in the said township of Ardsley, and the one on the north side of the said highway giving access to a footpath leading to the village of Ardsley, in the said riding, and to an accommodation road leading to Low Laithes Grange, in the said township of Wombwell, and extending from the said boundary in a westerly direction for a distance of 539yds. in length, and from 8yds. to 10yds. in breadth, on the 17th day of April in the year of our Lord 1877, and continually afterwards until the day of the taking of this inquisition, at and in the township of Ardsley aforesaid, in the riding aforesaid, was and yet is very ruinous, miry, deep, broken, and in such decay for want of due reparation and amendment of the same, so that the liege subjects of our said Lady the Queen, in, through, and along the said part of the said common and ancient Queen's highway, by themselves, and with their horses, coaches, carts, and carriages, could not during the time aforesaid, nor yet can go, return, pass, repass, ride, and labour without great danger of their lives and loss of their goods, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen, in, through, and along the said part of the said common and ancient Queen's highway, going, returning, passing, repassing, riding, and labouring, and against the peace of our said Lady the Queen her crown, and dignity. And that the inhabitants of the said township of Ardsley, in the said West Riding of the county of York, the said part of the common and ancient Queen's highway aforesaid (so as aforesaid being in decay) from the time whereof the memory of man is not to the contrary have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend when and so often as it shall be necessary.

2nd count.—And the jurors aforesaid, upon their oath aforesaid, do further present that, on the 17th day of April 1877, and long before, there was, and from thenceforth continuously hitherto, there had been, and still is, a certain common Queen's highway, leading from Wombwell, in the said West Riding of the county of York, towards and unto Barnsley, in the said riding, used for all the liege subjects of our said Lady the Queen, to go, return, pass, and repass, on foot and on horseback, and with cattle, carts, and carriages, at their will and pleasure, and that a certain part of the said common Queen's highway being part of a highway called Wombwell-lane, and situate and being in the township of Ardsley, in the parish of Darfield, in the riding aforesaid, to wit, commencing at the boundary between the township of Ardsley aforesaid and the township of Wombwell in the said riding; such boundary being at a point in the said highway, distant 145yds., in a north-westerly direction from a bridge over the river Dove, called Oldham, otherwise Oldham Bridge, on the said highway, where there are two gateways, the one on the south side of the said highway, giving access

to an accommodation road leading to a house called Quarry House, in the said township of Ardsley, and the one on the north side of the said highway, giving access to a footpath leading to the village of Ardsley, and an accommodation road leading to Low Laithes Grange, in the said township of Wombwell, and extending from the said boundary in a westerly direction, for a distance of 539yds. in length, and from 8yds. to 10yds. in breadth, the said 17th day of April 1877, and from thence continually, until the day of the taking of this inquisition at and in the said township of Ardsley, in the said parish of Darfield, in the riding aforesaid, was, and still is, very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that the liege subjects of our said Lady the Queen in, through, and along the said part of the said common Queen's highway, with their horses, coaches, carts, and carriages, could not, during the time last aforesaid, nor yet can go, return, pass, repass, ride, and labour without great danger of their lives and the loss of their goods to the great damage and common nuisance of all the liege subjects of our said Lady the Queen, going, returning, passing, repassing, riding, and labouring, and against the peace of our said Lady the Queen, her crown and dignity. And that within the parish of Darfield aforesaid in the riding aforesaid from the time whereof the memory of man is not to the contrary there have been, and still are divers townships or districts whereof the said township of Ardsley during all the time last aforesaid hath been and still is one; and that the inhabitants of the said township of Ardsley, in the parish aforesaid, in the riding aforesaid, from the time whereof the memory of man is not to the contrary have repaired, maintained, and amended, and have been used and accustomed to repair, maintain, and amend, and of right ought to have repaired, maintained, and amended, and still of right ought to repair, maintain, and amend when and so often as it hath been or shall be necessary such and so many of the common highways situate, and being within the said township of Ardsley as would otherwise be repairable by the inhabitants of the said parish of Darfield at large; and that the said part of the said common highway hereinbefore mentioned to be ruinous, deep, miry, broken, and in decay as aforesaid now is and during all the time when the same part of the said common highway as above alleged to be ruinous, deep, miry, broken, and in decay as aforesaid, was a common highway situate in the said township of Ardsley, and which but for the said prescription and usage would be repairable, maintainable, and amendable by the inhabitants of the said parish of Darfield at large; and that by reason of the premises the inhabitants of the said township of Ardsley, in the parish of Darfield aforesaid, during all the time last aforesaid, ought to have repaired, maintained, and amended, and still ought to repair, maintain, and amend the same part of the said common highway so being ruinous, deep, miry, broken, and in decay as aforesaid, when and so often as it hath been and shall be necessary so to do.

3rd count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the 17th April 1877, and long before there was and from thenceforth continuously hitherto there hath been and still is a certain common

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Queen's highway leading from Wombwell, in the said West Riding of the county of York towards and unto Barnsley, in the said riding, used for all the liege subjects of our Lady the Queen to go, return, pass, and repass on foot and on horseback and with cattle, carts, and carriages at their will and pleasure, and that a certain part of the said common Queen's highway being part of a highway called Wombwell-lane, and situate and being in the township of Ardsley, in the parish of Darfield, in the riding aforesaid, to wit, commencing at the boundary between the township of Ardsley aforesaid and the township of Wombwell, in the said riding, such boundary being at a point in the said highway distant 145yds. in a north-westerly direction from a bridge over the river Dove called Oldham otherwise Oldham Bridge on the said highway, where there are two gateways, the one on the south side of the said highway, giving access to an accommodation road leading to a house called Quarry House, in the said township of Ardsley, and the one on the north side of the said highway, giving access to a footpath leading to the village of Ardsley, and an accommodation road leading to Low Laithes Grange, in the said township of Wombwell, and extending from the said boundary in a westerly direction for a distance of 539yds. in length, and from 8yds. to 10yds. in breadth, on the said 17th day of April 1877, and from thence continuously until the day of the taking of this inquisition at and in the said township of Ardsley in the said parish of Darfield in the riding aforesaid was and still is very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that the liege subjects of our said Lady the Queen, in, through, and along the said part of the said common Queen's highway, with their horses, coaches, carts, and carriages could not, during the time last aforesaid, nor yet can go, return, pass, repass, ride and labour without great danger of their lives, and the loss of their goods, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen, so going, returning, passing, repassing, riding and labouring and against the peace of our said Lady the Queen, her crown and dignity. And that the said parish of Darfield, from the time whereof the memory of man is not to the contrary, has been, and yet is divided into several (to wit, seven) townships, whereof the said township of Ardsley is, and immemorably has been, one. And that within the said parish of Darfield, from the time whereof the memory of man is not to the contrary, there always has been, and still is, a certain ancient and laudable custom there used and approved of; that is to say, that each of the said several townships within the said parish of Darfield from the time whereof the memory of man is not to the contrary, have repaired, maintained, and amended, and have used and been accustomed to repair, maintain, and amend, and during all the time aforesaid of right, ought to have repaired, maintained, and amended, and still of right ought to repair, maintain, and amend all and every the Queen's common highways, situate, lying and being within their own respective townships, that would otherwise be repairable, maintainable, and amendable by the inhabitants of the said parish of Darfield at large, when and so often as the same should have been or might be necessary;

and that the inhabitants of the said parish of Darfield at large have not during all or any part of the time aforesaid repaired, maintained, or amended, and have not been used or accustomed to repair, maintain, or amend the Queen's common highways within the said parish. And that the said part of the said Queen's common highway so being ruinous, miry, deep, broken, and in great decay, is situate within the said township of Ardsley; and, but for the usage and custom aforesaid, would have been, and would now be, repairable, maintainable, and amendable by the inhabitants of the said parish of Darfield at large. And that the said part of the said Queen's common highway, from the time whereof the memory of man is not to the contrary, always has been, and still is, repairable, maintainable, and amendable by the inhabitants of the said township of Ardsley. And the jurors of our Lady the Queen do further present that the inhabitants of the said township of Ardsley, the said part of the said common Queen's highway so being ruinous, miry, deep, broken, and in decay as aforesaid, ought to have repaired, maintained, and amended, and still of right ought to repair, maintain, and amend, when and so often as it should or shall be necessary so to do.

The following facts were proved at the trial, and were admitted to be correct by both the prosecutors and the defendants.

The parish of Darfield, in which the township of Ardsley is situate, is divided into seven townships, each of which (with the two exceptions hereinafter mentioned) has repaired its own highways. There is an immemorial custom for each township to repair all highways (with the two exceptions hereinafter mentioned) within the limits of the respective townships.

Each township has appointed its own surveyors, and levied its own highway rates.

There have never been any repairs done by the parish at large, nor have any rates been levied for the parish at large, and no surveyors have been appointed for the parish.

The portion of road indicted is within the township of Ardsley, and is out of repair; although the portion of road lies within the township of Ardsley yet down to the year 1868, since which time Wombwell has denied its liability to repair the same, and so far as its previous history can be traced, it has always been repaired by the adjoining township of Wombwell, but there is no evidence to show when and for what consideration (if any) Wombwell commenced to repair the road in question.

There is also in the township of Ardsley another road which was till three years ago a turnpike road leading from Doncaster to Saltersbrook, 500yds. of this turnpike road situate in the township of Ardsley, have from time to time been repaired by the township of Darfield (one of the other seven townships into which the parish of Darfield is divided as aforesaid), Ardsley has repaired the remaining part of this turnpike road situate in Ardsley. These repairs (that is to say the repairs done by the township of Darfield, as well as those done by the township of Ardsley) were directed by the trustees of the turnpike road and paid for by them. The trustees paid a sum of money out of the tolls to the township of Darfield, and also a sum of money to the township of Ardsley to repair this road; and the sums of

By 3 & 4 Will. 4, c. 97, s. 20, it is enacted that

From and after the 10th Oct., in the year one thousand eight hundred and thirty-three, so much of the said schedule as is contained in the following words (that is to say): "Waters, *videlicet*, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state to be used for the purpose of compounding or making any of the said waters," shall be and the same is hereby repealed.

A rule *nisi* was moved for and granted, and came on for argument in the Exchequer Division, before Kelly, C.B., and Cleasby and Huddleston, BB. The Exchequer Division discharged the rule, giving judgment for the Crown.

The defendant appealed.

The case in the court below will be found fully reported 37 L. T. Rep. N. S. 247.

Herschell, Q.C. and Ince, Q.C. (with them *E. B. Cooper*) for the defendant.

Dicey (with him the *Solicitor-General*) for the Crown.

The arguments were the same as in the court below.

BRAMWELL, L.J.—I am of opinion that this judgment must be reversed. I do not agree with the majority of the court below. The first question for us is, whether in the reign of George III., directly after the passing of the Act, this article would have been within the description of articles contained in the schedule. Now, this is a preparation in a solid state to make a certain water. Is what is made from it a water of such a description as is contained in the schedule, or is it that and something else besides? Witnesses have been called on behalf of the Crown who say that the result of the composition is properly called a water "impregnated with carbonic acid gas." Now this description may have been wrong, and it might, perhaps, more properly have been described as a medicine, but the witnesses did not say so, but the contrary. It is said that, because there is another ingredient in the composition, it is not correctly called "a water impregnated with carbonic acid gas;" but surely that is wrong—at all events, I cannot agree with it. The next question is, does the Act which repeals this part of the schedule under the head "waters" cause this composition to come within the enumeration in the tail of the schedule? Now, it is possible that this composition would have come under the tail of the schedule if it had not been specifically mentioned in the schedule itself; but the question is to be considered with reference to the particular enactments with respect to mineral

wherein the person making, preparing, uttering, vending, or exposing for sale the same hath or claims to have any occult secret or art for the making or preparing of the same, or hath or claims to have any exclusive right or title to the making or preparing the same, or which have at any time heretofore been, now are, or shall hereafter be prepared, uttered, vended, or exposed to sale under the authority of any letters patent under the Great Seal, or which have at any time heretofore been, now are, or shall hereafter be by any public notice or advertisement, or by any written or printed paper or handbills, or by any label or words written or printed, affixed to, or delivered with any packet, box, bottle, phial, or other inclosure containing the same, held out, or recommended to the public by the makers, vendors, or proprietors thereof, as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure, or relief of any distemper, malady, ailment, disorder, or complaint incident to or in any wise affecting the human body."

waters. There is a general injunction against selling them without a stamp, and before the repealing Act was passed this article was taxable under the schedule, and not under the general words at the tail of the schedule. It would have been taxable as an artificial mineral water, whether claimed under a patent or by a person claiming an occult secret in the manufacture, or advertised and praised as a medicine. Then comes the repealing Act, which says that so much of the schedule as are contained in the following words: "Waters, viz., all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state to be used for the purpose of compounding or making any of the said waters," shall be repealed. The repealing Act says in effect, though not, in words, that artificial mineral waters are not to be taxed. The schedule has made certain things taxable; it is then repealed. The argument for the Crown is, that the taxation of the mineral waters is not repealed if you continue to sell them as patent medicines, or advertise them in the manner pointed out in the tail of the schedule. The effect of the repealing Act in my view is this: In the first place, the schedule taxes all artificial mineral waters, whether patented or not. The tail of the schedule says they must still be taxed if they are patented or advertised, &c.; but the repealing Act says, you must not tax artificial mineral waters at all. It is said that you cannot look at the repealed portion of an Act in order to make out the meaning of the remainder. If that is true, it follows that a clause in an Act, which at the time it is passed has one meaning, may obtain another meaning if some other part of the Act is repealed. That, in my opinion, would be an absurd result. It is right to say that when a portion of an Act is repealed it is as though it never had existed with respect to the particular matters dealt with by that portion. So much for the words of the statutes, and now for the substance of the matter. I think the intent of the Legislature was to exempt these waters from taxation, and not to make them taxable if the vendor said they were good for diseases. If that were not so, the Legislature might have said "the part of the schedule which refers to artificial mineral waters shall be repealed, provided nothing shall be repealed which in any way comes under the provision of the tail of the schedule." But it has not done so, and I think it meant to exempt such articles from taxation.

BRETT, L.J.—In this case there are two main questions. The first, under what part of the 52 Geo. 3, c. 150, does this composition come? and the second, what is the effect of the repealing statute? The one is a question of fact, the other of the construction of the first statute. This must be construed as if on the day after it was passed. It is for taxing certain medicinal compositions, and it uses this term, "all artificial mineral waters." That is intended, I think, to include what would be generally known and understood both by scientific and commercial people as "artificial mineral waters," and also to include what perhaps would not be so known, namely, "waters impregnated with carbonic acid gas." I do not think it makes a difference if an extraneous substance is used in the composition of the waters, whether it is a mineral or not. Now

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for the remaining part of the schedule. A schedule is part of a statute, and as much an enactment as any other part. Then under which part does this composition come? If it were such as people could not call it a water impregnated with carbonic acid gas, I should have thought that it was put in that specifying part of the statute. Was it a composition which when used with water would be a medicine, or something other than a medicine, within the words at the tail of the schedule? I think that the admitted facts are that, when compounded and mixed with water, it produced a carbonic acid gas water, with a foreign substance contained therein, and this is what the scientific witnesses said at the time. I am of opinion that it still remains a water impregnated with carbonic acid gas, such as to fall under the schedule, and that it would have been taxable under the schedule. The next question is, what is the effect of the repeal of part of the statute? The whole matter, no doubt, is to be construed as if the repealed part had never existed. The first thing you look at in a repealing statute, is that part of the original statute with which the repealing statute deals, where in the statute there are several enactments some of which are repealed. Here are two distinct enactments, one of specified waters, and the other of other substances. The two enactments are distinct, the one is repealed, and the other has nothing to do with it.

CORROD, L.J.—I am of the same opinion. The Crown here claims duty as upon a water advertised on paper as good for certain diseases, and the question here is, What is the effect of the repealing Act? And, first, as to the construction of 52 Geo. 3, the defendant says, "I was taxable under that Act, but it has been repealed." The Crown says, "No; you would not have been taxable under that, but under the tail of the schedule; or, at any rate, after the repeal of that part of the schedule you would have been liable under the tail of the schedule." As a matter of construction, is the preparation within the first part of the statute? If it is, it cannot be in the tail of the schedule. The Act was aimed at compositions which were sold as medicines. The witnesses for the Crown call it a mineral water that has medicinal properties. The question is, Can it be said that this production is a carbonic acid gas water? If it is something else in substance, then it is not within the schedule. I think it is not within the tail of the schedule, and that the Legislature did not intend to make such articles as this subjects of taxation. I am of opinion that the defendant is not liable.

Judgment reversed.

Solicitor for plaintiff, the *Solicitor of Inland Revenue*.

Solicitors for defendant, *Crouch and Spencer*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 19 and 26, 1878.

(Before BACON, V.C.)

LEWIS v. BOETFEUR. (a)

Charitable legacies—Pure and impure personality—Direction to pay charitable legacies out of pure personality—Direction to marshal—Residue—Construction.

A testator gave his wife a legacy of 1000*l.*, and bequeathed out of his pure personality a sum of 9000*l.* to trustees for his wife for life, and ultimately between certain charities; he then gave to the same trustees all other his real and personal estate for conversion, directing them to hold it, after paying the 9000*l.*, and after payment, out of such residuary estate as should not be wanted for the said legacy, of his debts, funeral and testamentary expenses, upon trust to pay the income to his wife for life, and after her death to raise out of his said residuary estate certain legacies for the benefit of the plaintiffs, and then legacies in favour of charities to the amount of 40,000*l.*, directing these latter legacies to be paid out of his pure personality; then, as to the "ultimate residue" of his said residuary estate, he directed his trustees to hold one-tenth for A., another tenth for B., and the remaining eight-tenths for a charity, and declared that the said "ultimate residue" should be marshalled so that the eight-tenths might be paid out of that part of his estate which might lawfully be appropriated to charitable purposes. There was only a sum of 2000*l.* impure personality. The testator's estate was not sufficient to pay all the legacies in full. On the death of the widow the question arose whether this 2000*l.* was chargeable in exoneration of the pure personality with the whole, or only rateably with the pure personality with its proportion of the debts, costs of administration, and legacies (other than the 9000*l.*)

Held, that there was nothing in the words of the will to controvert the general rule of the court, and that the debts, costs, and legacies were payable out of the pure personality (less the 9000*l.*) and impure personality rateably.

PETITION.—Alexander Boetfeur, by his will dated the 26th May 1868, after bequeathing to his wife, the defendant, Matilda Maria Allemora Constant Boetfeur, the sum of 1000*l.*, to be paid to her immediately after his decease, bequeathed "out of such part of my personal estate as may be lawfully applied to charitable purposes and preferably to any payment thereof" the sum of 9000*l.* to his wife, and the plaintiffs and petitioners, Richard Lewis and Charles Reeve, their executors, administrators, and assigns, upon trust for investment as therein mentioned, and to pay the income thereof to his said wife for her life, and after her death upon trust to divide the said sum of 9000*l.*, or the securities for the time being representing the same, among certain charities which he particularly mentioned. The testator then devised and bequeathed unto the same trustees, their heirs, executors, administrators, and assigns, all his real and personal estate which was not thereby otherwise disposed of, upon trust to sell, get in, and convert the same as

therein mentioned; and he directed that his trustees should hold "all my residuary estate, after satisfying in the first place out of such part of my personal estate as may lawfully be applied for charitable purposes the said legacy of 9000*l.*, and after paying out of such part of the said residuary estate as shall not be wanted for the said legacy my debts, funeral and testamentary expenses (all which debts and expenses I charge thereon), upon trust to pay" the income to his wife for life, and after her death, "to raise out of my said residuary estate and pay the legacies following," i. e., two legacies of 200*l.* and 50*l.*, and a legacy of 250*l.* to each of the plaintiffs, and then numerous charitable legacies amounting to 40,000*l.*, and directed that "the said last-mentioned legacies for charitable purposes shall be paid exclusively out of such part of my residuary personal estate as may lawfully be appropriated for such purposes, and preferably to any other payment thereout (except the said legacy of 9000*l.* directed to be paid in the first place and the legacies to the said Richard Lewis and Charles Reeve)," and as to "the ultimate residue of my said residuary estate," he directed his trustees to stand possessed as to one-tenth thereof in trust for one of the plaintiffs, and as to another one-tenth in trust for the other plaintiff, and as to the remaining eight-tenths thereof for the Royal National Lifeboat Institution, and the testator declared "that in the division of the said ultimate residue, the same shall, if and so far as necessary, be marshalled so that the two equal tenths shall be paid out of such parts thereof as cannot lawfully be appropriated for charitable purposes, to the intent that the remaining eight equal parts may consist of such personal estate as may be lawfully appropriated for such purpose."

The testator died on Dec. 30th 1869, having no real estate, though shortly before his death he had contracted for the sale to the Metropolitan Railway of a leasehold house for 2000*l.* It was admitted in argument that this sum of 2000*l.* was impure personalty, and that eight-tenths of the residue of this sum, after payment of what was payable thereout, was undisposed of. There was an administration suit respecting the testator's estate, and Mrs. Boetefeur, the tenant for life, having now died, the object of the present petition was to obtain a division of the funds in court among the unpaid legatees, and the question arose whether, on the construction of the will, this 2000*l.* impure personalty was chargeable in exoneration of the pure personalty with the whole, or only rateably with the pure personalty with its proportion of the debts, costs of administration, and legacies to the plaintiffs, the petitioners.

Sir Henry Jackson, Q.C. and Macnaghten for the petitioners.—This petition, which practically takes the place of a further consideration—that having been accidentally not reserved—is for the purpose of having it decided whether the 2000*l.* is to be drawn upon rateably with the other funds, or is wholly liable for payment of debts, costs, &c., in exoneration of the other legacies to charities. It is clear, on the authority of *Harrison v. Harrison* (1 Russ. & M. 71), that this 2000*l.* is impure personalty, and the case will be argued on that assumption. The testator has, by the words of the will, created a demonstrative fund out of which the charitable legacies are to be paid; but there are no words in the will sufficient to con-

vert the ordinary rules of this court applicable to the distribution of assets. The debts, costs, and legacies to the petitioners are therefore payable rateably out of the pure and impure personalty, and the minutes as framed are perfectly right.

Daniel Jones for the representatives of the widow.—By the terms of the will the 1000*l.* legacy to Mrs. Boetefeur must be paid first in full, for the legacies out of "residuary estate" cannot have priority over a legacy given first. It is "residue" after payment of the 1000*l.* legacy, and the directions as to preference apply only to legacies out of residue. Next, as to the payment of the debts and costs, it will be contended on behalf of the charities that *Miles v. Harrison* (30 L. T. Rep. N. S. 190; L. Rep. 9 Ch. 316) governs this case; but I submit that it does not. That case went entirely on the particular words of the will, which are not the same as here. The costs, debts, &c., are therefore payable rateably out of the pure personalty and the 2000*l.* impure personalty. Then, as to any portion of the impure personalty which is not disposed of by this means, there will be an intestacy, to one-half of which the widow would be entitled, as there are no children. I ask that this one-half, when ascertained, may be paid out to us at once, and the other half carried over. By this means we shall save the expense of a second application.

Rigby, for the Attorney-General, representing the charities.—Though the court will not marshal assets in favour of charities as a general rule, yet it will do so if the directions in the will are sufficiently explicit:

Miles v. Harrison (sup.);

Wills v. Bourne, L. Rep. 16 Eq. 487;

and ours is a stronger case even than these. The testator directs the charities to be preferred to all other claims, and therefore the costs of suit, the debts and legacies, must all come primarily out of the impure personalty:

Sturge v. Dimesdale, 1 L. T. Rep. 252; 6 Beav. 462;
Tempest v. Tempest, 29 L. T. Rep. 101; 7 De G. M. & G. 470.

were also referred to.

B. B. Rogers (*Westlake*, Q.C. with him) supported the contention of the Attorney-General.

Sir Henry Jackson, Q.C. in reply.—Unless there is a declaration to the contrary, each fund, pure or impure, must bear its own share rateably. In the cases before Lord Selborne (*Wills v. Bourne*) and Lord Cairns (*Miles v. Harrison*) words sufficient were found; but here the testator has avoided disturbing the general rule.

BACON, V.C.—I think the arguments which have been addressed to me, and the cases which have been cited, show that this is a question of construction. *Miles v. Harrison* and *Wills v. Bourne* (sup.), the cases that were before Lord Cairns and Lord Selborne, which I have been looking at during the course of the argument, proceed upon the words of the wills there existing, which were different to the words contained in this will. In the case before me the testator has plainly pointed out what he calls his residue, and he has charged upon this residue the payment of his debts and so on, which would unquestionably include, according to the practice of this court, the costs of this suit; having done that he gives the charitable legacies out of such part of his estate as may by law be applied to the payment of them, and he directs that the

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general residue which he has spoken of shall be marshalled. From the words of the will, a preferential payment of the charitable legacies is clear beyond all doubt; but it is a payment out of that property, the pure personality, which might be applied for that purpose. The direction to deal with the fund is equally clear. The direction to marshal, only has the effect of separating into two classes that which before was one, the residuary estate, which residuary estate is charged with the payment of the costs. Then comes the rule of the court, that where there are two legacies or two sets of interests they bear their proportions to the costs in the same proportion as they derive benefits under the will, and that is what the minutes in this case propose. I need not say that, if the cases cited applied to this case, I should be bound by them, and there would be nothing to reason about or to consider; but they do not, in my judgment, apply to this case, because here, guiding myself only by the words the testator has used, I find that he divides his estate into two classes—one goes to the payment of the charitable legacies and the other to the other legatees; and before either of them can claim anything the costs of the suit must be paid. The minutes will therefore be as proposed by Sir H. Jackson, and there being an intestacy as to any portion of the impure personality which remains undisposed of after bearing its share of the costs, debts, and legacies, Mr. Jones's clients will, upon production of satisfactory evidence of no issue, be entitled to have one-half of this sum when ascertained paid out to them, and the rest must be carried over.

Solicitors: *Few and Co., Stileman and Neate, Clayton, Sons, and Fergus, The Solicitor to the Treasury.*

QUEEN'S BENCH DIVISION.

Thursday, Feb. 21, 1878.

(Before COCKBURN, C. J. and MANISTY, J.)

FRANCIS (app.) v. MAAS AND ANOTHER (resps.). (a)
Seeds—Adulteration—Appearance—Kind—Quality
—32 & 33 Vict. c. 112, ss. 2 and 3.

The respondents were charged under the Adulteration of Seeds Act 1869 with causing to be dyed, with intent to enable some other person to defraud, certain clover seeds.

They were proved to have submitted clover seeds to a process of sulphur-smoking, whereby their appearance was greatly improved, but still represented no other sort of seed. The magistrate refused to convict.

Held, upon a case stated, that the Act being expressly directed to adulteration, and the offence of dyeing being limited to process by which the appearance of another kind of seed is acquired, this was not a fraud within the application of the Act; and that the magistrate was right.

This was a case stated by one of the Metropolitan police magistrates sitting at Southwark Police Court, under the 20 & 21 Vict. c. 43, in order to obtain the opinion of the High Court of Justice upon the question of law therewith submitted, at the request of the complainant, who was dissatisfied with the judgment on a summons heard on Dec. 10, 1877, as being in law erroneous.

Messrs. Frith and Maas, seed merchants, appeared to a summons taken out against them by

Alexander Francis, under the Seeds Adulteration Act (32 & 33 Vict. c. 112), "For that they did unlawfully, with intent to enable some other person to defraud, cause to be dyed certain seeds within the true intent and meaning of the Act, viz., clover seeds," &c.

It was proved to the magistrate's satisfaction at the hearing that the defendants had in fact submitted the seeds in question to a certain process of sulphur-smoking, whereby their appearance had been greatly improved, and that in short a very inferior and comparatively worthless sample of old clover seed had by the process been made to resemble new and valuable clover seed; but it was not proved, nor alleged, that there was any representation that the seed was other in sort than what it really was, viz., clover seed.

In the interpretation clause of the Act (sect. 2) the term "to dye seeds" means to give to seeds, by any process of colouring, dyeing, sulphur-smoking, or other artificial means, the appearance of seeds of another kind. It was argued for the complainant that these words would include manipulation of seeds by such process or artificial means in order fraudulently to present the appearance of improved quality.

The magistrate was of opinion that the words of the statute, "seeds of another kind," meant a totally different thing from old and inferior seeds of the same kind altered so as to pass for new and reliable seeds; and holding that the conduct of the defendants, however reprehensible, did not bring them within the penalties of the Act, he dismissed the summons.

If the court should be of opinion that the magistrate was wrong, he prayed that the case might be remitted to him for re-hearing.

Grain argued for the appellant.—There can be no doubt that the respondents, upon the facts proved, would have been within the words of the 3rd section, if the meaning of that section were not limited by the interpretation clause: "Every person who, with intent to defraud or to enable another person to defraud, does any of the following things; that is to say—(1) kills or causes to be killed any seeds; or (2) dyes or causes to be dyed any seeds; or (3) sells or causes to be sold any killed or dyed seeds, shall be punished as follows, that is to say," &c. The title of the statute, which is an Act to prevent the Adulteration of Seeds, and the preamble, "Whereas the practice of adulterating seeds in fraud of Her Majesty's subjects, and to the great detriment of agriculture, requires to be repressed by more effectual laws than those which are now in force for that purpose," both go to show that the object of the Legislature was intended to apply to the fraud established in this case. The word "kind," although technically different from "quality," may be said to include that meaning in popular language.

Lyon for the respondent.—Even if the word "kind" can be taken to mean "sort," there is no evidence here of an offence against this Act. There was no adulteration, and the quality of the seed was not injured by what the respondents did. [MANISTY, J.—The magistrate sufficiently finds an intent to defraud; the apparent quality was altered.] The words of the Act do not cover any such alteration.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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Grain in reply.—The adulteration was accomplished by the mixture of sulphur smoke. [COCKBURN, C. J.—But the clover was not corrupted by foreign substance.]

COCKBURN, C. J.—We have arrived at the conclusion to which I consider myself forced by the words of the statute. It is impossible, without violence to the language used, to carry out what would seem to be reasonably the object of the Legislature. There can be no doubt this was a detestable and abominable fraud; but we are called upon to say whether it is such a fraud as to come within the provisions of a penal Act of Parliament. I can come to no other conclusion than that this statute does not touch the matter. The preamble shows that it was directed to repress the practice of adulterating seeds. Now, adulteration means the infusion of a foreign article, and it does not seem to me that sulphur-smoking meets that definition. We must next look at the nature of the offence described in the Act itself, and we find that "to dye seeds means to give to seeds, by any process of colouring, dyeing, sulphur-smoking, or other artificial means, the appearance of seeds of another kind." The effect of sulphur-smoking is described in this case as giving these clover seeds the appearance of being greatly improved; but it is expressly stated that the seeds were not thereby made to represent anything but clover seed. The word "kind" cannot mean quality, and, although these seeds are made to appear of another quality than they really are, yet they still appear to be clover seeds. I should willingly apply the Act to this case if I could do so without forcing the language beyond its sense.

MANISTY, J.—It is fair to express the regret which we cannot but feel that we are unable to include this case in the application of the Act. The preamble points to the practice of adulterating seeds as the repressive object of the Act. In construing a statute there is nothing of necessity to prevent its provisions from going beyond the preamble; but in my opinion what was done in this case by the respondents was certainly not adulteration. Another canon of construction is, that if the meaning be not reasonably clear, the words of a statute are not to be interpreted to impose a penalty for an offence charged against them. Reading the facts proved by the light of the interpretation clause, the respondents are charged only with giving clover seeds the appearance of an improved quality upon that which they really possessed by a process of sulphur-smoking. I fear upon all sound principles we must adopt the view which the stipendiary magistrate has taken of the charge.

Judgment for respondents.

Solicitor for appellants, *Tahourdin and Hargeaves.*

Solicitors for respondents, *Simpson and Palmer.*

COMMON PLEAS DIVISION.

Monday, Feb. 11, 1878.

(Before GROVE, J.)

HALLIWELL v. COUNSELL. (a)

Master and servant—Apprentice—Surety—Discharge of—Grievous bodily harm—Reasonable ground for fear.

To a statement of claim alleging that the defendant had become surety on an indenture of apprenticeship for the faithful service of the apprentice, and that the apprentice had not faithfully served, but had absented himself, the defendant pleaded that while the apprentice was in the plaintiff's service the plaintiff assaulted him and inflicted personal injury upon him, and threatened to do him grievous bodily harm, and that the apprentice, fearing that grievous bodily harm would be inflicted upon him, left the plaintiff's service.

Held, that the statement of defence should be amended by adding an allegation that the apprentice had reasonable ground for such fear.

DEMURRER to a statement of defence.

The statement of claim alleged that the defendant had become surety by covenant for the due and faithful fulfilment by an apprentice of his contract of apprenticeship, and that the apprentice had broken his said contract by unlawfully absenting himself from the service of the master. The statement of defence admitted the contract of suretyship, and pleaded that while the apprentice was faithfully serving the plaintiff, the plaintiff actually assaulted him, and inflicted personal injury upon him, and further threatened to do him grievous bodily harm, and that the apprentice, fearing that if he remained longer in the service of the plaintiff grievous bodily harm might in fact be inflicted upon him, left the service of the plaintiff before the expiration of the term stipulated for in the contract of apprenticeship, which was the grievance alleged. The plaintiff demurred to the above statement of defence.

Bigham, for the plaintiff, in support of the demurrer.—The facts alleged are no real defence to the action. The slightest corporal chastisement, such as that which a master has a right to inflict upon a boy for misconduct, would satisfy the allegation that an assault had been committed, and personal injury inflicted. As to the grievous bodily harm, it is not alleged that any was in fact sustained, and the mere fact that a timid boy was afraid it might be is surely not enough to justify a breach of the contract of service. His fear might have been wholly unreasonable.

Mattinson for the defendant.—There is no modern authority establishing that a master may chastise his apprentice at all; and the *dicta* that refer to his right to do so might just as well be relied upon to justify him in beating at adult servant. "Grievous bodily harm" is something well recognised by the criminal law, however difficult it may be to define, and does include slight punishment. If such a threat was uttered, that would make the fear of the apprentice reasonable.

GROVE, J.—I am inclined to think that the statement of defence, as it stands, is not a good plea. It alleges that personal injury was suffered, which may mean very little; and that grievous bodily harm was feared in consequence of a threat used by the plaintiff. If it had gone on to say that

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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the apprentice had reasonable grounds for fearing that grievous bodily harm would be inflicted upon him, I should have had no doubt that it would have been sufficient. I think the demurrer should be allowed, with liberty to amend by inserting such an allegation in the statement of defence, but without costs.

Demurrer allowed; no costs.

Solicitors for the plaintiff, *Goldring and Jukes.*

Solicitors for the defendants, *Sharp and Ullithorne.*

Friday, March 1, 1878.

(Before DENMAN and LINDLEY, JJ.)

FIELDING v. RHYL IMPROVEMENT COMMISSIONERS. (a)

Public Health—Local government—Bye-laws—Public Health Acts 1848 and 1858—Towns Improvement Act 1847—Building—Notice to town surveyor.

The appellant was convicted by two justices for an offence against certain bye-laws made by local improvement commissioners under powers conferred by the Public Health Acts 1848, 1858, and a private local Act which incorporated the Towns Improvement Act 1847. The bye-laws in question provided (inter alia) that notice should be given to the town surveyor of any new building which it was intended to erect, and that detail plans and sections of the same should be deposited at his office, showing the position, form, and dimensions of such building, and of the water-closet, privy, well, and all other appurtenances, with a description of the materials and of the intended mode of drainage. The bye-laws had been published in accordance with the requirements of the Public Health Act 1848, but not with those of the Towns Improvement Act 1847. The appellant, who was about to build a number of cottages, erected two brick structures within the district without complying with the above bye-laws. One of such structures was intended for a brick-kiln, the other for the storing of tools and the general convenience of the workmen; and the justices found as a fact that the appellant intended to pull down both structures upon the completion of the cottages.

Held, first, that the bye-laws had been sufficiently published by compliance with the provisions of the Public Health Act 1848.

Held, secondly, that the structures in question were not "buildings" within the meaning of the bye-laws; and that, if the bye-laws had been intended to include them, they would have been unreasonable.

Query, how far an excessive delegation of the powers of a local authority to a town surveyor may render such bye-laws illegal.

APPEAL from justices under 20 & 21 Vict. c. 43. The following case was stated:—

This is a case stated by the undersigned, two of Her Majesty's justices of the peace in and for the county of Flint, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before us as hereinafter stated.

1. At a petty sessions holden at Rhyl, in and for the division of Rhuddlan, in the county of Flint, on the 30th April 1877, and thence adjourned until the 28th May 1877, an application preferred

by Arthur Rowlands, clerk to the Rhyl Improvement Commissioners (hereinafter called the respondents), against James Fielding (hereinafter called the appellant), under the bye-laws Nos. 36 and 41 of the said commissioners, made on the 1st Dec. 1865 (and duly confirmed by Her Majesty's Secretary of State), charging for that he, the said James Fielding, on the 19th Feb. 1877, at the parish of Rhuddlan, in the said county of Flint, unlawfully did erect certain new buildings and works within the district of the said Rhyl Improvement Commissioners, without giving (and the said James Fielding did then and there omit to give) notice to the town surveyor of Rhyl aforesaid of his (the said James Fielding's) intention so to do, and without at the same time leaving, or causing to be left, detail plans and sections of such buildings and works for the approval of the said surveyor, contrary to the bye-laws in that behalf duly made by the said commissioners then in force in the said district, and contrary to the form of the statute in such case made and provided, was heard and determined by us, the said parties respectively being then present; and upon such hearing the appellant was duly convicted before us of the said offence, and we adjudged him to forfeit and pay the sum of 2*l.*, to be paid and applied according to the law, and also to pay the complainant, the said Arthur Rowlands, the sum of 7*l.* 17*s.* for his costs in that behalf, and if the said several sums were not paid forthwith, we ordered that the same should be levied by distress and sale of the goods and chattels of the said James Fielding.

2. And whereas the appellant being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, hath, pursuant to sect. 2 of the said statute (20 & 21 Vict. c. 43), duly applied to us in writing to state and sign a case setting forth the facts and the grounds of such our determination as aforesaid for the opinion of this honourable court, and hath duly entered into a recognisance as required by the statute in that behalf.

3. Now, therefore, we, the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case.

4. Upon the hearing of the information it was proved on the part of the respondents, and found as a fact, or admitted on the part of the appellant, that on Feb. 19, 1877, certain structures of brick and mortar were in course of erection on land of the appellant, situate within the district of the Rhyl Improvement Commissioners. Structure No. 1 was built with 9in. walls, and contained two rooms, one of which had a fireplace and chimney. Structure No. 2 consisted of upright walls some two feet thick in the form of a square, having an opening at either end, and measuring about twelve yards on each side. The appellant had in contemplation the building of a number of cottages in the immediate neighbourhood of such structures, and the first-mentioned structure was for the storing of tools and general convenience of the workmen proposed to be employed in the erection of such cottages; the other being for the purpose of a brick-kiln. Both structures were intended to be pulled down by the appellant upon the completion of the cottages in question. Notice was sent by the town surveyor to the appellant that he was infringing the bye-laws of the com-

missioners, to which the appellant replied by inquiring which of the bye-laws was being infringed. The surveyor pointed out that he was infringing the bye-laws relating to the erection of new buildings within the district of Rhyl. No notice in writing or detail plans and sections of the structures or of the proposed cottages were at any time sent or submitted to the town surveyor. The adoption of various sections, including sections 115 and 116 of the Public Health Act 1848 (11 & 12 Vict. c. 63) and sect. 34 of the Public Health Act 1858 (21 & 22 Vict. s. 98) by the Rhyl Improvement Commissioners was proved.

The bye-laws in question were put in evidence, and proved, as was also their printing and publication, in conformity with sects. 115 and 116 of the Public Health Act 1848. A copy of such bye-laws accompanies this case. On the part of the appellant it was contended, firstly, that the bye-laws were bad; (a) from insufficient publication, and that proof should have been given that such bye-laws were published in the manner directed by sect. 105 of the Towns Improvement Act 1847 (10 & 11 Vict. c. 34), which Act is incorporated in the Rhyl Improvement Act 1853, and that a copy thereof should have been painted and placed on boards and hung upon some conspicuous part of the locality to which the same relate, and that the publication, as directed by the Public Health Act 1848, was insufficient; (b) that such bye-laws exceeded the powers given by the Act under which they were made; (c) and that they were unreasonable, and therefore bad at law, in leaving the approval and disapproval of plans in the hands of the town surveyor. Secondly, that the structures in question, being only temporary erections, were not buildings within the meaning of the bye-laws and of the Act of Parliament under which the bye-laws were framed.

On the part of the respondents it was contended that proof of publication of the bye-laws, as required by sects. 115 and 116 of the Public Health Act 1848, was sufficient, and that the Town Improvement Act 1847 did not govern the matter; that the bye-laws in question were just and reasonable; that the structures in question were buildings within the meaning of the bye-laws and of the Public Health Act 1858; that the question whether they were or were not of a temporary character did not become an element in the matter; and even if it did, that in face of the fact that no notice whatever had been given by the appellant to the surveyor of the proposed erections, or of their character or purpose, or of the cottages proposed to be erected, the respondents were compelled to treat them as ordinary and permanent structures.

We, however, being of opinion that the publication of the said bye-laws was properly proved, that they were just and reasonable and within the powers given by the Act of Parliament in that behalf, and that the structures in question were buildings within the meaning of such bye-laws, gave our determination against the appellant in manner before stated.

The questions of law for the opinion of this court therefore are, first, whether publication of the said bye-laws was sufficiently proved? Secondly, whether such bye-laws are just and reasonable within the powers for that purpose given by the Public Health Acts 1848 and 1858? Thirdly, whether the structures in question are

buildings within the meaning of the said bye-laws? If the court should be of opinion that the said conviction was legally and properly made, then such conviction is to stand; but if the court should be of opinion otherwise, then the said conviction is to be quashed. Signed by the Justices.

By sect. 28 of the Rhyl Improvement Act 1872 (35 & 36 Vict. c. civ.), it was enacted that the Rhyl Improvement Commissioners might make bye-laws with regard to certain specified matters, including the regulation of all new buildings within the district; and it was further provided that the provisions of the Towns Improvement Clauses Act 1847, with respect to bye-laws, should apply to all the bye-laws so made, and to all the bye-laws respectively authorised to be made by that Act, and that the prescribed manner of confirmation should be as the local government board should in each case determine.

The commissioners had accordingly made certain bye-laws, of which the following were referred to and are material:

36. *Notice, Plans, &c., of New Buildings.*—Every person who shall intend to erect any new building shall give a week's notice to the town surveyor of such intention, by writing delivered to the said surveyor or left at his office, and shall at the same time leave or cause to be left at the said office detail plans and sections of every floor of such intended new buildings, drawn to a scale of not less than one inch to every eight feet, showing the position, form, and dimensions of the several parts of such building, and of the water-closet, privy, cesspool, ashpit, well, and all other appurtenances; and such plans and sections shall be accompanied by a description of the materials of which the building is proposed to be constructed, and of the intended mode of drainage and means of water supply.

37. *Powers of the Town Surveyor to disapprove of Plans.*—If the town surveyor disapprove of the mode proposed in such notice, section, and plans, he shall within six days after receiving the same give notice in writing to such person of the particulars of such disapproval, and of the requirements of the commissioners in respect to the proposed work; and it shall not be lawful to begin to build or rebuild any such building, or to construct any drain, privy, water-closet, or ashpit, until the section and plans have been approved by the town surveyor, and no person shall deviate from such approved section or plan.

40. *Notice by Town Surveyor in case of Irregularity.*—If in doing any work, or erecting any building, anything is done contrary to the rules herein contained, or anything required by these rules is omitted to be done, or if the town surveyor finds, on surveying or inspecting any building or work, that the same is so far advanced that he cannot ascertain whether anything has been done contrary to the rules herein contained, or whether anything required by such rules has been omitted to be done; the town surveyor shall (within six hours after such survey or inspection) give to the builder or person engaged in erecting such building, or in doing such work, notice in writing, requiring such builder or person, within forty-eight hours from the date of such notice, to cause anything done contrary to the rules herein contained to be amended, or to do anything required to be done by such rules which has been omitted to be done; or to cause so much of any building or work as prevents such town surveyor from ascertaining whether anything has been done or omitted to be done, as aforesaid, to be to a sufficient extent cut into, laid open, or pulled down.

41. *Penalties for not giving Notices, &c.*—If any owner or person shall construct, or cause to be constructed, any works, or do any act, or omit to do any act, or comply with any requirement of the commissioners, or the town surveyor, contrary to the provisions herein contained, he shall be liable for each offence to a penalty not exceeding 5*l.*, and he shall pay a further sum not exceeding 40*s.* for each and every day during which such work shall continue or remain contrary to the said provisions; and the town surveyor may, if he shall think fit, cause such work to be removed, altered, pulled down, or otherwise

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dealt with, as the case may require, and the expenses incurred by him in so doing shall be repaid by the offender, and be recoverable from him in a summary manner.

It was proved that the commissioners had adopted sects. 115 and 116 of the Public Health Act 1848 (11 & 12 Vict. c. 63), and sect. 34 of the Public Health Act 1858, and that the bye-laws made by them had been published in conformity with those provisions. The requirements of the Towns Improvements Act 1847 (10 & 11 Vict. c. 34) had not been complied with, so far as the publication of the bye-laws was concerned.

Wills for the appellant.—First, we say that the bye-laws were insufficiently published. The mode of publication prescribed by the Rhyl Improvement Act 1852, and by the Public Health Act 1847, has not been followed; and it is not sufficient to have complied with the regulations of the Public Health Act 1848 (11 & 12 Vict. c. 63), s. 116. Secondly, the bye-laws themselves are illegal. The powers delegated by them to the surveyor are unreasonable and excessive (bye-laws 37, 41). Thirdly, the structures in respect of which the appellant was convicted were not buildings within the meaning of the bye-laws.

Higgins (*Musgrave* with him) for the respondents.—The bye-laws were properly made and published under the Act of 1848. We had no power to make bye-laws under the Towns Improvement Act 1847, and therefore could not publish them according to the provisions of that Act. The power deputed to the surveyor is not excessive, and the bye-laws are therefore reasonable:

Hall v. Nixon, 32 L. T. Rep. N. S. 87; L. Rep. 10 Q. B. 153.

They are not confined in their operation to dwelling-houses, and include the structures in question.

Wills in reply.

DENMAN, J.—In this case the appellant Fielding complains of the decision of two justices in favour of the Rhyl Improvement Commissioners, the respondents, under which the appellant was fined under a bye-law made by the commissioners. The bye-laws on which the justices professed to act were bye-laws 36 and 41 of those made by the respondents; and it is argued that the appellant ought to succeed on the first point made in this case, because there was no sufficient publication of these bye-laws. The answer given to that is, I think, a sufficient one; for, as far as I can see, it appears to me that the particular matter to which this bye-law applies was not a matter which came within the statute which requires publication by means of a board, but within the statute which only requires publication by putting up a copy of the bye-laws in a certain part of the place or office. It is not, however, on that ground that I am going to decide the case, as there is another reason, much more free from doubt, for deciding it in favour of the appellant. The second question raised is, whether the bye-laws are just and reasonable within the powers given to the commissioners by the Public Health Acts of 1848 and 1858. On that second question it appears to me that the answer depends upon the construction to be put on the bye-laws themselves; and if I could come to the conclusion that the bye-laws could fairly bear the construction put on them by the respondents, I should think them unjust, unreasonable, and absurd; and it is

because I think that would be the result of deciding in favour of the respondents, that I am now holding them to be reasonable and just. The third question is, whether these structures are buildings within the meaning of the bye-law. The word building, which is the word used, is a general word and might mean anything that could possibly be called a building; but I do not think the bye-law can be construed in that way, when we look at all its provisions as we are bound to do. The bye-law relied on by the respondents is r. 36, and it is to the effect that every person intending to erect a new building within the district shall give a week's notice, and leave or cause to be left at the office of the town surveyor detail plans and sections of every floor of such intended new building, showing the position, form, and dimensions of all the parts, and of the water-closet, privy, cesspool, and all other appurtenances thereof. It is true that the word building is a large word, and in itself might include any erection which could in any sense be designated by such an expression. But looking at the whole, it would be a *reductio ad absurdum* to apply these bye-laws to at least one of these structures. One of them is a blank wall, apparently erected on ground without any residential quality whatever, and for the purpose, as is alleged, of having bricks burnt within it. It would be absurd to suppose that was a building for which plans and sections as described above were to be supplied. It cannot have been intended to apply to such a building as this. So far as that part of the case goes the argument is very strong. With regard to the other structure there is more difficulty. That is described to be a structure of brick and mortar in course of erection on land of the appellant with nine-inch walls, containing two rooms, a fireplace, and a chimney. Then it goes on to say this structure was intended to be used for the storing of tools and general convenience of the workmen. It does not say that anybody was to dwell in it, or that it was to serve any purpose but the storing of tools and the general convenience of the workmen; and it does by inference say that it was a temporary structure, to be used merely for the purposes contemplated in what I have just read. It would be, in my opinion, absurd to hold that this was a building within the bye-law, so as to render it necessary to give notice of its erection and deposit plans with the local commissioners. I think therefore the justices were wrong.

LINDLEY, J.—I am of the same opinion. The question turns on the true construction of the 36th bye-law. I may say, first, on the preliminary point, that I think it may be properly held that these bye-laws were made under the Act of 1848, and not under the Act of 1847; and in that case the objection which has been taken to the sufficiency of their publication falls to the ground. Coming to the bye-law itself, we must look first at the general drift of the laws, and consider their headings and subdivisions. The heading of bye-law 38 is, "Notice, plans, &c., of new buildings." Now, we have not in this case to determine, what might be a difficult question, as to whether any particular building is a building or not, where it is not a temporary one, because I understand from the case that these buildings were temporary. I understand that the justices were satisfied that they were temporary merely, and that the builder

intended to pull them down after a short time. That is not saying merely that the builder said he intended to remove them, but that they were actually temporary as a matter of fact. I cannot think that this bye-law is applicable to such a structure as this. It is quite obvious that the persons who framed these laws never dreamed of their being applied in such a way; and, if there were any words in them which did force me to think they did apply, I should think them unreasonable and absurd. But I do not see any such words, and hold that, on the true construction of this bye-law, it does not apply to such structures. I need not allude further to the other points raised, or decide how far these bye-laws exceed the proper limits of the delegation of authority, but I was considerably impressed by that part of the argument. It is, no doubt, a very considerable delegation of authority. Our judgment must be for the appellant.

Solicitors for the appellant, *Williamson, Hill, and Co.*

Solicitors for the respondents, *Finney and Bruff*, for *Louis and Edward, Ruthin.*

EXCHEQUER DIVISION.

Dec. 5 and 6, 1877.

(Before KELLY, O.B., POLLOCK and CLEASBY, BB.)

THE CHARTERED MERCANTILE BANK OF INDIA v. WILSON. (a)

Inland revenue—Inhabited house duty—Separate dwelling-house—Premises occupied for the purpose of trade only—Telegraph company—48 Geo. 3, c. 55, sched. B., rules 6, 14—14 & 15 Vict. c. 36—32 & 33 Vict. c. 14, s. 11.

The building, known as Nos. 65 and 66, Old Broad-street, consisted of a basement, ground floor, and of upper floors running over the ground floor of the premises No. 66, as well as over a portion of No. 65. There was an entrance hall on the ground floor of No. 66, with a staircase leading to the first and upper floors. No. 66 comprised the basement under this hall, the hall itself, and the whole of the first and upper floors. No. 65 consisted of the remainder of the ground floor and basement. The two premises had distinct and separate entrances into the street, but a second entrance to No. 66 was afforded through No. 65, by means of a door in a lobby leading from the entrance of No. 65 to the entrance hall of No. 66. This door afforded the sole internal communication between the two premises, and was kept open during banking hours, in order to afford a second entrance into No. 66, but, when closed at night by the bank porter, completely separated the two premises. No. 65 was occupied by the appellants, and No. 66, with the exception of a room occupied by a caretaker employed by the appellants, was let to a telegraph company, and used by them solely for the purposes of their business.

Held, that the premises No. 65 and 66 were properly rated to the inhabited house duty as one inhabited house.

Held also (Kelly, O.B. and Pollock, B.; Cleasby B. dissenting), that premises occupied for the purpose of carrying on the business of a telegraph company are premises occupied for "the purposes of trade only," within the meaning of 32 &

33 Vict. c. 14, s. 11, and are therefore exempt from assessment to the inhabited house duty.

CASE, stated under 37 Vict. c. 16, s. 9, by commissioners for the general purposes of the Income Tax Acts, and for executing the Acts relating to the inhabited house duties, on appeal against an assessment to the inhabited house duties for the year ending 5th April 1874, of 5500*l.*, being the full value of the whole of the appellants' premises, Nos. 65 and 66, Old Broad-street, in the city of London, the appellants claiming exemption under the Act 32 & 33 Vict. c. 14, s. 11.

The premises, constituting Nos. 65 and 66, Old Broad-street, are situate at the corner of Old Broad-street and Austinfriars. They consist of a basement, ground floor, and of upper floors running over a portion of the premises known as No. 65. There are two separate main entrances from the street, one in Old Broad-street, known as No. 65, and the other in Austinfriars, known as No. 66. The entrance to the portion of the premises known as No. 66 is in Austinfriars. There is a lobby on the ground floor, containing a staircase leading to the first and upper floors, and a staircase leading to the basement under this lobby. These premises No. 66 comprise the basement under this lobby, the lobby itself, and the whole of the first and upper floors.

The entrance to No. 65 is in Old Broad-street, and the premises consist of the remainder of the ground floor and basement. The basements of No. 65 and No. 66 are completely separated by brick walls and approached by separate staircases.

The premises No. 65 are in the occupation of the appellants, and used by them as a bank and for the purpose of carrying on their business as bankers.

The premises No. 66 are (with the exception of two rooms on the third floor, occupied by a caretaker, employed by the appellants, and his wife, who reside there for the protection of the entire premises) let to the Eastern Telegraph Company (Limited), and are occupied by them solely for the purpose of carrying on the business of the company. The whole of the orders for the management of the business of the company are issued from the premises so occupied by the company, and all the accounts between the company and their customers, and between the company and their own shareholders, are kept on such premises.

With the exception of the caretaker and his wife, no person sleeps on any portion of the premises No. 65 or 66.

The entrance to No. 65 from Old Broad-street opens into a lobby, through which is the access to the appellants' bank premises.

The only internal communication between Nos. 65 and 66 is through this lobby.

The regular entrance to the premises No. 66 is by the door from Austinfriars; but during banking hours the iron doors between the lobby to No. 65 and that to No. 66 are allowed by the appellants to be open so as to enable the Eastern Telegraph Company, by crossing the lobby to No. 65, to have an access to their premises from Old Broad-street, which is to some more convenient than the entrance from Austinfriars. At the close of the bank business of the day these iron doors are, with the entrance No. 65, Old Broad-street, closed and locked by the bank porter who keeps the keys of

(a) Reported by H. F. DICKENS, Esq., Barrister-at-Law.

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both doors, and when this is done the bank premises are completely shut off from the rest of the building, and the only approach to the premises No. 66 is from Austinfriars.

In the valuation list made for the City under the Valuation (Metropolis) Act 1869, in the year 1870, the premises were valued as one building and were thenceforth until 1875 rated to the poor as one building; but upon the appeal of the appellants against the new valuation list made in the year 1875 the assessment has been divided and Nos. 65 and 66 are now separately assessed and rated to the poor.

The appellants contend, first, that no part of the premises form an inhabited dwelling-house within the meaning of 14 & 15 Vict. c. 36, sect. 2, and that, even if they come within that section, they would still be exempt under the provisions of 32 & 33 Vict. c. 14, s. 11, inasmuch as they were used for the purposes of trade only. Second, that the bank premises are occupied for the purpose of trade only, and that they are so structurally severed from the rest of the building as to be a different tenement for rating purposes, and that, even if the premises in the occupation of the telegraph company are not exempt and are not occupied as trade premises within the meaning of this statute, yet the assessment is wrong inasmuch as the whole of the premises are rated therein. Third, that whether this is so or not, the assessment was bad as being to the full value, although a considerable part of the premises were in the occupation of the appellants for the purposes of trade only.

In the year 1870 the appellants were assessed to the inhabited house duty for the year 1869 ending the 5th April 1870, as the occupiers of the premises No. 65, and having by mistake paid the amount, it was, on their application to the Board of Inland Revenue, refunded on the ground that the premises occupied by the appellants were exempt under the 11th section of the Act 32 & 33 Vict. c. 14. During the whole of that year 1869-70, the premises No. 66 were unoccupied, with the exception of the two rooms on the third floor, occupied by the caretaker, but from that time the occupation has been as at present.

The premises were again assessed for 1872-3, and an appeal was made against that assessment on the 12th June 1873, when it was contended on behalf of the Crown that this case should be governed by case No. 2845, decided by the judges, in which it was stated that in their opinion the booking offices, waiting room, board room, and other offices of the South-Eastern Railway Company, were liable as not being used for the purposes of trade, and as these premises were similarly occupied by the telegraph company and the bank, they were also liable. The commissioners confirmed the assessment on that occasion, and the duty for 1872 was paid.

The appellants, however, have taken the first opportunity of appealing against the assessment since the statute allowing an appeal was passed.

Finding on the present occasion that the circumstances were unaltered, the commissioners again confirmed the assessment, whereupon the appellants declared their dissatisfaction with the decision, and duly required them to state and sign a case for the opinion of the Court of Exchequer.

The Act under which the inhabited house duty is levied is that of 14 & 15 Vict. c. 36, the assessment being regulated under the rules of 48 Geo. 3, c. 55, sched. B.

32 & 33 Vict. c. 14, s. 11:

Any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a warehouse, for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or building used as a shop or counting-house, shall be exempt from inhabited house duty, although a servant or other person shall dwell in such tenement or part of a tenement for the protection thereof.

F. M. White, Q.C. (Saunderson with him) for the appellants.—The two houses in respect of which this assessment has been made are distinct and separate tenements, and should therefore, if liable to taxation, be separately assessed. But they are exempt from assessment as premises occupied for purposes of trade only, within the meaning of the exemption contained in sect. 11 of 32 & 33 Vict. c. 14. The business of a telegraph company is a trade within the meaning of that section, even though no actual buying and selling takes place. On the first point he cited

The Attorney-General The Mutual Tontine Westminster Chambers Association, 1 Ex. Div. 489.

Sir H. Giffard, S.G. (Dicey with him) for the Crown.—The first question is this—Does the building fall within the exemption of 32 & 33 Vict. c. 14, s. 11. It is not occupied for "the purposes of trade only." It is clear from the definitions given in Webster's and Richardson's Dictionaries that trade means actual buying and selling. Under the Bankruptcy Acts the test as to whether or not a man was a trader was, whether his business was one of which buying and selling was a necessary and indispensable constituent. The business of a life insurance company has been held not to be within the exemption:

The Edinburgh Life Assurance Company v. The Solicitor of Inland Revenue, Cases in the Court of Session, 4th series, vol. 2, p. 394.

He was proceeding to argue the question as to whether the premises in question formed one inhabited house, when he was stopped by the Court.

KELLY, C.B.—We think we are justified in pronouncing our judgment in this case in its present stage. With regard to the question which has been argued by counsel for the appellants, and which has not yet been argued by the Solicitor-General, speaking for myself alone, I might, independently of the authorities in this court, have been disposed to entertain some doubts whether this was really to be deemed one tenement, and so to be liable to the duty in question. But my learned brethren are decidedly of opinion that it is to be deemed one tenement, and that therefore it is liable to duty; and on looking to the authorities, whatever doubts I might have been disposed to entertain, I do not feel disposed to differ with my brethren, and therefore upon that point our judgment must be for the Crown. But with regard to the question of whether this tenement, or whatever it may be called, is to be deemed a tenement occupied as a house for the purpose of trade only, I am clearly of opinion that it is to be deemed a house or tenement occupied for the purposes of trade. The main ground upon which I found that opinion is that in these days, and in this great commercial country, we are bound to put a large and liberal con-

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struction upon any terms of an Act of Parliament where the construction proposed to be put upon it is in favour of the trade and commerce of the country. Undoubtedly, if we are to take the words "for the purposes of trade" as relating only to a business of buying and selling, no one could say that there is any buying and selling in carrying on the business of a telegraph company. But I think it was never the intention of the Legislature, in a provision of this nature, so to limit the meaning of the word "trade." It is not only the literal meaning of the word which is to be regarded. In literature of all descriptions, both in prose and verse, whether with regard to commerce or with regard to any other subject with relation to which the term may be used, we find that the word "trade" is often used in a much more extensive signification than merely the operation or occupation of buying and selling. And why are we to limit it in a case of this nature to buying and selling? When we find that from improvements in machinery, and the advancement of science, and the vast accumulation of subjects and materials and operations which have come into practice and use in the world, and especially in this great commercial country; when we find the word "trade" used not singly and simply by itself; and where we also find it in a provision of this nature, I cannot feel any doubt but that the real object of the section was to protect the commerce and the whole of the commercial business of the country. Whatever may be the precise nature of the occupation, if it is one which is practised for the commercial benefit of the country the section was intended to exempt such a case from the liability to this tax. We find the word does not stand alone, but that the section not only says "part of a tenement occupied as a house for the purpose of trade only," but goes on to say, "or as a warehouse for the special purpose of lodging goods, wares, or merchandise therein." Now, I apprehend that not only in the city of London and in the metropolis, but in Manchester, Liverpool, and all the great commercial towns of this country, a warehouse is the scene of larger and more numerous commercial operations than any description of building that can well be imagined. There may well be warehouses where there is nothing like buying and selling, but where goods are deposited, and there may be persons who may be traders in other respects, and who likewise carry on that business independently of their own particular trade. When we find, then, this example given in the section, "a warehouse for the purpose of lodging goods, wares, and merchandise therein," and nothing like buying and selling referred to, or at all pointed at, I think we may apply the maxim, *Noscitur a sociis*, and construe the earlier provision about a house used "for the purposes of trade only" upon the same principle as the provision which next follows respecting warehouses, which has been given as an example by the Legislature, and in which there is nothing like buying and selling carried on. The section then proceeds to mention the words, "a shop or counting-house." Now, a shop undoubtedly is a place in general in which nothing is carried on but buying and selling. I say "in general," because it is not always so. I have heard the expression repeatedly, and we find it in books, that a banker's is a "shop;" and yet in a bank there is nothing

like buying and selling as generally understood; but it is a trade or business of a description quite *sui generis*. Then we come to a "counting-house." Now, a counting house is a building or apartment in which every description of commercial business which can be imagined is usually carried on. A tradesman doing any large amount of business has, independently of his shop, a counting house in which the business of that department of the concern is carried on. Merchants who live by buying and selling have it, and so have a variety of descriptions of commercial men—in fact, almost every description of man of business has something like a counting-house in which he carries on his business or a portion of his business. Therefore there again we have one of the largest and most comprehensive terms which the English language contains introduced into this provision for exemption. I think therefore, applying the maxim *noscitur a sociis*, we may reasonably infer that the Legislature never intended by the use of this word "trade" to limit the business carried on, which is to exempt the occupier of the tenement from the tax in question, to purely buying and selling. We may reasonably say that it was intended to embrace a great variety of different operations, though all of a commercial character—something, therefore, like a warehouse, like a shop, like a counting-house. All these separate parts of this exemption are, in my opinion, to be construed upon the same principle of construction, which is, that a large and literal interpretation is to be put on the exemption which the Legislature has provided for persons who do in fact carry on, or assist in carrying on, the commercial business of the country, whatever may be the precise mode of doing so. I have only a word to say about the Scotch case which has been cited. I have the greatest respect for the decisions of the Court of Session in Scotland upon commercial, as well as other, questions. But when we consider that the judgment of the learned judges in that case related to a life assurance company, there is something so totally different in a life assurance company from anything in the nature of a telegraph company that I cannot think the authority in question has any bearing upon the present case. The difference is substantial in every way. A life assurance company, in one sense, may be said to be a commercial undertaking; but, on the other hand, it is one of a very peculiar character, and indeed of a very limited character. A life assurance is an agreement or contract made between one man and another, or between an individual and a company, that, in consideration of certain payments made by him during his life, his executors shall at his death become entitled to receive from the company a particular sum of money. I do not know that there is anything of a commercial nature or of a commercial character in a transaction of that kind. It is quite different from the business of a telegraph company. I content myself therefore with saying that, in my opinion, the difference between the two is so manifest both in principle as well as in fact, that I do not consider the case in Scotland at all applicable to the case which is now before the court. Under these circumstances it appears to me that we are bound to put a large and liberal construction upon the exemption, and that therefore upon this point the appellants are entitled to the judgment of the court.

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CLARKE, B.—I confess I think that judgment ought to be given for the Crown, although I deemed it quite unnecessary to have any further argument, because we are all agreed upon the question which the Solicitor-General has not yet argued. Now, as to the first question, I do not entertain any doubt that these premises are to be regarded, for the purpose of applying the law of inhabited house taxation, as an inhabited house. It is a question of considerable difficulty in the first instance; but it has really been considered and decided already, and therefore it is impossible without waste of time to go back, in every case where no essential difference exists, and have a difficult question, which has already been settled by authority, argued over again. Various cases have been referred to; among others, the *Weavers' Hall* case, and the *Westminster Buildings* case. The question of part of a tenement was particularly considered in the former of these two cases, and I endeavoured to point out in that case that, on reference to the 57 Geo. 3, you find that, when it speaks of a tenement or part of a tenement, it refers to that which might have been taxed as part of an inhabited house, and that part of a tenement was one tenement in that sense which was subject to taxation. That appeared to me to be decisive of the question that it becomes the same as one house with a separate private entrance altogether—it was part of a tenement in the simple and ordinary meaning of the word, but it was an inhabited house for the purposes of taxation. That is the only explanation, in my opinion, of that term "part of a tenement;" we must read it with the recital of the 57 Geo. 3, from which it appears that it must be part of a tenement which was the subject of taxation as an inhabited house. Now in this case we have this morning seen the lease which has been referred to. I think it would be a waste of time to read the words of it, but the result is this, speaking generally. All the upper floor is let no doubt, but there is a common entrance during the day; that is a great feature of the case. The tenant has a right to go through the entrance of the bank to his premises during the day, and he has a right to put his plate upon the door of the bank, giving a character of unity as it were to the whole; but still more, there is one person living in one part, that is the telegraph part, who has the care of the whole. Those circumstances give to this tenement the character of one house, and in a way which certainly has not occurred in any case which has been decided. There is one person living and sleeping in the apartments, and having common access to the whole. I would particularly desire not to make a mistake upon that. "The premises No. 66 are (with the exception of two rooms on the third floor occupied by a caretaker, the caretaker not being employed by the telegraph company, but employed by the appellants, who resides there for the protection of the entire premises) let to the Eastern Telegraph Company." But upon this a remark occurs which places the appellants in an unfavourable position as regards a part; for if the learned counsel's argument is correct, that these are separate tenements, it is then quite plain that the telegraph part must be assessed as an inhabited house, and for this reason, that assuming the opinion of my learned brothers to be correct (as we will for the purpose), that this is a trade, that part is not exempt, because there is a person who lives

there who is not a caretaker of those premises, but who takes care of other premises as well. Therefore, if that conclusion were really the correct one, it must, in my opinion, convey the obligation to have that part of the premises assessed. Now we come to the next part of the case, and after what I have heard from my Lord, I cannot say that I come to the same conclusion. I quite agree that the Scotch decision is not upon the same facts as the present case, because you can see a considerable difference between an insurance society and a telegraph company, and passing by the case of a mutual assurance society, it appears to me that the principles laid down in that case are quite correct, and that if you apply them to the present case we should come to the conclusion that the telegraph company does not come within the exemption of the section. It is necessary, however, to go back to the history of the legislation upon the subject in order to see how one arrives at this conclusion, because it is to a certain extent a system of legislation, and you cannot take one part of it alone without regard to the rest. I will begin by taking the learned Solicitor-General's suggestion that every house that is occupied is an inhabited house. Then you have an exemption made by the 57 Geo. 3, c. 25, and the importance of referring to this Act arises from the fact that the language of the 57 Geo. 3 is the same as the language of 32 & 33 Vict. I have very little doubt that I am almost repeating the previous argument of the learned Solicitor-General, but not having had the advantage of hearing it, I must give it as my own view. It is said there that, "whereas it is become usual in cities and large towns and other places, for one and the same person, or for each person where two or more persons are in partnership, to occupy a dwelling-house or dwelling-houses for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade, or as warehouses for lodging goods, wares, or merchandise therein, or as shops and counting-houses, and to abide therein in the daytime only for the purposes of such trades respectively which have been charged with the said recited duties." With regard to the question before us the words which are important are "for the purposes of trade;" it does not say for the purposes of trade only. There is clearly no difference between that Act of Parliament and the one we are now considering, though perhaps it may occur in the enacting part, but it does not in the recital. A little further on we come to the enactment which says "as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house." There we come to the enactment. This enactment, having been made and acted upon, was felt to be a grievance to a certain class of persons who did not occupy premises for the purposes of trade, but who occupied premises for the purpose of some employment by which they gained their livelihood. This led to the enactment of 5 Geo. 4, c. 44, s. 4 of which is in these terms. After reciting the Act of 57 Geo. 3, it says, "Whereas by an Act passed in the fifty-seventh year of Geo. 3 provision is made for granting exemptions"—I will not read them in detail—"and whereas it is expedient to extend the same exemptions to the cases herein mentioned, be it further enacted

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that, upon all assessments to be made for any year commencing from and after 5th day of April 1824, the provisions in the said Act contained for granting exemptions from the said duties to persons in trade in respect of houses, tenements, or buildings in the said Act described, shall and may be extended and applied by the respective commissioners and officers acting in the execution of the said Act and of this Act, on due proof, to all and to every person, or any number of persons in partnership together for and in respect of any house, tenement, or building, or part of a tenement or building, in the said Act described, which shall be used by such person or persons as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, business, or calling by which such person or persons shall seek a livelihood or profit." You have here, therefore, in reference to this particular subject of taxation, a clear distinction drawn between premises occupied for the purposes of trade, or as warehouses, or counting-houses, or shops, and premises which are occupied as offices or counting-houses for the purposes of carrying on any business of profit. That is the way in which the law stood until we come to the Act of 32 & 33 Vict. The Acts of Parliament, hitherto, did not allow any person to sleep on the premises at all; they must be upon the premises by day only. When the enactment took place which we are now considering, however—whether intentionally or unintentionally it is not for me to say, it may or may not have been intended—the enactment is made to apply only to these premises mentioned in the 57 Geo. 3, that is to say, counting-houses and so on, and it is not made to apply to those matters enumerated in the 5 Geo. 4, where persons occupy offices or counting-houses for the purpose of carrying on any business whereby they obtain a livelihood. The language of the larger section, which I am now considering, is precisely the same as the language of the 57 Geo. 3, with the exception of the addition put at the end—but I do not think that can have any bearing upon the present question—"or being used as such." I do not think that can make any difference. It was upon this that they proceeded in the Scotch case—that the Legislature had drawn a distinction between premises used for the purposes of trade, and offices or premises occupied for the purposes of carrying on any vocation or business. Those are the Acts of Parliament, and there is a distinction made, and there is nothing whatever to repeal it; and I should feel myself departing from the distinction which the Legislature itself has pointed out, if I were to say that those premises, which would in my opinion clearly come within the 57 Geo. 3, as being offices for the purpose of carrying on business, were offices or premises occupied for the purposes of trade only. I think we should be saying there is no distinction between the two; but the Act of Parliament says there is, for these are plainly the offices of the telegraph company, and occupied by them, and would be exempt from taxation as an inhabited house if no person slept there by night, and if they were only used by day; but if a person does sleep there by night they do not come within the words of this exemption. For the reasons which I have stated, I think the Crown is entitled to our judgment.

POLLOCK, B.—In my opinion the appellants are entitled to our judgment; and, inasmuch as there is no difference of opinion, or any reasonable doubt, after so many decisions upon the same subject with regard to the character of the premises, I think it will be quite sufficient for me to give my reasons for agreeing with my Lord upon the question of whether or not this telegraph company can be said to be using these premises for the purposes of trade. Now, no precise description of the business of this company is given to us; but there is some material, although not much, for us to infer what is the nature of the business. They are described in the case as a telegraph company (limited). It is said that these premises are occupied by them solely for the purpose of carrying on the business of the company. The whole of the orders for the management of the business are issued from the premises so occupied by the company, and all the accounts between the company and their own shareholders are kept on such premises. Now, as I understand the business of a company like that, they have not merely to transmit by electric apparatus messages from one part of the world to the other, but they have also to do all those things which are conditions precedent to their doing so, in the way of acquiring machinery and telegraphic communications by wires and cables, and arrangements for the repairs of their cables, involving either the direct purchase of the materials or the entering into contracts for their repairs by others who do purchase those materials; and they have also to keep up correspondence and communication with many parts of the world, receiving money and paying money, and having clerks who keep their accounts. Now, that being so, can this business, which is carried on by them, be properly said to be within the meaning of this Act of Parliament, or these series of Acts of Parliament, for I entirely agree with my brother Cleasby that we must take them as a series with which we have to deal, of such a nature that the telegraph company can be said to occupy these premises for the purpose of trade? Now one is almost tired of citing rules and principles whereby statutes are to be construed; but there is one rule which I think is perfectly clear, and that I find so well expressed by Sir Benson Maxwell in his very able work on the interpretation of the statutes, that I will take his words rather than use my own. He begins his second chapter of the 1st section in this way: "In interpreting a statute it is to be borne in mind at the outset that language is always used *secundum subjectam materiam*, and that it must therefore be understood in the sense which best harmonises with the subject-matter." That, I think, is a very good and a very clear proposition. Now, that being so, what was the subject-matter of this statute, and what was the spirit of the distinction to be created? It was a distinction between persons who inhabited houses for the purposes of residence and persons who occupied "houses" as they were then called, for the purposes of trade; and you find coupled with the word "trade," as my Lord has said, such places as warehouses for lodging goods, wares, and merchandise therein, or shops or counting-houses, thereby expressing that as the antithesis, as it were, which it is the intention of the statute to establish. Now I think, if I am right in the construction which I have put upon

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the statute and the spirit in which I construe it, that it would be a somewhat dangerous rule to depart from the meaning which the words would require upon that principle, because I find in the subsequent statute other words introduced for a more extended purpose by the Legislature. If it is for me to choose between the two rules of construction, I would rather prefer the construction adopted by my Lord, than that which has been adopted by my brother Cleasby, in the construction of the latter statute; but I regard it as a very important matter, and I do not think it is a matter to be treated lightly, nor do I think it is a question which is perfectly free from doubt; but I have applied my mind, as best I can, to see what is the fair and reasonable meaning of the words "for the purposes of trade" in the section. Now some citations were made in the course of the argument from dictionaries, and I would only say that I would personally avoid citing any word from dictionaries as implying in any sense a definition, because such a course is dangerous; but one may cite from a dictionary, or a work of good repute, to see what is the common acceptance of a word. Yesterday two dictionaries, one Richardson's and the other Webster's, were cited for the purpose of giving us a definition of the term, but I have found a definition in Johnson's which seems to me to be more near the spirit in which I am construing the words. It is the second meaning which he gives, in which trade is described as an "occupation or particular employment, whether manual or mercantile, as distinguished from the arts or the learned professions." That is a very fair expression of the meaning of the word in common parlance, when you are speaking of whether a person exercises a profession or whether he carries on a trade; and in the same way, whether a person occupies a house for the purpose of dwelling therein personally, or whether he occupies it for the purpose of carrying on a trade. Now another head of argument, and one of course to which we ought to attend with the greatest care, is that which is used by the learned Solicitor-General in regard to the Bankruptcy Act; and no doubt the word trade was originally there intended as applying only to persons who either bought or sold, or whose business was immediately cognate to the buying or selling of goods; but even then you find from time to time the words used in a much looser sense, and although we have no right to refer to the enlargement of the number of persons who have been made liable to become bankrupts by different statutes from time to time, we may look at these statutes to see in what sort of sense they used the word themselves. I find in one statute as far back as James I. that a scrivener may be bankrupt. In the 21 James I. c. 19, s. 2, the words used are, "Or that shall use the trade or profession of a scrivener, receiving other men's moneys or estates into his trust or custody." Therefore, even there you find the word used in a wider sense than that of mere buying or selling. And in Christian's Bankruptcy Law you find thirty or forty pages devoted to considering all the different cases in which, apart from the statute law, persons have been made bankrupts who have not actually been traders in the limited sense of buying or selling, or bartering. I do not think, however, myself that that is a true guide to our conclusion in this case. I would rather say that, although the

statutes relating to bankruptcy present some analogy, they do not present a true analogy, because the contemplation of the statute and the common law too was devoted to a very different purpose from that which was the object and intention of the statute which is now under our consideration. I thought it right to say so much, because, as I said before, this is an important matter, and it is a matter in which one is desirous of giving the ground of the conclusion at which we have come. Upon these grounds I think the appellants are entitled to our judgment.

Judgment for the appellants.

Solicitors for the appellants, *Clarke, Rawlins, and Clarke.*

Solicitors for the Crown, *The Solicitor of Inland Revenue.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Wednesday, Feb. 6, 1878.

(Before JAMES, BAGGALLAT, and THESIGER, L.JJ.)

LORD v. MULKERN. (a)

Building society—Mortgage to the society by a member—Action to redeem—Reference to arbitration—Friendly Societies Act (10 Geo. 4, c. 56), s. 27—Construction.

In a suit by a member of a benefit building society (enrolled under 6 & 7 Will. 4, c. 32, and not re-registered under the Building Societies Act 1874) to redeem property mortgaged by him to the society and for an account, the defendants asked that all matters might be referred to arbitration.

The rules of the society provided that any dispute arising between the society and any member thereof should be referred to arbitration pursuant to 10 Geo. 4, c. 56, s. 27.

Held, that the arbitration clause in the Act 10 Geo. 4, c. 56, only applied to disputes between the society and its members as members, and did not apply to a redemption suit where the relation of mortgagor and mortgagee existed.

THIS was an appeal from a decision of the Master of the Rolls. The action was brought by a member of the Birkbeck Permanent Benefit Building Society against the trustees of the society, for the redemption of property which he had mortgaged to secure a loan of 14,000*l.* and interest which they had advanced to him. The society had entered into possession of the property. The society was enrolled in April 1851, under the Building Societies Act (6 & 7 Will. 4, c. 32), by which the provisions of the Act 10 Geo. 4, c. 56, which relates to friendly societies, are made applicable to benefit building societies. By sect. 27 of that Act it is enacted that "provision shall be made by the rules of every such society specifying whether a reference of every matter in dispute between any such society or any person acting under them and any individual member thereof, or person claiming on account of any member shall be made to any of His Majesty's justices of the peace as may act in and for the county in

(a) Reported by E. S. ROOPE, Esq., Barrister-at-Law.

which such society may be formed, or to arbitrators to be appointed in manner hereinafter directed . . . and whatever award shall be made by the said arbitrators, or the major part of them, according to the true purport and meaning of the rules of the society, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without appeal." The rules of the Birkbeck Society provide that, "in case any dispute arises between the society and any member thereof, or the legal representatives of any member, reference shall be made to arbitration pursuant to 10 Geo. 4, c. 56, s. 27, unless such dispute can be amicably arranged," and arbitrators appointed. The plaintiff having moved before the Master of the Rolls for preliminary accounts, the defendants applied for an order that all matters in dispute between the parties should be referred to arbitration pursuant to the rules of the society.

The Master of the Rolls having ordered a reference to arbitration, the plaintiff appealed.

Davey, Q.O. and Bush, for the appellant, contended that neither the rules of the society, nor sect. 27 of the Act of 10 Geo. 4, c. 56, had any application to disputes between the society and its members in their character of mortgagor and mortgagee, but only to disputes between the society and its members in their character of members. This point was not taken before the Master of the Rolls, because it was thought that his Lordship, in a recent case of *Wright v. The Monarch Investment Building Society* (L. Rep. 5 Ch. Div. 726), had adopted an opposite view. That case, however, was under the Building Societies Act of 1874, in which the arbitration clause differed in its terms from the 27th section of the Act of 10 Geo. 4, c. 56. In support of the present contention, they relied upon *Morrison v. Glover* (14 L. T. Rep. 183, 204; 4 Ex. Rep. 490), which, they submitted, was exactly a case in point. There a building society lent money to a member on mortgage of leasehold property, and the member covenanted to observe the rules of the society, and also to pay the rent reserved by the lease, and the trustees of the society having sued for breaches of both these covenants, it was held that, as some part of the plaintiff's claim was not a matter in dispute between the society and the defendant as member, but only as mortgagor, the society was not bound by its rules to refer to arbitration the subject-matter of the action. They also referred to

Fleming v. Self, 24 L. T. Rep. 101; 3 De G. M. & G. 997;

Cutbill v. Kingdom, 10 L. T. Rep. 114; 1 Ex. Rep. 464;

Moseley v. Baker, 6 Hare, 87; 1 Hall & T. 301;

Seagrave v. Pope, 19 L. T. Rep. 173; 1 De G. M. & G. 783;

Crispe v. Bunbury, 8 Bing. 394.

Waller, Q.C. and Owen, for the trustees, contended there was no material difference between the Building Societies Act of 1874 and that of 10 Geo. 4, c. 56, and that the court would put an end to what was clearly intended by those Acts, if parties were not to be allowed to go to an arbitrator instead of incurring the expense of a suit in the High Court. In the case of *Prentice v. London* (33 L. T. Rep. N. S. 251; L. Rep. 10 P. C. 679), the question was between the trustees and a member, with regard to a mortgage transaction, and it was considered that questions

between a building society and a member were properly referable to arbitration. They also cited

Reeves v. White, 17 Q. B. 995; 21 L. J. 169, Q. B.

[BAGGALLAY, L.J.—In giving judgment in the case of *Prentice v. London*, Lord Coleridge said: "The case seems to me to fall directly into the principle on which *Morrison v. Glover* was decided;" and Brett, J. said substantially the same thing.]

JAMES, L.J.—There are some decisions which cannot be questioned. Here, the decisions in common law and Chancery which have been referred to have been recognised by several subsequent authorities, and they are perfectly good law, and are binding upon us; and it is not competent to us to overrule them. If you wish to overrule them, you must go to the House of Lords. I do not think that the Master of the Rolls intended in his judgment in *Wright v. The Monarch Investment Building Society* to overrule the other decisions. He merely said that they did not apply to the Act of 1874. In my opinion, if the cases which have been cited by Mr. Davey had been referred to at the time, the Master of the Rolls would not for a moment have thought of overruling those decisions.

BAGGALLAY, L.J.—This case appears to me to be entirely within the authority of *Morrison v. Glover*. In fact, we rarely find two cases in which the circumstances are so similar, and *Morrison v. Glover* has been recognised in every case cited in the course of the argument, including those relied upon on the part of the respondent.

THESIGER, L.J. concurred.

Solicitors: *J. Kays; J. G. Ponsons.*

SITTINGS AT WESTMINSTER.

Jan. 29, 30, 31, and Feb. 12, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

REG. v. CHARLES BRADLAUGH AND ANNIE BESANT. (a)

Obscene libel—Indictment—Omission to set out the words of the libel—Arrest of judgment.

An indictment for publishing an obscene book, which does not set out the passage or passages of such book alleged to constitute the offence, but only refers to the book by its title, is bad, and the defect is not cured by verdict.

THE defendants had been tried in the Court of Queen's Bench (into which court the indictment had been removed by *certiorari*), on an indictment which charged them with "unlawfully and wickedly devising, contriving, and intending, as much as in them lay, to vitiate and corrupt the morals as well of youth as of divers other subjects of the Queen, and to incite and encourage the said subjects to indecent, obscene, unnatural, and immoral practices, and bring them to a state of wickedness, lewdness, and debauchery, unlawfully, &c., did print, publish, sell, and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, and obscene book, called 'Fruits of Philosophy,' thereby contaminating, &c." The jury found that the book was calculated to deprave public morals, but exonerated the defendants from all corrupt motive in publishing it.

(a) Reported by P. B. HUTCHINS Esq., Barrister-at-Law.

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Judgment was deferred to a subsequent day, in order that the defendants might move the Court of Queen's Bench to quash the indictment or to arrest judgment, which they accordingly did, on the ground that, in an indictment for this offence, the words said to constitute the libel ought to have been set out. The Court of Queen's Bench, however (consisting of Cockburn, C.J. and Mellor, J.), decided against the defendants, and judgment was entered, and sentence passed. The case below is reported in L. Rep. 2 Q. B. Div. 569.

The defendants now brought error, assigning several grounds, the only material one, in view of the judgment, being the same as that on which they moved the Court of Queen's Bench, namely, that in an indictment for an offence consisting of words, the words themselves, alleged to constitute the offence, must be set out.

Jan. 29, 30, 31.—The defendants, Charles Bradlaugh and Annie Besant, in person.—There is a mass of authority for saying that, where the alleged offence consists of words, the words ought to appear in the indictment. Many of them are collected in Archbold's Crim. Pl., p. 57, 18th edit. *Zenobio v. Astell* (6 T. R. 162) was a civil case; but the rule is the same in criminal cases: (*Hunter's Case*, 2 Leach, 631.) In that case, too, there had been verdict, and yet judgment was arrested. That was a case of forgery, and was before the statute of 2 & 3 Will. 4, c. 123, by which such necessity was removed in cases of that offence. *Ree v. Mason* (2 T. R. 581) was a similar case of false pretences, and was not overruled by *Reg. v. Goldsmith* (28 L. T. Rep. 881; L. Rep. 2 C. C. R. 74). The same was held in a case of seditious libel: (*Ree v. Horne*, 20 St. Tr. 793.) Archbold's Crim. Pl. 805, 806, 18th edit., states what it is necessary to set out. In *Wright v. Clements* (3 B. & Ald. 503) judgment was arrested on this ground. *Ree v. Sparling* (1 Strange, 498) and *Ree v. Popplewell* (2 Strange, 685) were cases of swearing and cursing, and there it was held that the oaths used must be set out. So in *Reg. v. Howe* (1 Strange, 699), where the indictment was for speaking scandalous and contemptuous words of a magistrate in the execution of his office: (Russell on Crimes, 5th edit., vol. 3, p. 219, citing *R. v. Sacheverell*, 15 How St. Tr. 466; and *Tabart v. Tipper*, 1 Camp. 352.) In *Sacheverell's* case the opinion of the judges, ten in number, which is in favour of the defendants here, was not overruled by the House of Lords, before whom *Sacheverell* was impeached by the Commons; the House did not feel bound by it only because, whatever might be the rule in a court of law, by the law and usage of Parliament no such rule was recognised, and that was not a prosecution in a court of law but an impeachment. The opinion of the judges in *Sacheverell's* case is quoted by Lord Ellenborough in *Cook v. Cox* (3 M. & Sel. 110) and recognised by him as an authority. The note to *Sacheverell's* case, at p. 467, saying that in *Layer's* case (16 How St. Tr. at p. 317) "the judges without any doubt held this opinion" (of the judges in *Sacheverell's* case) "to be wrong" is not justified. Eyre, J., it is true, is surprised at it, having thought it was enough if a libel appear by its sense or in substance. Even if that were enough it has not been done here. In *Ree v. Orull* (17 How St. Tr.; 2 Strange, 789), also a case of obscene libel, all the words were set out. Also

in *Starkie on Libel*, 4th edit., by Folkard, p. 699, it is said that "the libellous matter must be set out in the indictment." There is all this authority in our favour, and no English decision against us. But some American cases will be cited for the prosecution. In *Commonwealth v. Holmes* (17 Massach. Rep. 335) the libel was not set out, it is true; but, at any rate, there was a count excusing such omission, and giving a reason for it. *Commonwealth v. Tarbox* (55 Massach. Rep. 66) is in my favour, for there it was held insufficient to paste the libel on to the indictment. But American cases cannot be used as authority, as they do not proceed on English common law, but on the law as contained in the American revised statutes. *Commonwealth v. Sharples* (2 Serj. & Rawle, Pennsylv. Rep. 91) was a case of a picture, and is not therefore in point. *Reg. v. Goldsmith* (28 L. T. Rep. N. S. 881; L. Rep. 2 C. C. R. 74; 22 L. J. 94, M. C.) is not against us; Bovill, C.J.'s judgment is expressly in our favour. That was a case of false pretences, an offence which is regulated by statute. In *Sill v. The Queen* (22 L. J. 41, M. C.), also a case of false pretences, it was held a fatal defect to omit to state on the indictment whose property the money obtained by false pretences was. In *Hearne v. Stowell* (12 A. & E. 719) judgment was arrested for a defect in a declaration, which caused the connection between the alleged libel and the plaintiff to fail. These cases plainly show the common law rule, which has been altered in some cases by statute, but not in this case. This is not a mere formal defect, but a substantial one, and fully justifies the rule which has made it fatal.

Sir H. S. Giffard (S.G.), and Mead for the Crown.—This defect in the indictment, if it is one, is aided by verdict, for the jury have found the allegation in the indictment, as to the nature and character of this book, to be true. *Sacheverell's* case (15 How. St. T. 566), though not conclusive one way or the other, shows, at any rate, that it is only a question of practice. The test of what defects verdict will cure is in the answer to the question, Is it an allegation which, though so imperfect and insufficient as that it might be bad on demurrer, is nevertheless proved, and must have been proved, in its particularity, before verdict could have been given thereon? Then, if verdict has been given, the defect must be held to have been cured:

Heyman v. Reg. 28 L. T. Rep. N. S. 162; L. Rep. 8 Q. B. 102, per Blackburn J.;

Pippet v. Hearn, 5 B. & Ald. 634;

Reg. v. Aspinall, 36 L. T. Rep. N. S. 297; L. Rep. 2

Q. B. Div. at p. 57;

Reg. v. Goldsmith, 28 L. T. Rep. N. S. 881; L. R.

2 C. C. R. 74, which overruled

Ree v. Mason, 2 T. R. 581.

In *Sill v. The Queen*, 22 L. J. 41, M. C., it was owing to the statute requiring the ownership of the money to be shown that the omission of an allegation stating whose it was was not cured by verdict. In murder, it is true, you must be more particular, but that is by reason of the peculiarity of the offence. Each case depends on its own circumstances. There is less necessity for such a rule now than there was when most of the cases cited were decided; for now, since Fox's Act (32 Geo. 3, c. 60), libel or no libel is not a question for the judge but for the jury. All that can be for the judge is to say that it cannot possibly be a libel. How much must be set out,

and what is merely a formal and what a substantial defect, are only questions of degree. 14 & 15 Vict. c. 100, s. 25, gave a full power of amendment in the case of mere formal defects, provided only that objections to such defects should be taken before the jury were sworn. The book being designated under a *videlicet* makes no difference. It is a material allegation, and no other libel could have been proved under this indictment. And evidence is admissible to identify a thing named on the indictment, as always had to be done where the indictment named the instrument with which the mischief of which the prisoner was accused was done. And there is no hardship suffered by the defendants. If they lose the power of taking the opinion of a court as to whether the indictment shows any obscene libel to have been published, they get an equivalent, and substantially the same, ground of demurrer in the omission. *Layser's case* (16 How St. Tr. 93) has destroyed the authority of the opinion of the judges, not acted on, in *Sacheverell's case* (15 How St. Tr. 467). In *Dugdale's case* (Dear & P. C. O. 64) there was a similar omission to this, and yet no objection to the indictment on that ground was taken by counsel, nor was such omission noticed by Lord Campbell, who presided. In *Reg. v. Aspinall* (36 L. T. Rep. N. S. 297; L. Rep. 2 Q. B. Div. 59) the indictment merely amounted to "you conspired to defraud," and yet it was held enough. What distinction can be drawn between conspiracy and this offence for this purpose? The conspiracy was the offence there, so here is the publishing. The court should be careful not to sacrifice substance to form; the jury have seen the book, and have found it an obscene libel. In *Reg. v. Perrott* (2 M. & Sel. 376.) the indictment contained no allegation that the pretence was false, and therefore was defective, even after verdict; for a verdict of guilty only means guilt of the premises in the indictment contained. In *Reg. v. Knight* (37 L. T. Rep. N. S. 801) there was no allegation of defendant's bankruptcy, although it was necessary, but the defect was held to be cured by verdict. In *Tarbo's case* (55 Massach. Rep. 66) the libel was affected to be set out, but being done in an irregular mode, viz., by pasting on to the indictment, the indictment was held bad. Having affected to set it out, of course they should have done so regularly and accurately.

Mead with him.—The word libel is used in a different sense in obscene, to what it is in defamatory and other libels, and implies a different class of offence altogether. Therefore it may well be that what would be necessary in an indictment for defamatory libel would not be so in one for an obscene libel. The gist of this offence is that it is *contra bonos mores*; it is not a libel in the ordinary sense: (*Reg. v. Ourlil*, 2 Strange, 783.) In Archbold's Crim. Pl. p. 314 (18th edit.) is given a precedent for a similar offence which, throughout, does not contain the words "libel" or "publish," but only "sell and utter." A similar precedent occurs in Chitty's Crim. L. vol. 2, p. 46, a book of great authority. That there is some distinction between this and other libels appears also from the fact that an obscene libel is capable of being tried at quarter sessions, whereas other libels were removed by 5 & 6 Vict. c. 38 from its jurisdiction. The courts will also excuse the setting out of words when they are so obscene that it is undesirable they should be perpetuated

on the record. The American decisions cited by the defendants (*Commonwealth v. Holmes*, 17 Massach. Rep. 335; *Commonwealth v. Sharples*, 2 Serj. & Rawl. 91; and *Commonwealth v. Tarbo's*, 55 Massach. Rep. 66) show that that is the law in America; and they are authorities here, as American criminal law is founded on our common law. There is some small English authority, too, in a precedent in Chitty's Crim. L. p. 45, where the libel is alleged to be "in terms or expressions not fit or proper to be named or mentioned in any language, or in any court of justice." It is true there is no such express allegation in this indictment, but the epithets employed are peculiarly strong, and amount to such an allegation by implication.

The defendants in reply.—There is no such distinction as has been contended for between obscene libel and any other. The definition of libel in Russell on Crimes, vol. 3, p. 177, is broad enough to cover all. A blasphemous libel, at any rate, is within the same class of offence, and in *R. v. Williams* (26 How St. Tr. 653), which was a blasphemous libel, the words were set out. In Archbold's Crim. Pl. 814, the precedent immediately before the one read by Mr. Mead was exactly of this sort, and there the words are set out, and the word libel is used. So also in Starkie on Libel by Folkard, p. 773, form 35. *Wilkes's case* (4 Burr. 2527) was an obscene libel, and the words were set out. In *Curl's case* (2 Strange, 789) the discussion on the word libel was merely as to the jurisdiction of spiritual or temporal courts. In that case, too, the words were set out. If the word libel is removed from this indictment, no offence is charged. Fox's Act made no such alteration in the law as is contended; it gave additional protection to defendants. *Reg. v. Aspinall* (36 L. T. Rep. N. S. 297; L. Rep. 2 Q. B. Div. 57) is in our favour.

Cour. adv. vult.

Feb. 12.—BRAMWELL, L.J.—The question we have to decide is a purely technical one: it is a pure question of law, and does not affect the merits of the defendants' case in the least. It arises in this way. The defendants were indicted for that they "did print, publish, sell, and utter a certain indecent, lewd, filthy, bawdy, and obscene book called 'Fruits of Philosophy,'" and were tried and found guilty. They thereupon moved the Court of Queen's Bench to quash the indictment, and also in arrest of judgment. That rule was refused them, and they now come before us to ask us to say that the Court of Queen's Bench was wrong in that decision. The objection taken to the indictment is that it states that an offence has been committed, but does not show what that offence is—it does not show, on the face of it, what the offence is that is said to have been committed; and, on the other side, it seems to be allowed that this objection would have been a good one if taken on demurrer, but, it is said, it is now taken too late, and is a bad objection in arrest of judgment. Now, the general rule on the subject is clear and beyond all doubt, and by it the indictment must show, on the face of it, the particular offence committed, and how it was committed. That is the general rule at common law, and this case rests wholly on common law principles, no statute being applicable to it. For instance, in an indictment for murder, it is not enough to say a man is indicted "for that he committed murder," or "for

that he murdered A. B." So in the case of burglary, it will not do to allege merely that the man committed burglary, but you must set out that the prisoner did, at such and such a time, on a certain day, "break and enter the dwelling-house of A. B.," &c. And there are three reasons given for requiring this particularity, two of which are perhaps unimportant at this day, but the third of which is still a substantial reason. The first reason was that the defendant might know what precise charge he had to meet; the second, that, in the absence of this particularity, it might become difficult afterwards to prove of what precise offence the defendant had been convicted or acquitted, as the case might be. At the present day perhaps these reasons have little weight, as it rarely could happen that there was any real doubt as to the offence the defendant was charged with. But the third reason is even now a substantial one. The third reason for requiring particularity was in order that the defendant might have an opportunity of taking the opinion of a court, either on demurrer, or in arrest of judgment, as to whether the offence he was charged with was an offence at all, or constituted any ground for an indictment. And it was, and is, reasonable that a defendant should have such an opportunity of challenging the indictment, and it is therefore reasonable to require that the indictment shall set out the specific offence which is charged. It follows, therefore, that where the offence consists in words, written or spoken, the words themselves must be stated and set out; and that, where they are not set out, the indictment is on that account defective. So in an indictment for perjury, it has always been held necessary to set out the particular words which are said to constitute the offence: (Chitty's Crim. Law, p. 309.) So also in the case of forgery, it is necessary that the forged document be set out: (Chitty's Crim. Law, p. 1040.) Now, how does it stand in the case of libel? In defamatory libel there can be no doubt that it was necessary, and it seems almost to be conceded that, in that case, it still would be necessary that the words should be set out so that the court might be enabled to tell whether they could be, or indeed whether they were, a libel. To show that that was the law, *Cook v. Cox* (3 M. & S. 110) is a clear authority. Lord Ellenborough, in delivering judgment in that case, says: "A motion has been made in arrest of judgment, on an objection to the last count. . . . The objection is, that in a count for slander by words, the words themselves should be set out, in order that the defendant may know the certainty of the charge, and may be able to shape his defence. . . . The weight of authorities is against the setting out words by their effect only." And then he cites a number of cases in support of that proposition, and goes on to say that "there seems to be no reason for any difference in this respect between civil and criminal cases; the action arises *ex delicto*." Certainly, if there were any difference, it would not be that greater laxity was permitted in criminal than is permitted in civil cases. He concludes by saying: "If, however, the authorities cited are law, and they are supported by more ancient ones, it is of the substance of a charge of slander by words, that the words themselves should be set out with sufficient innuendoes;" and judgment was accordingly arrested. That was the opinion of Lord Ellenborough in a case of slander, and it is

recognised as good law in the case of *Solomon v. Lawson* (8 Q. B. 823). The head-note of that case says that, "where a declaration for libel sets out a publication which refers to a previous publication, but, unless by reference to the language of such previous publication, contains no libel, such previous publication must be considered as incorporated in the publication complained of, and must appear in the declaration to be set out *verbatim*, and not merely in substance." These were both civil actions it is true; but undoubtedly, as is remarked over and over again in the judgments in these and similar cases, there is no difference in this respect between civil and criminal pleading; and if there were a difference, as I have already said, it would be that greater strictness would be required in criminal cases. These two cases then are clear authority for the necessity of setting out the words themselves in defamatory libel, and whatever reason exists for requiring that they should be set out in that case exists also for the same necessity in this. It has been argued that "libel" has a different signification in this and some other cases from what it has in the case of defamatory libel, and it is said that there is no case of a blasphemous or obscene libel where judgment has been arrested for not setting out the words constituting the offence. I certainly do not know of any such case, but neither do I know of one in which it has been held that they need not be set out; and reason suggests that it is as necessary in these as in any other libels. At any rate in *E. v. Ourll* (17 How. St. Tr. 154; 2 Strange, 789), which was a case of an obscene libel, the words were set out; and in *E. v. Sparling* (1 Strange 498) it was held a fatal defect in an indictment for cursing and swearing that the oaths themselves were not set out so as to appear on the face of it. Then another reason is given why an obscene libel should not be set out *verbatim* in the indictment. The records of the court, it is said, ought to be kept pure and undefiled. This seems to me a wholly fanciful and imaginary *desideratum*. And if such an objection is good in the case of an obscene libel, why is it not equally good, or even better, in that of a blasphemous libel, or an indictment for the use of seditious language? And why is it not also an objection in the case of a libel defamatory of private character? There, if anywhere, it seems to me, it should prevail. What can be more inconvenient and grievous, for instance, than the perpetuation and publication, by means of the record of the court, of a libel charging a man with the commission of an infamous crime? Therefore the objection is a fanciful one; but it is said to be supported by authority. The only English authority quoted is a precedent in Chitty (Chitty Crim. Law, 2 vol., p. 45); but a solitary precedent in a text book is of but little weight: you must have a mass of precedents before they can be used as authority. The other authorities consist altogether of American cases. Now cases decided by the American courts are not, strictly speaking, authority at all; they are only guides, though frequently most valuable guides; they contain the opinions of able men, well versed in our law, and therefore will always have great weight attached to them in our courts, but they are not authority by which we are in any way bound. But even if they were binding on us, they

do not assist the case of the prosecution in any way, but make quite in the opposite direction. For instance, the case of *The Commonwealth v. Tarbox* (55 Massach. Rep. 66) has been relied on; but in that case there was an allegation in the indictment that the libel was so obscene it could not be put on the record, and it is clear that it was considered that, but for such an allegation, the words must have been set out. And the other American cases go no further to help the prosecution, but, as far as they go, equally aid the defendants' case. It is true that it is suggested in this case that, although there is no such specific allegation in the indictment, yet that one is implied in the epithets "lewd, filthy, bawdy, and obscene" applied to the libel; but as such epithets are employed in every indictment, they can imply nothing of the sort. This, then, is the state of the law down to recent times, certainly down to 1846, when *Solomon v. Lawson* (8 Q. B. 823) was decided. What is it that we are asked to do? We are not asked to say that the law has been altered, but we are asked to say nothing less than that all these cases are wrong, and all these judges have been mistaken as to the law from the beginning to the end. *Cook v. Oos* (3 M. & Sel. 110) we are to say was wrongly decided, and the statute of 23 Geo. 2, c. 11, altering the law in respect of perjury, was passed wholly without any necessity. And this we are invited to do on no other ground but that certain indictments in cases of false pretences do not set out the false pretences employed. Now I do not intend to go into these cases; I do not for a moment suggest they were not rightly decided; in a similar case I should feel myself bound by them. But in those cases the courts have held, not that there was a failure to state a necessary ingredient, but that there was merely an imperfect statement which was cured by verdict. That is clear from the case of *Heyman v. The Queen*, where Blackburn, J. uses the words "imperfectly stated" in pointing out the rule as to what sort of defect verdict will cure. So, also, in *Reg. v. Goldsmith*. In the report of my judgment in that case in the *Law Journal*, there is an evident error. On p. 98 I am reported to have said: "It is not impossible that if the false pretences used," &c.; it is plain that the word "not" ought to have been omitted. But these cases, whether right or wrong—and I think they were quite right—are for this purpose immaterial and irrelevant. It is impossible that the judges who decided them could have meant to overrule what was long and well-established law. They could not, because they ought not, and had no such power. Therefore the law remains as decided on the authorities that, in such a case as this, the words themselves must be set out, or the indictment will be bad on demurrer, or on motion in arrest of judgment. Now I come to consider the judgment of the court below: (L. Rep. 2 Q. B. Div. 569.) The Lord Chief Justice gives three reasons for his decision. The first reason is the great inconvenience that might arise from such a rule. He gives an instance of "what would be the monstrous inconvenience of setting out *in extenso* the whole of a publication which may consist of two or three volumes." With great deference to his Lordship's opinion, it seems to me equal inconvenience might arise from making such an exception to the general rule of law. For when is a libel to be considered too long to be set out? Is one of

ten volumes too long, or two, or one, or one of one hundred pages? Where is the line to be drawn? And it has not been suggested that a defamatory libel need not be set out, and yet it may be of any length. And however long a libel is, it is admitted that it must be set out, or, on demurrer, at any rate, the indictment will be bad. Then his Lordship says the objection ought to have been taken on demurrer. That might be so if the Legislature had said so, but it has not, and it is not the law of the land. The law says, convenient or inconvenient, he may take the objection at any time, before or after verdict. His last ground is that it is *communis nocumentum*, and therefore, after verdict, need not have been set out; but I am not aware of any such exception being known to the law. Now, in the judgment delivered by Mellor, J., I find he says, "if it be essential to set forth the terms in which the libel was published, the point may still be taken upon error." I am glad to find those words, and glad also to see that the Lord Chief Justice himself says that he "leaves the ultimate decision of this matter to the court of error." I am glad to find those expressions, because they show that they did not consider they had concluded the whole question, but that it was deserving of being more fully discussed here. The result is that there are a number of authorities, unimpeached and binding upon us, and no good reason having been given us why we ought not to do so, we must act upon them. According to the law as contained in them, this indictment is wholly defective, and not merely imperfect, the words "to wit," with what follows them, not supplying the defect in any way, being mere words of identification. Therefore, without expressing any opinion on the merits, which it is not for us to do, and which we could not do, being wholly in ignorance on the matter, we come to the decision, on the dry point of law, that judgment ought to have been arrested, and the judgment of the Queen's Bench Division must be reversed.

BARR, L.J.—I am of the same opinion. In the first place I would remark that we are not called upon in this case to differ from any mature judgment of the court below. It is plain they had formed no strong opinion on this point which is now before us. And they had not the materials before them for forming such an opinion; for the authorities were not brought before them as they have been brought before us. The only cases the prosecution brought to their attention were the American cases and *Dugdale's case* (Dear & Pearce's C. C. 64), which, I think, is clearly not in point. On demurrer, they were prepared to have held the indictment would have been bad; we say it was so bad that verdict did not cure it. Now, there are three questions which arise for our consideration: first, what is it necessary to set out in such an indictment as this? secondly, what kind of omission can be cured by verdict? and, thirdly, is this such an omission? Now, the first question I cannot answer better than in the words of my judgment in *Reg. v. Aspinall*, which was a case carefully and laboriously considered. There it is said: "Every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by such pleading. An indictment must, therefore, contain an allegation of every fact necessary to constitute the criminal charge preferred by it.

As in order to make acts criminal they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it is necessary to show that certain acts have been committed, it is necessary to allege that those acts were in fact committed; and then the judgment goes on to enumerate other ingredients of an indictment which are necessary in certain cases. Where, therefore, the charge is of a crime which consists in words, written or spoken, it follows from that that the words themselves must be set out; and in all libels, whether obscene, blasphemous, seditious, or defamatory, the words used are the crime. It is quite unnecessary to inquire whether the term libel is properly applied to obscene or blasphemous publications; I am aware that in Sir James Stephen's valuable Digest of the Criminal Law these offences are not classed under the head of libel at all; but for this purpose it is wholly immaterial to consider that question; it is clear that the offence consists in the words used. Other cases in which words constitute the crime are perjury, false pretences, forgery, sending threatening letters, and administering unlawful oaths. In every one of these cases there is authority for saying that the words must be set out, unless a statute expressly dispenses with such a necessity. Every such statute is an express authority for the proposition that, but for it, the words must have been set out. The earliest case bearing on this point is the case of *Res v. Sparling* (1 Strange, 498). The defendant was there indicted "for that he did, within ten days last past, profanely swear fifty-four oaths, and profanely curse 160 curses, *contra formam statuti*," and was convicted, but, the report says, "the court held the conviction naught for another exemption, that the oaths and curses were not set forth; for what is a profane oath or curse is a matter of law;" and the conviction was quashed. So in *Res v. Popplewell* (2 Strange, 685) the same decision was come to, in a similar case, on similar grounds. So also in *Res v. Chaveney* (2 Raymond Rep. 1368). In all these cases there had been conviction; therefore they are express authorities, and go the whole length of this case. Then, in the case of the offence of sending threatening letters, *Lloyd's case* (East Pl. O. 1122) is an authority to show that the letter must be set out, or a conviction obtained on such a defective indictment will be held bad. Yates, J. is there reported to have stated, "that he had caused inquiries to be made into the practice of the Old Bailey, and upon the Western and Home Circuits, and found that, in all indictments upon that Act of Parliament, the letter itself was generally set forth; and that the clerks did not remember an instance where the indictment did not state at least the substance of the letter." Then, in false pretences, *R. v. Mason* (2 T. R. 581) is an authority. Mellor, J. seems, in *Heyman v. The Queen*, to have thought that that case had been overruled, but I cannot find that that is the case; on the contrary, I find it constantly approved of and acted upon. Mason was indicted "for that he unlawfully, &c., did obtain from one Robert Scofield divers sums of money, that is to say, the sum of two guineas, of the proper moneys of the said Robert Scofield, by false pretences, with an intent," &c. He was

convicted and sentenced to transportation for seven years, when he brought a writ of error, on which the court ordered the judgment to be set aside. Buller, J. says: "Several objections have been made on the part of the defendant; but the material one, on which I found my judgment, is that the indictment does not state what the false pretences were." And Grose, J. says, that, in his opinion, "the objection that the pretences are not specified is decisive. This is a charge for a precise crime, and therefore it must be alleged." There, after others have been enumerated, the fundamental reason for the rule is given, that the words are the crime, and must therefore be alleged. In *Res v. Perrott* (2 M. & Sel. 379), also a case of false pretences, the actual question was a different one. The defect in the indictment there was that it did not specifically negative the truth of the alleged false pretences, but the grounds of Lord Ellenborough's judgment apply equally to this case. "Every indictment," he says, "ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him." The cases of perjury I do not intend to cite, as the statute (23 Geo. 2, c. 11) enacting that "henceforth in every indictment for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant" is decisive to show that, but for it, that would not have been sufficient. *Hunters' case* (2 Leach C. C. 624) is an authority in the case of forgery. In that case, the forged document was a receipt, which was not however totally omitted from the indictment, but was so defectively set out that, in Grose, J.'s words, "there was nothing to show that the instrument, which did not on the face of it import to be a receipt, was in fact a receipt, or was intended to be a receipt, or could have the operation of a receipt." It is clear from that judgment that the learned judge considered this omission to amount to an omission of the offence charged, and the indictment to be bad on that ground. *R. v. Mason* (2 T. R. 581) he cites with approval. Administering unlawful oaths is an offence regulated by statute. There are two statutes with respect to it, 37 Geo. 3, c. 123, and 52 Geo. 3, c. 104. Sect. 4 of the former statute, and sect. 5 of the latter, enact that, in indictments for this offence, it shall not thenceforth be necessary "to set forth the words of such oath or engagement, and that it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof;" clearly showing, that but for such a provision it would have been necessary to set forth the oath in full. Then I come to defamatory libels and slanders. *Newton v. Stubbs* (3 Mod. 71; 2 Show. 435) was an action, not an indictment. The declaration set out the slander in Latin, and not, as it was spoken, in English; and it was objected that the words used were not set out. The court held the objection good, even after verdict, and judgment was arrested. In *Zenobio v. Astell* (6 T. Rep. 162) the libel was in French, but the indictment, after saying that it was published in the French language, went on to say that it was "to the purport and effect following in the English language, that is to say," and then followed a translation of the libel in English. It was held, on motion in arrest of judgment, that such a declaration was defective, Lord Kenyon remarking that "the plaintiff should have set out the original words, and then have trans-

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lated them." In *Wright v. Clements* (3 B. & Ald. 503) the declaration alleged that the defendant published certain libellous matters of and concerning the plaintiff, "in substance as follows: that is to say," and then set out the very words of the libel. On motion in arrest of judgment it was argued that, from some such a preface to the setting out of the libel, it must be concluded that the actual libel published was not set out *verbatim*, but in substance only; and the court allowed the objection, saying the libel ought to have been introduced by some such words as "to the tenor and effect following," which would have imported that the very libel itself was set out; and judgment was accordingly arrested. *Cook v. Cox* (3 M. & Sel. 110) is to the same effect. These cases were decided in 1814 and 1820, and therefore after Fox's Libel Act (32 Geo. 3, c. 60), passed in 1792, which is a sufficient answer to the argument founded on that Act. But it is quite clear that no alteration was, or was intended to be made in the law in this respect by that Act. This appears both from the principle of that enactment, and also from express provision contained in it. After that Act it was still left for the judge to say whether the words used could possibly be a libel, and therefore, since before he can decide that question he must have the libel before him, the necessity for setting out the libel was not removed. But the Act contains an express provision to the same effect. By sect. 4 it is provided, "That in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground, and in such manner as by law he or they might have done before the passing of this Act; anything herein contained to the contrary notwithstanding." The last case that I shall refer to is a very remarkable one. In *Rees v. Wilkes* (4 Burr. 2527) the defendant was indicted for having published an obscene and impious libel, "to the purport and effect following, to wit;" and then followed the libel. Before the trial, the Attorney-General, Sir Fletcher Norton, applied to Lord Mansfield at chambers to amend the indictment by striking out the above words, and substituting for them the words "to the tenor and effect following, to wit;" which his Lordship, after hearing the other side against it, did. Now here it is worthy of notice that, although the actual libel was fully set out, yet the highest law officer of the Crown thought it inexpedient and unsafe to go on without substituting technical prefatory words, which were always held to signify that the actual words of the libel followed them, for other words which had not the same technical significance. So, taking a review of all these cases, we find in them a strong body of authority, derived from every kind of crime which consists in words, to the effect that in all such crimes the pleadings must set out the words themselves which constitute the offence. Now what are the cases which are said to be to the contrary effect? In *Dugdale v. The Queen* (Dear & P. 64) the indictment was for keeping in his possession indecent prints, and, in a second count, for obtaining and procuring indecent prints, in both cases with an intent to publish them. In neither case were the prints set out in the indictment, but it was not necessary, on such a charge, that they should be set out. The offence was complete though the defendant should never have looked at them, and therefore it was not necessary to the

validity of such an indictment that they should appear on the face of it. This case is therefore distinguishable on that ground; but I think it would have been enough to say that there is a difference, in this respect, between indecent prints and pictures, and an offence consisting of words. *Sedley's case* (1 Keb. Rep. 620; Fortescue, 99) is also distinguishable on the same ground, that it was not a case of libel at all, but of indecent exposure. In *Reg. v. Goldsmith* (28 L. T. Rep. N. S. 881; L. Rep. 2 C. C. R. 74) the prisoner was indicted for unlawfully receiving goods knowing them to have been obtained by false pretences, he did not get them himself by false pretences. Now, on such a charge, it was not necessary to prove that the prisoner knew what false pretences had been used in getting the goods, therefore it was not necessary to set out the actual false pretences in the indictment; just as, in an indictment for receiving goods knowing them to have been stolen, it is not necessary to show how or by whom they were stolen, since that offence can be committed by a man who is ignorant of the exact circumstances of the theft. *Heyman v. The Queen* was a case of conspiracy fraudulently to remove goods in contemplation of bankruptcy, and, as in *Reg. v. Aspinall*, which was also a case of conspiracy, the offence was held complete directly the agreement was come to, so that—after verdict at least—an indictment which alleged such an agreement, but omitted other particulars, was good. In those cases the crime did not consist in words, but in an agreement for a particular purpose. Then as to the last question, how far the omission must go to be incurable by verdict. The rule as to this point also is stated in my judgment in *Reg. v. Aspinall*. After stating the test for determining what is a mere imperfect averment—which the verdict will cure—to be to see if, "assuming the facts which are accurately alleged in the indictment to have been proved as alleged, and the facts which are imperfectly alleged to have been proved in a sense adverse to the accused, the charge is supported," the judgment goes on to give the test of an omission which verdict will not cure: "But if, assuming both the above-mentioned allegations of facts, the perfect and imperfect allegations, to be proved respectively as before stated, the charge would not be supported for want of the existence of some other allegation, affirmative or negative, which has been totally omitted, then the indictment is bad notwithstanding the verdict. The verdict is only to be taken as conclusive evidence that the facts alleged in the indictment, accurately and inaccurately, were proved in a sense adverse to the accused. If those facts, so proved, would not support the charge, the indictment is bad on a writ of error;" and the passage from Williams' Saunders (vol. 1., p. 261, edit. 1871) is to the same effect. The indictment must contain all that is put in issue; what is totally omitted is not in issue, whereas an inaccurate or defective averment is, and verdict accordingly cures the defect. Now is there such a total omission here? The introductory words, "a certain indecent, lewd, filthy, bawdy, and obscene libel," merely point out the class of offence under which the words which are to follow come. But all that follows is, "to wit, a certain indecent book called 'Fruits of Philosophy.'" There is no description even of

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the contents of the book, and a total omission of all quotation, and, according to the authorities I have examined, such an omission is fatal. Some American cases have been cited; but they do not help the prosecution, for they either are not the law of England, or, if they are, they are in the defendants' favour. They seem to say that where there is an averment that the libel is so bad as to pollute the records of the court if set out upon it, the libel need not be set out. But here there is no such averment. Even if there had been such an averment, I know no authority for saying that that is the law of England. It seems a more robust doctrine to say there is nothing in such an objection, when everyone that it is in court during the trial hears the obscenity over and over again. Therefore, in my opinion, this indictment is incurably defective, and the defendants are on that short ground, one entirely of law and quite apart from the merits of their case, entitled to our judgment.

COTTON, L.J.—I am of the same opinion. Though merely one of criminal pleading, this is an important question, since it is most desirable that there should be certainty in our criminal law. Now the rule on this point, as to what it is necessary to set out in an indictment for a libel, is perhaps best stated by Lord Ellenborough in *Cook v. Cox* (3 M. & Sel. 110), which has been already frequently referred to. That rule was established a long time ago; it has been constantly and uniformly recognised since, as appears from the string of cases referred to by my brother Brett, and no case going in the opposite direction has been cited by the counsel for the prosecution. The only case at all of that character was *Dugdale's case* (Dear & P. C. C. 64), but that case was not really in point. Therefore the rule must be taken to be well and firmly established, and that being so, it is scarcely necessary to consider the reason of it. But one good and sufficient reason it is easy to see, viz., that the defendant may be able, by demurrer, to raise the question whether the indictment charges any offence at all. We must not look at the injustice or inconvenience of any particular case; here is a rule existing, and it is our duty to adhere to it. The court below plainly were not aware of these English cases laying down and confirming this rule. None of them were brought to their attention, American cases alone being cited. But do these American cases even justify such an omission as there is here? We should not be bound by them if they did, but they do not. They lay down a rule that, where there is an allegation that the libel is too bad to be put on the record, it may be omitted; and it is enough to say that there is no such allegation here. But do the English courts recognise that rule? They do not. Our courts do not allow libels to be perpetuated and disseminated under a pretence of judicial necessity, but that is as far as they go. Where it is relevant and necessary, there is no rule which allows matter to be omitted merely because it is impure or libellous. A court ought not to consider its records defiled by any matter which a defendant has a substantial interest in demanding to be placed on them. If it is desirable that there should be an exception in any such case, the Legislature must make it, as it has made exceptions in other cases. Is this omission, then, cured by verdict? The rule is simple; verdict

will cure only defective statements. This is not a mere defective statement, there is an absolute and total omission. Such an omission has not been cured, and cannot be cured by verdict; therefore, according to settled and well-established rules of law, the defendants are entitled to our judgment.

Judgment reversed.

Solicitor for the prosecution, T. J. Nelson.

Wednesday, Feb. 27, 1878.

(Before COCKBURN, C.J., BRAMWELL, BRETT, and COTTON, L.JJ.)

USILL v. BREARLEY; USILL v. HALES; and USILL v. CLARKE. (a)

Practice—Appeal—Security for costs.

Upon an application that an insolvent appellant shall find security for the costs of a pending appeal, the court will look into the subject-matter of the action, and, if the appeal appears to be unreasonable or frivolous, will order security to be found.

THE plaintiff brought three actions for libel against the defendants as the printers and publishers of the *Standard*, *Daily News*, and *Morning Advertiser* respectively.

The circumstances were as follows:

The plaintiff was a civil engineer and had employed persons to make the survey of an Irish railway for him.

Some of these persons made an *ex parte* application in one of the Metropolitan police courts with a view to taking criminal proceedings against the plaintiff. The sitting magistrate dismissed the application on the ground that he had no jurisdiction, and that the applicants' remedy was by taking civil proceedings. The defendants correctly and without malice reported in their newspapers what had occurred before the magistrate, and the plaintiff thereupon brought his action.

At the trial before Cockburn, C.J. and a special jury, the learned judge held that the publication of the report was privileged, and directed a verdict for the defendants.

The plaintiff appealed from this decision to the C. P. Div., who affirmed it. (Reported 38 L. T. Rep. N. S. 65).

An appeal from the decision of the C. P. Div. is now pending in the Court of Appeal.

It was admitted that the plaintiff was hopelessly insolvent.

B. D. Yelverton, Barnard, and Bremner, for the defendants in the three actions respectively, now asked that the plaintiff should be ordered to give security for the costs of the appeals. Bremner referred to

Wilson v. Smith, 34 L. T. Rep. N. S. 471; L. Rep. 2 Ch. Div. 67; 45 L. J. 292, Ch. Div.

Shortt for the plaintiff.—In *Bourke v. The Whittemoss Colliery Company* (35 L. T. Rep. N. S. 160; L. Rep. 1 C. P. Div. 556) the court refused to order an insolvent appellant to give security for costs when the question at issue had not before been considered in a court of error. The subject-matter of this action has never been gone into as yet. [COCKBURN, C.J.—I think we are entitled to take into consideration whether the appeal is a reasonable one or not in deciding

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

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whether or not security should be given.] If so, there is this substantial question here, whether or not a report of statements injurious to the plaintiff, and made *ex parte* when there was no jurisdiction to act upon them, is privileged. This report is not justified within the rule in

Wason v. Walter, L. Rep. 4 Q. B. 73.

COCKBURN, C.J.—We think that this application should be acceded to, and that the plaintiff should find security for a moderate amount of costs. In coming to this conclusion we are justified in taking into account, not merely the pecuniary position of the plaintiff, but also the other circumstances of these actions. If this court were of opinion that there were reasonable grounds for going on with the appeals, we should not allow the insolvency of the plaintiff to stand in the way of the further consideration of the matter, and I therefore think we must look at the circumstances under which the actions were brought. Looking at the nature of the action, and all the circumstances, although there are no previous decisions on the point, it is clear that the fact of a magistrate having no jurisdiction does not take away the privilege that pertains to proceedings in a court of justice to which the public have a right of access, and the publication of which only enlarges the right of audience. The proceedings of a court of justice should be published without check. I think, therefore, we may freely take into account the character of this action, and the question which is professed to be involved in it. We may also take into account the nature of the plaintiff's proceedings, who has brought three actions on the same report. I think that is a vexatious course of proceeding on his part, and that he should be required to give security for costs of a moderate amount. Therefore, in all three actions, the plaintiff must either bring into court the sum of 50*l.* or give security to that amount; but if he gives security in respect of one appeal, he may select which he will proceed with. The rest of the Court concurred.

Order made accordingly.

Solicitors for the plaintiff, *Oarr, Fulton, and Carr.*

Solicitor for the defendant *Brearley, J. Goden.*

Solicitors for the defendant *Hales, Ashurst, Morris, and Co.*

Solicitors for the defendant *Clarke, Childs and Co.*

Friday, March 1, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

BOWYER v. THE SOUTH METROPOLITAN CEMETERY COMPANY. (a)

Burial fees—Incumbent's right in parishes and districts—Cemetery Act—6 & 7 Will. 4, c. 129 (Local and Personal), ss. 18-22.

By a private Act to establish a cemetery it was provided that certain fees should be paid by the cemetery company to the incumbent of the parish or other ecclesiastical district or division from which any body should be removed for the purpose of interment in the cemetery.

The Act also directed that a portion of such fees should be paid over by the churchwardens, or chapelwardens, to be by them applied among the persons entitled by law or custom to share in the

burial fees receivable in such parishes or districts by the churchwardens or chapelwardens.

After the passing of the Act three separate ecclesiastical districts—one with, and the other two without, a burial-ground—were formed out of the parish of Clapham—one of the parishes to which the Act applied. Before the cemetery was established the parish churchyard of Clapham was used as the place of burial of persons dying in the parish, and the vicar of Clapham for the time being was entitled to all fees on such burials.

Held (affirming the decision of the Ex. Div.), that the Act applied to future ecclesiastical districts with or without burial places; and, therefore, that the incumbents of the three districts were entitled to the fees under the Act, as against the vicar of Clapham.

Vaughan v. The South Metropolitan Cemetery Company (1 John. & Hem. 256; 30 L. J. 265, Ch.) approved and affirmed.

APPEAL from Exchequer Division.

An action having been brought by the Rev. Fitzwilliam Wentworth Atkins Bowyer, plaintiff, against the South Metropolitan Cemetery Company to recover 324*l.* 7*s.* 6*d.*, the amount of certain burial fees alleged to be due from them to him as rector of the parish of Clapham, and the Rev. Thomas Stantial, and the Rev. Aubrey Charles Price, and the Rev. George Forrester, having claimed to be respectively entitled to portions of the said sum; by an order of the Hon. Mr. Justice Field, dated 25th April 1877, it was ordered that all further proceedings against the South Metropolitan Cemetery Company be stayed, and that they should pay into court the sum of 324*l.* 7*s.* 6*d.* after deducting their taxed costs, and also that the plaintiff and the claimants should proceed to the trial of an issue in which the said plaintiff should be plaintiff, and the said claimants defendants, and that the question between the said plaintiff and the claimants should be stated for the opinion of the court in the form of a special case. In accordance with the said order, the said parties have by agreement stated for the opinion of the Exchequer Division the following:

CASE.

1. The Rev. Fitzwilliam Wentworth Atkins Bowyer is rector of the parish of Clapham, and has been entitled to all dues and fees accruing and appertaining to the rector or incumbent of the parish of Clapham since the 25th Feb. 1872, at or about which date the rectory was avoided by the death of his predecessor.

2. The Rev. Dr. Stantial is the incumbent of the ecclesiastical district of St. John, the Rev. Aubrey Charles Price is the incumbent of the ecclesiastical district of St. James, and the Rev. George Forrester is the incumbent of the ecclesiastical district of St. Paul. The said districts of St. John, St. James, and St. Paul are wholly comprised within the limits of the parish of Clapham, as it existed at the time of the passing of the Act next hereinafter mentioned. The said several incumbents of St. John, St. James, and St. Paul have been entitled to all dues and fees accruing or appertaining to the inhabitants of the said districts respectively since the said 25th Feb. 1872. The said incumbent of St. John has been entitled to all dues and fees accruing or appertaining to the incumbent of the said district since the 15th Jan. 1875.

(a) Reported by W. AFFLETON, Esq., Barrister at Law.

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3. The South Metropolitan Cemetery Company were incorporated by the statute 6 & 7 Will. 4, c. 129, and it is by the said statute amongst other things enacted as follows:

Sect. 18:

And be it further enacted, that upon the interment of every person within the consecrated part of the said cemetery who shall appear by the books of the company to have been removed for the purpose of interment from the parish in which the cemetery shall be situated, or from any parish in the county of Surrey adjoining thereto, or from any of the parishes of Lambeth, Battersea, and Wandsworth, in the said county of Surrey, or from any parish within the cities of London or Westminster, or the borough of Southwark, according to the limits thereof settled and described in an Act passed in the second and third years of the reign of his present Majesty, entitled "An Act to settle and describe the divisions of counties and the limits of cities and boroughs in England and Wales so far as respects the election of members to serve in Parliament," the said company shall pay unto the incumbent for the time being of the church or chapel in the parish or other ecclesiastical district or division of the parish from which such person shall be so removed the fees following (that is to say), in case such person shall be interred within any vault, octacomb, or brick grave, the fee of twenty shillings, and in case such person shall be interred in the open ground, the fee of seven shillings and sixpence.

Sect. 22:

And be it further enacted, that every such incumbent shall pay to the churchwardens or chapelwardens for the time being of his church or chapel out of every sum of twenty shillings that he shall receive by virtue of this Act in respect of interments in any vault, octacomb, or brick grave in the said cemetery, the sum of twelve shillings, and out of every sum of seven shillings and sixpence in respect of interments in the open ground of the said cemetery, the sum of three shillings and sixpence, to be respectively paid and applied by them in the same manner and amongst the same persons (including the incumbents of such churches and chapels), and in the same proportions as the fees or interments which the said churchwardens and chapelwardens are entitled to receive in their respective parishes, districts, or divisions of parishes are and ought by law or custom to be paid and applied.

Sect. 23:

And it be further enacted, that all fees payable by the said company by virtue of this Act shall be paid to the incumbent for the time being of the church or chapel in respect of which the same are payable, notwithstanding he may not have been the incumbent thereof at the time the interment took place for which such fee is paid, or at the time when the half-yearly settlement of accounts was made, and the receipt of the incumbent for the time being shall be an effectual discharge to the said company for the fees payable by them by virtue of this Act.

Sect. 24:

Provided always, and be it further enacted, that upon the cession, resignation, removal, or death of the incumbent of any church or chapel, to whom fees are payable by the said company by virtue of this Act, such incumbent, his executors, administrators, or assigns, shall be entitled to receive so much of the sum payable at the half-yearly day of settlement of accounts which shall happen next after such cession, resignation, removal, or death, as shall have accrued for such fees from the last preceding day of settlement of accounts, or from the time when such incumbent became first entitled in fact or by relation of law to receive the fruits of his living (as the case may require) up to the day of such cession, resignation, removal, or death, and the incumbent who shall be appointed in his place shall and may have, receive, and retain the residue of the said sum, and the incumbent of any church or chapel, who shall receive from the said company any sum which in pursuance of the directions hereinbefore contained is to be divided as aforesaid shall account for the same with the preceding incumbent, his executors, administrators, or assigns, and pay over to him or them accordingly, and the said company shall not be liable to

see to the application thereof, and in like manner the incumbent for the time being of any church or chapel in respect of which any arrears of fees are payable to the said company, shall, upon the receipt, duly account for and pay over the same unto the preceding incumbent, his executors, administrators, or assigns, or other, the person entitled thereto, and the company shall not be answerable or accountable to any person other than the actual incumbent for the time being for the payment of any fees or arrears of fees under or by virtue of this Act.

4. In pursuance of the provisions of the said Act, the said South Metropolitan Cemetery Company established and maintained a cemetery at Norwood, in the county of Surrey, and a part thereof was set apart for the interment of the dead, according to the rights and usages of the United Church of England and Ireland, and was duly consecrated for that purpose by the bishop of the diocese.

5. The parish of Clapham is a parish in the county of Surrey, adjoining the parish in which the said cemetery is situated, within the meaning of the 18th section of the said Act.

6. For some years previous to the establishment of the said cemetery, the churchyard of the parish church of Clapham was used as the place of interment of persons dying within the said parish, and the rector or incumbent of Clapham for the time being was entitled to all fees arising or accruing in respect of such interments, excepting as hereinafter mentioned.

7. None of the said districts of St. John, St. James, or St. Paul were in existence at the date of the passing of the said Act.

8. The chapel or church of St. James was originally set apart from the said parish by deed dated the 5th Nov. 1829 (which is set out in the Appendix hereto).

9. The said deed contained a power to the trustees of the said chapel or church therein appointed to sell vaults or pieces of ground lying or being in or under the said chapel or church for private places of interment, for a price not less than would, at the time of such sale, have been payable to the rector of Clapham for the time being upon similar sales of vaults or pieces of ground in the parochial cemetery. And it was thereby declared that the said trustees should stand possessed of the purchase moneys thereof, upon trust to pay to the rector of Clapham for the time being the sum he would be entitled to receive for the sale or grant of a similar vault or parcel of ground in the parochial cemetery for the time being of the parish of Clapham, to retain the surplus for the discharge of a certain debt upon the church, and to pay over the residue, if any, to the minister thereof for the time being, for his own absolute use and benefit.

10. The said deed further provided that on every funeral which should take place at or within the said chapel, the rector of the parish church of Clapham, and also the clerk and sexton thereof respectively for the time being, should be entitled to the same dues and fees as they would respectively have been entitled to in case such funeral had been performed at or within the said parish church or the parochial cemetery thereunto belonging, and the surplus, if any, of the said dues and fees which should be received upon every such funeral should belong to the minister, clerk, or sexton for the time being of the said chapel respectively.

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11. The said deed contained similar provisions in respect of the rights of the rector of Clapham for the time being to dues or fees for every monumental stone or alab, or other erection, which should from time to time be erected, set up, or fastened within the said chapel. And it was further provided that proper entries of all burials which should take place at the said chapel should be made by the minister thereof for the time being as well in the parochial register book as in the register thereinbefore directed to be kept in the vestry room of the said chapel.

12. The chapel of St. Paul was built in pursuance of a private Act of Parliament (53 Geo. 3, c. 56), and by sect. 18 thereof it was provided as follows, namely:

And be it further enacted that nothing herein contained shall extend or be construed to extend to affect or prejudice the right, title, interest, claim, or demand of the rector of the said parish for the time being of, in, and to any Easter offering, oblations, surplice fees, fees for burials, or vaults, or monuments in the said chapel, or other ecclesiastical rights, dues, benefits, or advantages whatsoever arising within the said parish and belonging to the said rector for the time being, but the same shall continue in such and the same manner as they would or ought to have done in case that this Act had not been passed.

13. The district of St. John was constituted by Order in Council dated the 2nd Nov. 1842, the district of St. James by Order in Council dated 8th June 1854, and the district of St. Paul by Order in Council dated the 30th April 1861. The said Orders in Council are set out in the appendix to this case, and marked respectively A. B. and C.

14. By the said Orders in Council it was respectively provided that marriages, baptisms, and churchings should be solemnised and performed in the chapel or church of each of the said districts respectively, and that the fees arising therefrom should be received by the minister or incumbent for the time being of the said chapel or church. No mention of burial fees was made in the said orders, nor has any burial ground ever been attached to any of the said districts.

15. From the time of the creation of the said districts to the 25th Feb. 1872, all fees for burials payable under the 18th section of the said Act of 6 & 7 Will. 4, c. 129 in respect of persons removed for the purpose of interment from the several districts hereinbefore mentioned, were paid to the rector of Clapham for the time being, excepting so far as hereinbefore mentioned.

16. For the purpose of this case it is agreed that the fees payable under the 18th section since the 25th Feb. 1872, and up to the 31st Dec. 1876, in respect of persons removed for the purpose of interment from that part of the original parish of Clapham, not included in the several ecclesiastical districts hereinbefore mentioned, and the ecclesiastical district of All Saints (exclusive of the district of Christ Church which is not affected by this case) amount to 199l. 12s. 6d. The fees for persons so removed from the districts of St. John, St. James, and St. Paul within the same period to 66l., 92l. 7s. 6d., and 125l. 17s. 6d. respectively. The question for the opinion of the court is, whether the said rector of Clapham is entitled to all or any, and which of the said several sums of 66l., 92l. 7s. 6d., 125l. 17s. 6d., as against the incumbents of the said several ecclesiastical districts respectively.

ADDITIONAL PARAGRAPH TO SPECIAL CASE.

At the time of the statute 6 & 7 Will. 4, c. 129, there were in existence certain ecclesiastical districts or divisions of the parishes mentioned or referred to in the 18th section of the said Act to which burial grounds were attached, and the incumbents of which were duly entitled to solemnise and perform burials in the said district.

The burial fees received for instance in respect of interments in the vaults and churchyard of the district of St. Matthew, Brixton, were paid to the churchwardens for the time being of the said district church, and some fixed part thereof was paid over to the rector for the time being of the parish of St. Mary, Lambeth, out of which the said district was formed, and the residue thereof was applied partly in payment of the surplice fees of the incumbent for the time being of the said district parish of St. Matthew, and in payment of the fees of the clerk and sexton of the said district church.

The case was argued before Cleasby, B., who gave judgment for the defendants.

The plaintiff appealed.

Meadows White, Q.C. and *Kenselm Digby* for the plaintiff.—If sects. 18 and 22 are construed together, the words “remove for the purpose of interment” should be expanded into “remove for the purpose of interment from the parish burial place to the cemetery.” Sect. 18 is only meant to apply to a removal from parishes or districts where there was, when the Act was passed, already a burial place. The vicar of Clapham would have been entitled to the fees before these districts were constituted, and his rights in that respect have not been altered. The Act was passed to compensate clergymen whose incomes were diminished by reason of the cemetery. In this case the incumbent of the district church gets more and the vicar of the parish less than he would have done if the Act had not been passed. *Vaughan v. Metropolitan Cemetery Company* (30 L. J. 265, Ch.; 1 John. & Hem. 256) is wrong, and should be overruled. They also cited and referred to

Topsall v. Ferrers, Hob. 175;
Burdeane v. Lancaster, 1 Salk. 383;
Spry v. Gallop, 16 M. & W. 716, and judgment by Pollock, C.B., at p. 730;
Phillimore's Ecclesiastical Law, vol. 1 p. 863;
Gilbert v. Bussard, 3 Phil. Rep. 335;
14 & 15 Vict. c. 97, s. 2.

Charles, Q.C. (*Bullen* with him) for the defendants.—The question turns wholly upon the construction of sect. 18. That section was intended to apply to future ecclesiastical districts. Nothing is taken away by the Act, and therefore nothing is due by way of compensation to the plaintiff. Before Clapham churchyard was closed all the parishioners might, if they liked, have been buried there. The fallacy underlying the contention of the other side is that such fee is payable in respect of the particular work done. It is not so; fees were an endowment in respect of the clergyman's whole general work. The language of sect. 22 is not sufficient to control that of sect. 18. Sect. 22 is applicable only to particular cases where churchwardens were by law entitled to receive fees. The decision in *Vaughan v. The South Metropolitan Cemetery Company* (30 L. J. 265, Ch.; 1 John. & Hem. 256) is right, and the reasons given by Page Wood, V.C., in his judgment, are arguments for the defendants in this case.

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Meadows White, Q.C. replied.

BRAMWELL, L.J.—I am of opinion that the judgment of Cleasby, B. should be affirmed. I do not feel able to speak with confidence, dealing, as I am, with a matter very unfamiliar to courts of common law, and having to construe a statute which, as it is a private Act, one may, perhaps, be permitted freely to find fault with, and upon which it is extremely difficult to put a meaning. The question is, whether sect. 18 of the Act applies to future as well as to present ecclesiastical districts or parishes, and whether it includes districts which have not, as well as those which have, and districts which in the future will have not, as well as those which will have, graveyards of their own. It will perhaps assist in enabling us to construe the section, if we bear in mind the condition of legislation when this Act was passed. Compensation was being made to clergymen whose incomes were likely to be affected. Now in words sect. 18 includes future-to-be-created, as well as actually existing, divisions of the parish. I think there is nothing unreasonable in that. At first sight it may appear a little unreasonable that, upon a new district being made with a burial ground which would belong to the mother church by the original constitution of the district, the incumbent should have these fees under sect. 18. The answer is, that if the district existed before the Act was passed, the hardship would be the same, and it is quite certain that in that case, under sect. 18, the incumbent of the district would get his share of the fees. I can see nothing unreasonable in holding that sect. 18 applies in terms to both classes of cases, existing and future districts which have a graveyard. If so, is there anything unreasonable in holding that districts without a graveyard come within sect. 18? I think not. The vicar of the parish no doubt is entitled to be heard in all these matters, and provision might be made that no diminution of his income should take place during his lifetime; but why, in principle, after the death of the existing incumbent of the parish, should not the incumbent of the district without a graveyard have his share of the fees for the burial of persons dying in the district? Neither the incumbent of the parish nor of the district does any work in connection with the burials. I can see no reason why the incumbent of the parish, who has not the work to perform, should be paid these fees any more than the incumbent of the districts without a graveyard who cannot perform it. These fees are part of the church emolument, part, as it were, of the gains of the church in that district. Suppose for a moment a parish A. and within it a district B.; A., we will say, has a graveyard, B. has not. Two men of equal merit are appointed as incumbents of A. and B. The burial of the dead of B. is work which the incumbent of A. will not, and the incumbent of B. cannot do; why should not the incumbent of B. receive these fees? There is nothing therefore unreasonable, I think, in saying that sect. 8 applies to future-to-be-created districts, with or without a graveyard, as well as to districts existing at the passing of the Act. The next question is, does sect. 22 cut down the effect of sect. 18? If there is anything in sect. 22 to show that the Legislature do not mean what is the natural sense of the words in sect. 18, but something short of what they naturally signify, then we ought to limit our construction of sect.

18. But I cannot see that sect. 22 does that; in fact, I cannot see quite what it does do. I think, however, that whoever drew it had in his mind an impression that, in all cases where there were incumbents, there were also graveyards and churchwardens who were entitled to fees, because he seems to suppose that in every case when the incumbent receives the fees on interments he will have churchwardens entitled to receive a portion of them. I think the section was drawn under a mistake. It would be clearly wrong to cut down the plain meaning of language used in an Act of Parliament because you find inconsistent words in another part of the Act, which has been passed under an erroneous supposition. I think this section was so passed, and that it was not meant to cut down sect. 18. I think the decision in *Vaughan v. The South Metropolitan Cemetery Company (ubi sup.)* which has stood for seventeen years is right, and if I required stronger reasons for the conclusion I have come to, that case would afford them.

BRETT, L.J.—The question is whether two sums of 20s. and 7s. 6d. ought properly under sect. 18 of the Act to be paid by the cemetery company to the vicar of Clapham, or to the incumbents of three districts in the parish of Clapham. All the districts for the purposes of our decision are the same; they are all formed under the Church Building Acts, since the private Act which we are asked to construe was passed. I think that, as between the vicar of Clapham and the incumbents of the three districts, the fees in dispute are to be divided amongst the incumbents, and not go to the vicar of Clapham. I think so on the construction of sect. 18. If it is made out that those words work an injustice, that is no argument against the natural construction being put upon clear words. I think there is no injustice worked, and I also think there is nothing in sect. 22 to deprive the words in sect. 18 of their ordinary and natural meaning. Sect. 18 points distinctly to what might have been done under the Church Building Acts. Under those Acts the parish might have been divided into separate parishes. It might have been formed into ecclesiastical districts with certain rights and liabilities, or part of the parish might have been taken off and joined to and consolidated with another parish. As to what existed at the time of the passing of the private Act, I cannot bring myself to doubt that districts both with and without churchyards were intended to be included in sect. 18. Districts with and without churchyards might have existed after the passing of the Act. Sect. 18 deals with the period of time when, in the future, a body is to be removed, and it deals with all the cases for which the Church Building Acts provide. It would apply equally to a parish divided into separate parishes; then it goes on, "or other ecclesiastical district or division of the parish from which such person shall be so removed," dealing with the time of removal, the place from which the body is removed as either a parish, or district, or division. Therefore, upon the face of sect. 18, the words seem clear. But it is then said that they will work injustice, and if probable injustice is shown, they are not to be construed according to the proper canons of construction. I do not think they do work injustice. The argument used to show injustice is to say that these fees are paid by way of com-

pensation, and it is therefore contended that it is unjust to pay them to anyone but to the person who has lost the opportunity of earning them. That argument rests upon the assumption that fees are paid merely for the burial in respect of which they become due. I agree with Lord Hatherley that it is not so. In fact and in reason I think customary fees in a parish arose in this way: the clergyman has to perform many duties throughout the year, and to the whole parish; with regard to the churchyard, he has to keep it in order, it is his freehold; his duties are in fact the set of duties which he owes the whole parish. By custom fees are attached to some of the duties, but the custom is conclusive to show that they are not in payment for the particular work done. There is work to which no fees are attached. If that is so, it might be unjust to say to the vicar, "You will still perform all the duty of the parish, but part of the burial fees shall go to the incumbent of the district." But that is not the fact here, because all the duty which the vicar of Clapham used to perform in respect of the districts has been taken away or gone into other hands, and it is the incumbent of the district who has now to perform it. But if there is any injustice, I do not see how that would enable us to construe sect. 18 apart from its plain meaning. As to sect. 22 I have an opinion as to its construction, but I do not think it necessary to say what that opinion is. All I can say is that, in my view, there is nothing to take away the plain and ordinary meaning of the words in sect. 18. According to that plain and ordinary meaning I am of opinion that our judgment should be for the defendants.

CORROD, L.J.—The question is whether or not certain payments should be made by the cemetery company to the vicar of Clapham, or to the incumbents of three districts in the parish. I am of opinion that the sums are to be paid to the incumbents of the districts. The first question seems to be, is sect. 18 confined to districts existing at the time of the passing of the Act? There is nothing in the language of the section to say so. It might have been said. But the Legislature knew that separate districts were about to be constituted under the Church Building Acts, and the private Act which was passed in view of the large increase in population in that neighbourhood applies only to separate parishes and districts to be constituted under the Church Building Acts. The argument is that the section only applies to the incumbents of ecclesiastical districts where burials are possible, and it was attempted to be made out by arguing that "removal" in the section means taking away the body from some place where burials are possible, and not a physical removal merely. I do not think that a fair construction. One ought to see, in construing an Act of Parliament, whether there is anything which makes it necessary to place upon the words any but their plain and strict meaning. I think there is no reasonable doubt on the construction of the words here. A great part of the argument was founded upon this Act being by way of making compensation, and it was said that the vicar of the parish was to be compensated for the loss of work in respect of which the fees were payable. But the Act says nothing about making any compensation for fees for work which might have been done. The only recital in the

Act seems to show that it was an Act to provide for the inability of the existing churches to bury the dead, and bodies like the cemetery company were coming to Parliament in order to get powers to do it for them. The Act says that incumbents shall be paid a certain sum, not saying anything about compensation, but only a sum. We are not able to give a different construction to sect. 18 than the plain words will bear. But it is said that sect. 22 comes in and alters that meaning. I agree that sect. 22 must be looked at in construing the Act, but the utmost that can be said is this—that the framer of the section supposed that within the district in all the parishes there were churchwardens who were entitled to fees for burials. You cannot say that sect. 22 is to be construed as an interpretation clause of previous sections. It is not necessary or right to put a construction upon it. It is enough to say that it may not be applicable to all districts. That it can be so applied, in my opinion, is not, and cannot be, a necessary conclusion.

Judgment affirmed.

Solicitors for the plaintiff, *Paterson, Snow, and Bloomam.*

Solicitors for the defendants, *Lovell, Son, and Pitfield.*

Thursday, Feb. 28, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

THE ATTORNEY-GENERAL v. MOORE. (a)

Penalties—3 & 4 Vict. c. 97, s. 16—To whom payable, the Crown or borough—Municipal Corporations Act (5 & 6 Will. 4, c. 76), s. 126.

The effect of 5 & 6 Will. 4, c. 76, s. 126, and 3 & 4 Vict. c. 97, s. 16, is that penalties recovered under the latter section in a summary manner before justices of a borough having a separate court of quarter sessions go to the borough and not to the Crown.

Judgment of the Exchequer Division affirmed.

APPEAL from the Exchequer Division.

Information by the Attorney-General against the clerk to the justices of the borough of Warwick, to recover a sum of 11. 10s., being fines received by the defendant as such clerk, and alleged to be payable to Her Majesty. By the consent of the parties a case was stated under 22 & 23 Vict. c. 21, s. 10, which disclosed the following facts:—

The borough of Warwick is one of the boroughs contained in schedule A. of 5 & 6 Will. 4, c. 76, as having a commission of the peace. It has also a separate court of quarter sessions.

On the 29th May 1876 one Amos Dalton was convicted before two of the justices of the peace of the borough of a breach of sect. 16 of 3 & 4 Vict. c. 97, for that he did unlawfully and wilfully obstruct and impede one Robert Billington, then being in the execution of his duty on the Great Western Railway within the borough, and he was adjudged to forfeit and pay the sum of 5s., to be paid and applied according to law.

On the 6th Sept. 1876 one John Reeves was convicted and adjudged to forfeit and pay the sum of 11. 5s. for a similar offence.

Both these fines were received by the defendant, and were claimed by the Lords Commissioners of Her Majesty's Treasury as belonging

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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to the Consolidated Fund, and as being payable by the defendant to the receiver of fines, on the ground that, upon the right construction of 3 & 4 Vict. c. 97, s. 16, the said fines were forfeit, and therefore payable to Her Majesty. The defendant, however, declined to pay over these fines to Her Majesty, contending that, upon the right construction of 5 & 6 Will. 4, c. 76, s. 126, they ought to be paid to the treasurer of the borough to the credit and on account of the borough fund, inasmuch as the Act under which the penalties were recovered is not an Act relating to trade so as to bring it within the provisions of the last-mentioned section.

The question for the opinion of the court was whether the fines ought to be paid to Her Majesty or not.

The Exchequer Division (Kelly, C.B. and Cleasby and Pollock, BB.) gave judgment for the defendant (reported 37 L. T. Rep. N. S. 610), and the Attorney-General appealed.

By 5 & 6 Will. 4, c. 76 (the Municipal Corporations Act) s. 126:

When, by any Act, any penalties or forfeitures are or shall hereafter be made recoverable in a summary manner before any justice or justices of the peace, and by such Act respectively the same are or shall be limited and made payable to His Majesty. . . . In every such case the same, if recovered and adjudged before any justice of any borough in which a separate court of quarter sessions of the peace shall be holden as aforesaid, shall, notwithstanding anything in such Act respectively contained, be recovered for and adjudged to be paid to the treasurer of such borough for the time being, to the credit and on account of the borough fund of such borough. . . . Provided always, that nothing herein contained shall extend to any penalties or forfeitures recovered under any Act relating to the customs, excise, and post office, or to trade, or navigation, or any branch of His Majesty's revenue.

By 3 & 4 Vict. c. 97 (An Act for regulating Railways), s. 16:

If any person shall wilfully obstruct or impede any officer or agent of any railway company in the execution of his duty upon any railway, . . . every such person so offending shall and may be seized and detained by any such officer or agent until such offender or offenders can be conveniently taken before some justice of the peace for the county or place wherein such offence shall be committed, and, when convicted before such justice as aforesaid (who is hereby authorised and required, upon complaint to him upon oath, to take cognisance thereof, and to act summarily in the premises), shall, in the discretion of such justice, forfeit to Her Majesty any sum not exceeding 5*l*.

Sir *Hardinge Giffard*, Solicitor-General (*Muir Mackenzie* with him), for the Crown.—The proviso at the end of 5 & 6 Will. 4, c. 76, s. 126, excepting penalties recovered under any Act relating to trade from the operation of that section, may possibly apply to this case; but the substantial question is whether that section is not repealed, so far as relates to the application of penalties by 3 & 4 Vict. c. 97, s. 16; the words of the later Act, "shall forfeit to Her Majesty," amount to an express enactment that these penalties are to be paid to the Crown. See

Wray v. Ellis, 1 E. & E. 276.

K. E. Digby (*Mellor*, Q.C. and G. G. Kennedy with him) for the defendant.—Where sect. 126 of the Municipal Corporation Act is intended not to apply it is excluded by an express provision, as for instance in the Mutiny Act (40 & 41 Vict. c. 7), s. 91. [Brett, L.J.—That argument will not apply unless the section is expressly excluded by

some Act where the penalty is given to Her Majesty.]

BRETT, L.J.—I entertain no doubt whatever, and I cannot think that there is any difficulty in the case. The statute 5 & 6 Will. 4, c. 76, s. 126, contemplates future legislation when it provides that, when by any Act any penalties or forfeitures are or shall hereafter be recoverable, &c., and by such Act "the same are or shall be limited and made payable to His Majesty," they shall, in boroughs having courts of quarter sessions be paid to the treasurer on account of the borough fund. That section in effect says that we must read all those Acts by which penalties are made recoverable in a summary manner before justices as if the provision that the penalty or forfeiture is to be payable to Her Majesty were that it should be payable to the borough fund in all cases where the penalty or forfeiture is recovered in one of the class of boroughs mentioned in the section. I am not sure that one might not say that, though the borough fund is the beneficiary, still the forfeiture is a forfeiture to the Crown. I think, therefore, that the defendant was entitled to retain the amount of these fines, and the judgment of the Exchequer Division ought to be affirmed.

BRETT, L.J.—I am of opinion that 3 & 4 Vict. c. 97, s. 16, does not repeal the other Act (5 & 6 Will. 4, c. 76, s. 126), which contemplates penalties and forfeitures recoverable before justices, and says that in certain cases they shall be payable to the borough fund. We can apply the words of that section with certainty in the present case. It is true that by the later Act these penalties are forfeited to the Crown, but if we read that Act together with the statute of Will. 4 it is clear that they are payable to the borough fund.

COTTON, L.J.—I am of the same opinion. I cannot say that the Act for regulating railways repeals the Municipal Corporations Act, which points out the particular fund to which these fines are payable.

Judgment affirmed.

Solicitors for the Attorney-General, *Hare and Fell*, for the *Solicitor to the Treasury*.

Solicitors for the defendant, *Field, Boscoe, and Co.*, for *Moore, Warwick*.

HIGH COURT OF JUSTICE.

EXCHEQUER DIVISION.

Jan. 29 and Feb. 4, 1878.

(Before CLEASBY, B. and HAWKINS, J.)

THE GUARDIANS OF THE POOR OF THE WESTBURY-ON-SEVERN UNION (apps.) v. THE OVERSEERS OF THE POOR OF THE PARISH OF BARROW-IN-FURNESS (resps.)(a)

APPEAL FROM INFERIOR COURT.

Poor law — Derivative settlement — Child — Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 35 — Retrospective effect of — Construction.

By the first paragraph of sect. 35 of the *Divided Parishes and Poor Law Amendment Act 1876* (39 & 40 Vict. c. 61), it is enacted that "no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from

(a) Reported by H. LEIGH and R. RINGWOOD, Esqrs., Barristers-at-Law.

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her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

Held, by the Exchequer Division (Oleasby, B. and Hawkins, J.), that the whole of such first paragraph of that section, both in the enactment and the exception, is retrospective as well as prospective in its operation and effect.

A pauper, born in 1841, resided with his father till he was seventeen years old. The father was seized of a dwelling-house in the appellants' union, and thereby acquired a settlement of estate therein during the time that his son (the pauper) resided with him. The son never acquired a settlement of his own, but before the passing of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) had acquired a settlement in the said union by derivation from his said father.

Held, that the case came within the above-named exception in sect. 35 of the Act, and was therefore not within the operation of the earlier part of that section, and that the pauper consequently retained his derivative settlement from his father, in the appellants' union, subsequently to and notwithstanding the passing of the said Act.

THIS was a special case stated between the parties by consent and by order of Lopes, J., in pursuance of 12 & 13 Vict. c. 45, s. 11.

On the 27th Oct. 1877 the respondents obtained an order under the hands and seals of two of Her Majesty's justices of the peace for the county of Lancashire, within which county the said parish of Barrow-in-Furness is situated, adjudicating the settlement of James Dorrington, a lunatic pauper, to be in the parish of East Dean, in the county of Gloucester, and in the appellants' union.

1. The said pauper lunatic is the legitimate son of Thomas and Ann Dorrington, and was born at a place called Littledean Hill, in the county of Gloucester, on the 31st March 1841, which said place at the time of the said birth, and until the passing of the statute 5 & 6 Vict. c. 48, was an extra-parochial place, but was included in the parts of the Forest of Dean which by that statute became a township under the name of East Dean.

2. The said James Dorrington (the pauper) never acquired a settlement in his own right, but he resided with his father, the said Thomas Dorrington, until he was upwards of seventeen years of age.

3. The said Thomas Dorrington, father of the said pauper, before the pauper had attained the age of sixteen, to wit in the year 1855, was seized of a certain dwelling-house situated at Bilston Green, in the township of East Dean, in the said county of Gloucester, and in the said Westbury-on-Severn Union, and so continued seized thereof until the year 1862, and the said Thomas Dorrington resided and slept in the said township, in the said dwelling-house, for forty days, and during the time he was so seized thereof.

It is contended on behalf of the respondents that the said James Dorrington, the pauper, is, and by the appellants that he is not, upon the facts herein before appearing, settled in the said town-

ship of East Dean, in the said Westbury-on-Severn Union.

The question for the opinion of the court is, whether on the above-mentioned facts the legal settlement of the said lunatic pauper is in the said township of East Dean.

If the court be of opinion that the answer should be in the affirmative, the said order of the justices is to stand; if otherwise, to be quashed.

The appellants gave notice that they would take the following grounds of appeal:

First, that the said lunatic was not at the time of his being sent to the said asylum [at Lancaster], nor hath he been at any time since, nor is he now, settled in the parish of East Dean in the said Westbury-on-Severn Union. Secondly, that although the said pauper was born at Littledean Hill, in the Forest of Dean, as alleged, the said place where he was so born was, at that time and until the passing of 5 & 6 Vict. c. 48, an extra-parochial place. Thirdly, that the same pauper has not derived, and cannot be deemed to have derived, a settlement from his father, Thomas Dorrington, as alleged in the said order.

The case was argued at the bar as if there had been an express allegation that the residence of the pauper's father in the township of East Dean, in the appellants' union, was, during the time that his son, the pauper, lived with him, and that the son had acquired a derivative settlement there, and would accordingly be removable to that union but for the Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61); the only question, therefore, being upon the construction to be put upon that statute.

The following sections of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) are material:

Sect. 34:

Settlement for persons by residence.—Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided, that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed without such corroboration as the justices or court think sufficient.

Sect. 35:

Abolition of derivative settlements.—No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child shall acquire another settlement.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

Sect. 36:

Proviso for pending orders of removal.—The provisions relating to settlement shall not apply to any pauper removed under any such order of removal, or without

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such order under the provision in that behalf contained in the Union Chargeability Act 1865 before the passing of this Act, or in receipt of non-resident relief lawfully given, or in respect of whom any order of removal shall be pending at the passing of this Act.

Anstie (with him was *J. D. Greene*) for the appellants.—The question here is, whether or not sect. 35 of the Act of 1876 is retrospective, and whether or not the derivative settlement of the pauper within the appellants' parish is destroyed by that section. The contention on the part of the appellants is that the section is retrospective, and the derivative settlement destroyed. But for this enactment the pauper would doubtless have had a derivative settlement from his father in the parish or township of East Dean, in the appellants' union. Before the passing of this Act of Parliament questions concerning derivative settlements from parents often led to very difficult, complicated, and expensive inquiries, and it is submitted that the express intention of the Legislature in the statute in question was to abolish all such settlements except in the case of young children under the age of sixteen years. The three sections (34, 35, and 36) must be read together in order to see the full scope and meaning of the Legislature. By sect. 34 residence for three years in a parish, under such circumstances as would, in accordance with the statute in that behalf, render the person irremovable, confers a settlement. By sect. 35, paragraph 1, derivative settlement from a parent, except in the case of a child under the age of sixteen, is abolished, and sect. 36 provides that the provisions relating to settlement shall not apply to "any pauper removed under any order of removal, or without such order under the Union Chargeability Act 1865, before the passing of this Act, or in receipt of non-resident relief, or in respect of whom any order of removal shall be pending at the passing of this Act." In those several specified cases it is enacted that the Act shall not be retrospective, and the reasonable inference and implication therefrom is, that in all other cases it is to be retrospective; and if so, then it is in the present case, which is not one of the excepted cases in sect. 36. Sects. 34 and 35 are the only sections in the statute which relate to settlement; and in *Reg. v. The Guardians of Ipswich Union* (L. Rep. 2 Q. B. Div. 269; 46 L. J. 207 M. C. s. c. nom. *The Ipswich Guardians* (apps.) v. *The Great Yarmouth Guardians* (resps.)), 36 L. T. Rep. N. S. 317, the Queen's Bench Division (Cockburn, C.J. and Mellor, J.), held that sect. 34 was not retrospective, and therefore sect. 36 cannot apply to it. There is then only sect. 35, the only other section relating to which sect. 36 can apply, which shows that sect. 35 must have some retrospective effect. The opening words of sect. 35 are retrospective, and by them all previously gained derivative settlements are destroyed. It will be contended by the respondents, probably, that the exception in that section is retrospective also and applicable to children above the age of sixteen at the date of the Act. But that would render it necessary to read in to the exception many additional words with a retrospective operation which are not now there. The exception is entirely prospective in language and limited to children under sixteen at the date of the Act, under which age children were already protected by the 9 & 10 Vict. c. 66, sect. 3.

Lumley, for the respondents, *contra*.—There are

two answers to the appellants' argument. In the first place, the opening words of sect. 35 are not, it is submitted, retrospective. The whole clause is prospective. Whenever there is any ambiguity in the construction of a statute, the courts are always unwilling and slow to destroy or interfere with rights and liabilities that already exist and have accrued. If the contention of the appellants is right and is upheld, the consequence will be a great shifting of liability with respect to paupers throughout the country. Sect. 35 is not more retrospective in its language than sect. 34, which the Queen's Bench Division in the *Ipswich* case (*ubi sup.*) held was not retrospective. [HAWKINS, J. — What provisions relating to settlement in this statute are we to hold to be retrospective? Or are we to give no effect to the implication contained in sect. 36, that some of such provisions must be of that character?] The court is not bound by the decision of the Queen's Bench Division in the *Ipswich Union* case any further than it is a decision bearing directly upon sect. 34. Sect. 35 is not touched by it, and must be considered irrespectively of and apart from that decision. But, secondly, assuming that the opening words of sect. 35 are retrospective, then it is strongly contended on behalf of the respondents that the exception in the section is retrospective also, and that a settlement gained by a child under the age of sixteen before the passing of the Act is left untouched. The object and intention of the Legislature in this Act was to get rid of the difficulties, trouble, and expense in proving derivative settlement at sessions, going back sometimes to the grandfather and great-grandfather of the pauper. The total effect of the Act is that (sect. 35) all derivation of settlement, except in the case of a wife from her husband, and a child under the age of sixteen from its parent, is abolished, and the age of emancipation is fixed at sixteen years. Words which *prima facie* would be prospective will be construed as retrospective if the reason of the thing demands such a construction:

Reg. v. The Inhabitants of Christchurch, 12 Q. B. 149; 18 L. J. 23, Mag. Cas.

If the construction contended for by the appellants is the true one, a child of seventeen may be separated from its father should the latter become chargeable, whereas formerly they would have been kept together by the derivative settlement.

Anstie replied.

Our. adv. vult.

Feb. 4.—The following judgment was now delivered by

CLEASBY, B.—The question in this case arises upon the 35th section of the 39 & 40 Vict. c. 61. The pauper, as the law stood before the passing of that Act, had acquired a settlement in a parish in the Westbury-on-Severn Union, derived from his father, with whom he lived until he was upwards of seventeen years old. He had never acquired any settlement of his own. It was contended on behalf of the appellants, that the effect of the 35th section was to take away his derivative settlement. And the argument was that the first part of the section destroyed the derivative settlement, and that the exception applied only to derivative settlements acquired after the passing of the Act. To this two answers were given: one, that the 35th section was prospective altogether, and only

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applied to settlements gained after the passing of the Act; the other, that, if the first part was retrospective, the exception applied to settlements previously gained also. Upon the first question of the whole enactment of the 35th section being prospective, the case of *Reg. v. Overseers of Ipswich* (*ubi sup.*) was referred to, in which the Queen's Bench Division had decided that the 34th section, which related to the same subject, namely, the subject of settlements, was not retrospective, acting upon the well-known rule that enactments which affect the future rights of parties are to be construed as applicable to future and not past transactions, unless there is a clear intention expressed that they shall also be applicable to past transactions. We are not dealing with the 34th but the 35th section, and there is some difference in the language. Without questioning the decision upon the 34th section, we are compelled to say that, in construing the 35th section, we must give effect to the 36th section. The 36th section enacts that the provisions as to the settlement (including necessarily the 35th section) shall not take effect where there has been an order of removal, &c., which is as much as saying that they shall take effect and replace the old law in general, but not where the old law has been acted on. It would be giving no effect to the 36th section to hold otherwise, and we are not at liberty to reject a whole clause from an Act of Parliament which is obviously directed to a particular purpose. The 35th section then being retrospective in its operation, and applying to all derived settlements acquired before the passing of the Act, or to be acquired afterwards, the question is, what effect is to be given to the exception? Unless there is something in the language strongly pointing to a contrary conclusion, we ought certainly to read the whole clause as either prospective or retrospective. An exception is something taken out of what has gone before, and if what has gone before was retrospective only, it would almost follow that that which is excepted is the same. But in the present case the first part of the clause is no doubt prospective as well as retrospective, and it may therefore be argued that the exception applies only to it so far as it is prospective. And the language and subject-matter of the exception might no doubt be such as to make this a proper conclusion. But, without examining critically the language and grammar of the passage, we find nothing to justify us in saying that the enactment is to operate retrospectively, and the exception prospectively only. The effect of so holding would be that a woman whose husband died the day before the coming into operation of the Act would lose her derivative settlement, and a woman whose husband died the day after would retain it, which cannot have been intended. In reality the legislation is directed to remove difficulties of proof more than to introduce a law intrinsically better. This appears from the nature of the enactment, but more distinctly from the 3rd paragraph of the 35th section, and there is as much reason for applying such legislation to the past as to the future. If, in order to prove the place of settlement of the pauper, as derived from the father, it had been necessary to prove a derivative settlement of the father, then, by the direct enactment of the 3rd paragraph of the 35th section, the pauper would be deemed to be settled in the parish where he was born. But

it appears from paragraph 8 of the case that the father had himself acquired a settlement in the parish of East Dean, in the appellat union. The son, therefore, had that settlement, and having never acquired a settlement of his own he retained it. We have, since this judgment was written, been referred to a case in the Queen's Bench Division, namely, the *Parish of Great Yarmouth* (app.) v. *The Clerk of the Peace of the City of London* (resp.), not yet, I believe, reported. (a) There is a note of the case in the *Weekly Notes* of Saturday, the 2nd Feb. The question in that case arose upon the same section—the 35th—of the Act of Parliament as in this case. But the facts in that case are different from those of the present case, and there is nothing in the judgment in that case, so far as can be collected from the note of it as above mentioned, in any way inconsistent with our judgment on the present occasion. The order of the justices in the present case will therefore stand.

Judgment for the respondents, dismissing the appeal with costs.

Leave to appeal was refused.

Solicitors for the appellants, *Ingledeu, Ince, and Greening*, agents for *M. F. Carter*, Newnham. Solicitors for the respondents, *Scott, Jarmain, and Trass*, agents for *Frank Taylor*, Barrow-in-Furness.

Nov. 24, 1877; Jan. 11, Feb. 4, 1878.

THE MAYOR AND CORPORATION OF PENRYN v. BEST. (b)

Market—Right to compel sale in market or payment of toll—Immemorial custom—Grant by Crown—Evidence.

The mere grant of a market does not of itself confer the right to prevent persons from selling on market days in their private houses, though within the town or manor where the market is held. But such a right may be acquired by immemorial enjoyment or prescription.

In an action for the disturbance of a market, the following evidence was given in support of such a right:—King Henry III., by charter, granted that the Bishop of Exeter and his successors might have a market in the manor of Penryn every Monday, with all liberties and free customs thereto appertaining. The bishops from time to time leased to the borough of Penryn property in the borough "with all markets, &c., appertaining," and in 1875 the corporation acquired all the rights of the Bishops of Exeter. There was evidence of a meat market being held in the manor on Saturdays, so far as living memory went, but none was given to connect in any way the market so held with the Monday market granted by Henry III.; but it was proved that no market was in fact held on a Monday. In 1842 there were three or four butchers who had shops in the town, and it was proved to be their practice to close their shops on Saturdays, and sell in the market, in stalls provided by the

(a) This case was argued on the 24th Jan. last in the Queen's Bench Division, before Cockburn, C.J., and Manisty, J., and is reported under date of the 2nd Feb. last in 37 L. T. Rep. N. S. 712. See also the case of *Barton Regis* (apps.) v. *Liverpool* (resp.) on the same section (35) of the statute, argued in the same division before Cockburn, C.J. and Mellor, J., on the same day, and reported under the same date in 37 L. T. Rep. N. S. 713.

(b) Reported by H. F. DICKENS, Esq., Barrister-at-Law.

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town council, for which they paid stallage. This practice continued until 1862, when two butchers disputed the right of the corporation to compel them to sell in the market, and opened their shops on Saturdays. Writs were issued against them; they submitted and paid the costs, and ever since kept their shops open on Saturdays, but paid tolls in lieu of stallage. The defendant had a butcher's shop in Penryn from 1870; he paid the toll in 1872, but in 1875 declined to do so.

Held, first, that no such right was granted by the charter of Henry III.

Held, secondly, that the evidence (especially when taken in connection with the grant of a charter for a market with ordinary incidents) was not sufficient to warrant the conclusion of a right by prescription to hold a market on Saturday with such an incident attached.

THIS was an action for the disturbance of a market.

The statement of claim was as follows:—

The plaintiffs are owners in fee of a certain market, holden in the borough of Penryn, in the county of Cornwall, on Thursdays and Saturdays in each week, for the buying and selling amongst other things of flesh meat, together with tolls, stallage, and other perquisites and profits to that market appertaining; and all persons selling flesh meat on Thursdays and Saturdays within the said borough, ought of right to sell the same within the said market, and not in any private shop, without payment to the plaintiffs of the said tolls, stallages, and other perquisites and profits of the said market.

The defendant carries on business in the said borough, and sells amongst other things flesh meat. On Saturday the 4th Dec. 1875, and from that date on each Saturday until now, the defendant exposed for sale in his shop, within the limits of the said borough, flesh meat, and refused to pay the plaintiffs any of the said tolls, stallages, or other perquisites and profits of the said market, and caused them to lose the said tolls, stallages, and other perquisites and profits of the said market, and prevented their enjoyment thereof, and thereby disturbed the plaintiffs' said market.

The plaintiffs claim 10s. 6d. for market tolls and damages for the disturbance of the said market.

The defendant by his statement of defence denied all the material allegations in the statement of claim except the allegation as to the exposure by him for sale of flesh meat in his shop, which he admitted, and as to which he said that the plaintiffs made a claim on him in respect of the same which he refused to pay.

At the trial before Lord Coleridge and a special jury on the 30th Nov. 1876, at Westminster, the following facts were proved. In the year 1259 King Henry III. by charter granted that the Bishop of Exeter and his successors might have a market in the manor of Penryn every week on Monday and also in every year a fair of three days duration on days named, and that they should have the aforesaid market and fair "Cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi mercatum et feriam pertinentibus."

Proof of this was given by a charter of confirmation upon an *inspeimus* in the reign of Richard II. The bishops of Exeter from time to time leased to the borough of Penryn property in

the borough, the parcels of all these leases being to the following effect:

All that the lordship of Penryn borough, with all its rights, members, and appurtenances in the said county of Cornwall. And also all that the town, borough, and burgh of Penryn in the aforesaid county of Cornwall. And all messuages, lands, tenements, rents, meadows, leases, feedings, pastures, fields, fences, commons, orchards, gardens, fishings, and services of all tenants, as well of freeholders as tenants for years, copyholders, tenants at will, or other wages, and all others their appurtenances, within the said town and borough of Penryn aforesaid, or which at any time heretofore have been reputed, accepted, taken or known as part, parcel, or member of the same lordship, borough, and town of Penryn aforesaid, or heretofore annexed, leased, or granted to, and with the same by whatsoever name or names or title they are or have been heretofore known or called, together with all courts leets, views of frankpledge, fines issued, amercements, strays, goods of felons and fugitives, escheats, hereditaments, reliefs, perquisites of court, fairs, markets, innhalages, ankergages, coverages, incomes, liberties, and all others easements and commodities whatsoever, with all singular their appurtenances to the said lordship, town, and borough of Penryn aforesaid, or to any of them in anywise appertaining or belonging.

But though all these leases contained the general words "together with all markets, &c.," there was no particular reference in any lease to the market which formed the subject of the grant by the Crown to the Bishop of Exeter, or to the charter of Henry III.

One of these leases in 1745 contained an indorsement of delivery of seisin of the Guildhall and market houses.

In 1854, by an Order in Council, the possessions of the see of Exeter were vested in the Ecclesiastical Commissioners.

In 1856, by an Order in Council, the Ecclesiastical Commissioners were empowered to sell.

In July 1875 the Ecclesiastical Commissioners sold the rights of the Bishop of Exeter.

Evidence was given of the holding by the plaintiffs of a meat market on Saturdays so far as living memory goes; but there was none to connect in any way the market so held with the Monday market granted in 1259, and it was further proved that no market was in fact held on Mondays. It was further proved that in the year 1848 there were three or four butchers in Penryn, and that it was the practice for the butchers from that time to the year 1862 to close their shops on market days and to go into the market house, and there sell their meat in stalls provided by the council of the borough, the stallage charged being 1s. 6d.

In 1862 a dispute arose between the corporation and two butchers, who, to try the right, opened their shops on Saturdays during the market, and refused to pay to the council for selling meat in their shops on market days; but, upon writs being issued against them for damages for the disturbance of the franchise of the market, they paid the money claimed and the costs; and have ever since together with all the other butchers paid the amount of toll when they have sold in their shops on Saturdays.

The defendant had a butcher's shop in Penryn from 1870; he paid the toll in 1872, but in 1875 he declined to do so.

Upon these facts a nominal verdict for the plaintiffs for 20s. was entered by consent.

Herschell, Q.C. and *Charles, Q.C.*, for the plaintiffs, moved for judgment.—We put our case in

two ways: First, this incident of compelling the defendant to sell in the market appertains to the market by virtue of the charter of Henry III. That charter grants a market with "all liberties and free customs thereto appertaining." That certainly might include such an incident as the one in question, and in order to see whether such an incident was intended to be granted we must look to see what has been done under the grant. From the evidence, then, the fair inference is that this franchise was granted; otherwise why should the butchers have consented for so long a time to the burden?

Mayor of Weymouth v. Nugent, 6 B. & S. 22; 34 L. J., 81 M. C.

Secondly, we say that there is sufficient evidence to warrant the conclusion of a right by prescription to hold a market on Saturday with this incident. It is clear that such a right may be acquired by immemorial enjoyment:

Mosley v. Walker, 7 B. & C. 40;

Mayor of Macclesfield v. Pedley, 4 B. & Ad. 397.

There is ample evidence of such a right by prescription. If that is so, the plaintiffs ought not to be worse off because of the express grant of a Monday market with the ordinary incidents of a market.

Murphy, Q.C. and *Wormald* for the defendant.—First, the plaintiffs are bound by the terms of the grant on which they base their title, and no right to compel the butchers to sell in the Saturday market was granted by the charter of Henry III. The charter cannot be read with such an incident. A pre-existing custom would not apply to a new market:

Heddy v. Wheelhouse, Cro. Elis. 558, 591;

Holloway v. Smith, 2 Str. 1171;

Earl of Egremont v. Saul, 6 A. & E. 924.

The last case is an authority to show that this being a grant of a new market, although there might have been evidence from which a jury might have inferred an immemorial market, yet when you can show that this was a new market, the evidence of the custom cannot be allowed to extend the terms of the charter on which the plaintiffs found their title, a charter moreover which, according to the case in *Strange*, cannot give that right. Further, the mere grant of a market does not of itself confer the right to prevent persons from selling in their shops on market days, though within the limits of the town where the market may be held:

Mayor of Macclesfield v. Chapman, 12 M. & W. 18.

Secondly, a right to prevent a man using his own shop for his trade cannot be granted by the Crown. The Crown can lose no prerogative. If, then, such a power existed in the time of Henry III., it must exist now; and that it does not exist now is clear. See

Viner's Abridgment and Prerogative, par. b. 18;

Stephens' Commentaries, vol. 2, p. 475.

It is said that, in construing the charter, you must look to see what has been done under it. That doctrine is quite true; but it only applies to ambiguous instruments, and cannot therefore apply to this charter, which is quite unambiguous. Thirdly, it is clear that such a right as this can only be acquired by custom, not by a grant from the Crown:

Mosley v. Walker, 7 B. & C. 40;

Mayor of Macclesfield v. Chapman, 12 M. & W. 18.

The plaintiffs cannot avail themselves of custom, because there is an express grant; but even supposing they could do so, there is no evidence of immemorial custom. For what inference is to be drawn from the evidence? The only inference which will support the plaintiff's case is that, at the time of the grant of the Monday market by Henry III., a Saturday market must have existed. That is a most unreasonable inference to draw. The plaintiffs' claim, therefore, whether founded on the grant or on prescription, utterly fails.

Herschell, Q.C. in reply.—We are entitled to found our claim on either the charter or on prescription. It is not at all so clear that a grant of a market cannot confer such a right as this:

Mosley v. Chadwick, 7 B. & C. 47.

Our. adv. vult.

OLASBY, B. now read the judgment of the court (himself and Hawkins, J.).—This was an action for the disturbance of the market of the plaintiffs. The plaintiffs are no doubt entitled to have a meat market on Saturdays, and the defendant, on a Saturday when the market was held, sold meat in his own private shop in the town at some distance from the place where the market was held. The question is whether the franchise of the plaintiffs was of such a nature that they could maintain an action against the defendant. Similar questions have arisen before, and two conclusions may be considered as settled by authority. First, that the mere grant of a market does not of itself confer the right to prevent persons from selling on market days in their private houses, though within the town or manor where the market may be held. This was decided in the case of *Mayor of Macclesfield v. Chapman* (12 M. & W. 18.) It is pointed out in the judgment that an old case the *Prior of Dunstall's* case, had been erroneously supposed to decide the contrary. It may also be considered as decided by the *Earl of Egremont v. Saul* (6 Ad. & Ell. 924). We feel bound by these authorities, although dicta may no doubt be found to the contrary. See the case *Mosley v. Chadwick* referred to in the note (7 B. & Cr. 47). The second conclusion by which we are bound is, that such a right as is contended for may be acquired by immemorial enjoyment or prescription. For this there are two decisions: *Mosley v. Walker* (7 B. & C. 40), and *Mayor of Macclesfield v. Pedley* (4 B. & A. 397). It is not necessary to say anything about the effect of a modern grant or a grant since the time of legal memory of a market with this additional incident of preventing persons from selling, in their own houses, within the limits of the franchise. The question does not arise in the present case, but there are obvious objections of a serious nature to the grant of a franchise which prevented persons who were selling meat at the time in their private houses from continuing to do so. The facts brought before us in the present case are as follows: We understand that the verdict of the jury was not taken upon any particular question, but, upon the evidence being given, a verdict was taken for the plaintiffs generally, it being considered there was sufficient evidence to warrant that verdict. But the court was, upon the case being brought before them, to deal with the facts, and say what the proper conclusion was. Evidence was given of a charter in the reign of Henry III., A. D. 1259, by which the King granted that the Bishop of

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THE MAYOR AND CORPORATION OF PENRYN v. BEST.

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Exeter, and his successors, might have a market in the manor of Penryn every week on Monday, and also in every year a fair of three days' duration, on days named, and that they should have the aforesaid market and fair with all liberties and free customs appertaining to such a market and fair, except that they were not to be to the nuisance of neighbouring markets and fairs. Proof of this was given by a charter of confirmation upon an *inspeximus* in the reign of Rich. II. We think that, having regard to these two charters, there is no sufficient ground for regarding the charter of Henry III., which refers to no previous grant, as a confirmation of any previous grant of a market, notwithstanding the use of the not unusual words "grant and confirm" at the commencement. A number of leases were produced from the bishops to the borough of Penryn of property in the borough, and all these leases contained the general words "together with all markets," but there was no particular reference in any lease to the market which formed the subject of the grant by the Crown to the Bishop of Exeter or to the charter of Henry III. These leases were granted from time to time, and may be said to have brought the right of market down to the time when the borough became purchasers of the bishop's rights from the Ecclesiastical Commissioners. One of the leases, that of 1745, contained an indorsement of delivery of seisin of the Guildhall and market houses. This is of importance as showing all rights of the plaintiffs to the market were derived from the bishops. There was also evidence of the holding by the plaintiffs of a meat market on Saturdays so far as living memory goes. But there was no evidence to connect in any way the market so held with the Monday market granted in 1259. There was further evidence that there were three or four butchers who had shops in the town, and that it had been usual for these butchers on the Saturdays, when the markets was held, to close their shops and go and sell in the market, and that this had been done till 1862; and it was further proved that in that year two butchers opened their own shops on Saturdays, and disputed the right of the corporation to prevent it; and that writs having been issued against them, they submitted and paid the costs, and that they have since had their shops open on the Saturdays, and paid the plaintiffs toll, which must mean, no doubt, the stallage which the plaintiffs would have been entitled to if the butchers had occupied stalls in the market house. Authorities were referred to for the purpose of showing that no right to tolls was acquired by the charter referred to, particularly *Heddy v. Wheelhouse* (Cro. Eliz. 591); but the real question in this case is not the right to tolls *eo nomine*, but the right to compel the defendant to sell in the market house, if at all, by which the plaintiffs would acquire a right to stallage as owners of the soil; and the real question is whether the evidence establishes any such right. The facts are peculiar, because we have a charter for a market on Monday, and the proof is that no market has ever been held on Monday; but there is proof of a meat market having been held on Saturday. If the proof had been of a charter for a meat market on Saturday in the terms of the present charter, the grant being of a market and fair, with all liberties and free customs to such a market and fair belonging, the words in the original no doubt

being "cum omnibus libertatibus liberis consuetudinibus ad hujusmodi mercatum et feriam pertinentibus," as in the *Earl of Egremont v. Saul*, we should have felt satisfied that there is not sufficient to justify us in reading the grant as a grant of a market with the incident of preventing persons from selling meat in their own houses away from the market. As this incident is not a liberty belonging to a market, it would be enlarging the franchise beyond the words, and would be at variance with *Earl of Egremont v. Saul* (6 Ad. & Ell. 927). But the plaintiffs rested their case mainly upon another ground, viz., that there was sufficient evidence to warrant the conclusion of a right by prescription to hold a market on Saturday with this incident, and it was said that, if there was sufficient evidence of this enjoyment, the plaintiffs ought not to be worse off because there was in 1259 also an express grant which had been vested in them of a Monday market. And the cases of *Mosley v. Walker* (7 B. & Cr.), and *Mayor of Macclesfield v. Pedley* (4 B. & Ad.) are referred to as showing that such a right might be gained. But, upon referring to these cases and the evidence produced in the present case, we find a very great difference. We cannot examine in detail the evidence in those cases upon which the jury found in favour of the right, but it appears to us that if the same question had been left to the jury in this case, they ought, upon such different evidence, to come to a different conclusion. The evidence in the present case, except as to the existence of a market, only dates from the year 1848, and from that time to 1862 the only proof is that on the market day the butchers closed their shops and resorted to the market. This is entitled to very little consideration as showing that the butchers were under an obligation to close their shops; it is equally reconcilable with its being more to their advantage to sell in the market than at home, and it only dates from 1848. In 1862 they claimed the right to keep their shops open on Saturdays. Two actions were, however, brought and submitted to by two butchers, and since that time the butchers who have opened their shops on Saturdays have paid toll, until the present defendant disputed the right. This evidence is, in our opinion, far too weak to justify the conclusion of the right being gained by immemorial enjoyment, more especially when taken in connection with a charter being granted in 1259 for a market with ordinary incidents. The enjoyment of the right claimed is properly speaking only from 1862, as we consider the attendance of the butchers at the market on market days as proving little or nothing. The actions brought afterwards, and submitted to through proof of enjoyment, are no further evidence against the defendant; and the proof of payment of toll even by the defendant (as the witness says he believes) would not be conclusive. To justify the conclusion of immemorial enjoyment, the evidence ought to go further back, and be more like such as was given in the two cases last referred to, and the effect of the evidence is also weakened by the demand of the plaintiffs (which was acceded to) being for tolls which they were certainly not entitled to, their only right being to stallage as owners of the soil of the market; and the payments might be made under the belief that the plaintiffs were entitled to tolls, and not as an acknowledgment that the plaintiffs

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were entitled to make them close their shops. We have considered the case upon the merits, and not with reference to the particular claim set up in the statement, viz., to tolls and stallages for selling out of the market, which seems open to objection, but might have been amended. For the above reasons we think the plaintiffs have not established the right claimed, and that the rule must be made absolute, and there must be judgment for the defendant. *Rule absolute.*

Solicitors for the plaintiffs, *Gregory and Rowcliffes*, for *G.A. Jenkins*, Penryn.

Solicitors for the defendants, *Harris and Powell*, for *Dobell*, Truro.

Feb. 6, 7, and March 4, 1878.

GIRDLESTONE v. BRIGHTON AQUARIUM COMPANY. (a)

Profanation of the Lord's day—Action for penalties—21 Geo. 3, c. 49, ss. 1, 4—Judgment recovered—Covin and collusion—Estoppel—Judgment recovered under subsequent writ.

The plaintiff brought an action against the defendants to recover a penalty under 21 Geo. 3, c. 49, s. 1, for keeping open the Aquarium on Sunday, the 15th Aug., the writ being dated the 17th Aug. The fact that the 15th Aug. was the Sunday in respect of which the action was brought did not appear on the writ, but this appeared in the statement of claim which was delivered on the 24th November, and the defendants knew it was in respect of that day. The defendants subsequently got the permission of one Rolfe to bring an action in his name against themselves to recover penalties accruing on the 15th Aug. and the several Sundays between that date and the 17th Oct., and a writ was accordingly issued to that effect in Rolfe's name on the 20th Oct. This was done by the defendants in order to protect themselves against actions which might be brought for these various penalties, as well as to facilitate an early remission of the penalties by the Secretary of State under power given him by 38 & 39 Vict. c. 80. Rolfe, who at the time of giving this permission, did not know of the plaintiff's action, agreed that the defendants might make what use they pleased of this action, and that he would not issue execution or claim the penalties. Judgment in Rolfe's action was signed by default on the 28th Oct., and was pleaded by the defendants as a defence to plaintiff's action.

Held, that the judgment in Rolfe's action was fictitious and covinous, and was no bar to plaintiff's action.

Held, also, apart from all question of covin, that the effect of plaintiff's bringing the action was to make the penalty a debt due to him, and that no other action could afterwards be maintained in respect of it; and that since the plaintiff's action was brought in respect of the 15th Aug., and the defendants knew it, it was immaterial that this did not appear on the writ.

The writ in this action was dated the 17th Aug. 1875, and the action was brought to recover a penalty under 21 Geo. 3, c. 49, s. 1, for keeping open the Brighton Aquarium as a place of public entertainment and amusement on Sunday. The writ did not mention the particular Sunday in respect of which the penalty was claimed; but

the statement of claim delivered on the 24th Nov. mentioned the 15th Aug. 1875 as being the Sunday in question.

Defence: That a penalty in respect of the same Sunday had already been recovered in an action brought against the defendants by one Rolfe, and a judgment for the same signed against them on the 28th Oct. 1875.

Reply: Joinder of issue on the defence, and that the said judgment had been recovered by the covin and collusion of the defendants and Rolfe.

At the trial before Cleasby, B. it appeared that Rolfe's action was brought on the 20th Oct., and judgment signed by default on the 28th of that month. It appeared moreover, that Rolfe had given permission to the defendants to use his name, that it was brought by the defendants themselves in his name, to recover penalties accruing on the 15th Aug. and the several Sundays between that day and the 17th Oct., in order to protect the defendants, by being used as an answer to actions which might be brought for the various penalties included in it, as well as to facilitate an early remission of the penalties by the Secretary of State under the power given him by 38 & 39 Vict. c. 80.

At the time of giving the defendants permission to use his name, Rolfe did not know of the action already brought by the plaintiff; and at the same time he agreed that the defendants should make what use they pleased of the action brought in his name, and promised that he would not issue execution or claim the penalties. Upon these facts Cleasby, B. directed the jury that there was evidence of covin and collusion, and they found a verdict for the plaintiff.

A rule nisi to enter the verdict for the defendants on the ground that there was no evidence of covin and collusion, or for a new trial on the ground of misdirection, and that the verdict was against the weight of evidence, having been obtained,

Bosanquet and Wülberforce (Sir *Hardinge Giffard*, Solicitor-General, with them), for the plaintiff, showed cause.—There was ample evidence of covin and collusion to go to the jury. Rolfe's action, though brought in his name, was really an action brought by the defendants against themselves to deprive the plaintiff of the penalty for which he was then suing them. The judgment obtained in that action was fictitious, and therefore is of no avail against the plaintiff's claim. Covin is a secret assent determined in the minds of two or more persons to the prejudice of another. (See the definitions given in *Coke upon Littleton*, and in the *Termes de la Ley*.) All that is requisite to constitute covin is therefore present. But further, apart from all question of covin and collusion, Rolfe's judgment is no answer to this action, inasmuch as the writ and judgment are subsequent to the date of the plaintiff's writ. 21 Geo. 3, c. 49, made the penalty a debt from the defendants to the plaintiff as soon as the writ was issued, and before the 20th Oct. the right of action for the penalty of the 15th Aug. had vested in the plaintiff. On this point they cited

Jackson v. Gisleng, 2 Strange Rep. 1169;

Combe v. Pitt, 3 Bur. 1428;

Eg. v. Bird, 20 L. J. 70, M. C.; per *Parks, B.*, p. 94;

Baines v. Blackburn, *Sayers*, 216.

Charles Russell, Q.C. and *Macdonell* (*McMillan* with them) for the defendants.—The second ques-

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tion is not open to the plaintiff on this record. The sole point raised by the pleadings is whether or not Rolfe's judgment was covinous. If the plaintiff wished to raise this point, he should have pleaded it. But however that may be, there is a clear answer to the argument on that head, which is this—that the plaintiff's writ does not show that the penalty for which his action is brought was in respect of the performance on the 15th Aug., whereas the writ in Rolfe's action, which was issued before the statement of claim herein, did. The principal object of Rolfe's action was to obtain an early remission of the penalties by the Secretary of State under the powers given him by 38 & 39 Vict. c. 80. This was a perfectly valid reason for their taking the steps they did, and there is nothing covinous or collusive about it. Before the judgment can be set aside upon this ground, it must be shown that the defendants and Rolfe were both parties to the collusion. Here, on the contrary, Rolfe was not even aware of the purpose for which the judgment was obtained. On this point they cited the definition in Coke upon Littleton:

Meadowcroft v. Hugerin, 4 Moo. P.C. 388;

Perry v. Meadowcroft, 10 Beav. 122;

Gatlin v. Gatlin, 31 L. J. 43, Prob.

Cour. adv. vult.

March 4.—The written judgment of the court (Kelly, C.B., Cleasby and Pollock, BB.) was now read by

CLEASBY, B.—The facts of this case are not in dispute. It is admitted that the plaintiff brought his action on the 17th Aug. to recover a penalty under the statute 21 Geo. 3, c. 49. This made the penalty, if recoverable, a debt from the company to the plaintiff. It is further admitted that afterwards, on the 20th Oct., the defendants got permission from a man named Rolfe to bring an action for penalties in his name. It was not disputed that this action was a protective action; that is, to protect the defendants from the various penalties which were accruing, by being used as an answer to actions which might be brought for the various penalties included in it. It was brought in respect of penalties accruing on the 15th Aug. (the penalty sought to be recovered by the statement of claim in this action) and the several Sundays between that day and the 17th Oct. Judgment was recovered in that action by default on the 28th Oct. Proof was given that the proceedings in the name of Rolfe were taken with another view as well, viz., to obtain as soon as possible a remission of the penalties by the Secretary of State under the 38 & 39 Vict. c. 80. But this collusive proceeding for an innocent purpose did not make it a real recovery of the penalty by the defendants against themselves, or prevent it from being collusive for an injurious purpose, viz., to deprive others of the right to recover the penalties which have accrued. It appears to us, therefore, that such a fictitious judgment is no judgment at all to affect the rights of third parties. The question arose at the trial upon the reply that the judgment was obtained by covin and collusion. Now it can hardly be questioned that it was by collusion that the judgment was obtained against the defendants by the defendants in the name of Rolfe, for whatever purpose it was obtained. And as to its being covinous, the definition of covin was given in the argument, from Coke upon Littleton, and

we have it very clearly given in the *Termes de la Ley*: "Covin is a secret assent determined in the minds of two or more persons to the prejudice of another." In the present case the secret assent was the assent of Rolfe to the defendants borrowing his name to bring the action against themselves, and the prejudice of another was the judgment being used, as in the present case, to defeat the rights of others. It matters not whether Rolfe was kept in ignorance of the purpose to which the action was to be applied or not, it was not the less covinous in the defendants. One instance is put in the same book under the title "covin" of the use of a judgment fraudulently obtained: "Or if an executor or administrator procured judgment to be entered against him by fraud, and plead this to a bond, the party aggrieved may plead covin and relieve himself." In like manner, it appears to us that the plaintiff may relieve himself by pleading covin as an answer to the judgment obtained by the defendants. We were referred to certain passages in the summing up of the learned judge, to the effect that if the judgment was obtained collusively, and not intended to operate as a judgment, that would be sufficient. If these passages be taken by themselves they might mislead the jury, but taken in connection with the circumstances of the case, and the rest of the summing up, they would not do so. The plea itself showed the injurious purposes to which the judgment was applied, and as soon as it was admitted that it was intended to be protective, that part of the case did not require to be particularly referred to. And, further, even if there was an imperfect direction in this particular, yet, as it is clear that no substantial wrong or miscarriage has been occasioned thereby, we ought not to grant a new trial. (See Order XXXIX., r. 3, of Judicature Act 1873.) Another objection to the defence was presented at the trial, and has been argued before us. It did not appear to arise upon the pleadings, and was therefore put aside at the trial; but if a new trial was granted, and the statement of defence amended, there would be an answer to the plea. The present action was brought on the 17th Aug., and the penalty sought to be recovered was in respect of the opening of the Aquarium on the 15th Aug. The effect of bringing the action was to make the penalty a debt due to the plaintiff, and no other action could afterwards be maintained in respect of it: (*Jackson v. Gising*, 2 Strange, 1169; *Hutchinson v. Thomas*, 2 Levinz. 141.) See also *Combe v. Pitt* (3 Bur. 1423), though in that case the plea was in abatement. It follows that, upon its appearing that the present action was commenced before Rolfe's action, the proceedings in Rolfe's, though prosecuted to judgment, could have no effect upon the right of the plaintiff. The only answer that could be given to this objection was that it did not appear upon the face of the writ that it was sued out in respect of the forfeiture of the 15th Aug., and that any other Sunday upon which there had been a performance might have been inserted in the statement of claim. But as there is no doubt that the action of the 17th was in respect of the previous Sunday the 15th, and as the defendants knew that the action was in respect of that Sunday, it appears to us to make no difference that the writ does not specify the date. (See judgment of Parke, B. in *Reg. v. Bird* (20 L. J. 94, M. C.) The case of *Chalchman v.*

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Wright (Noy's Rep. 118) is an authority upon the whole case. It shows that previous proceedings are a bar to subsequent proceedings for the same penalty; and that proceedings to be a bar must be *bonâ fide*. It was there decided that a previous information for the same penalty is a good bar if it be *bonâ fide*, but if it be not *bonâ fide* the plaintiff may plead the fraud. Otherwise the defendants could keep the Aquarium open and incur a penalty every Sunday, and get a friend on every Monday morning to bring an action, and make these fictitious actions a defence to real ones, and so defeat the Act of Parliament. The jury in the present case found that the judgment was covinous and collusive, and for the above reasons we think we ought not to grant a new trial, and therefore the rule must be discharged.

Rule discharged.

Solicitors for the plaintiff, *Bridges, Sawtell, Heywood, and Ram.*

Solicitors for the defendants, *Benham and Tindell.*

Tuesday, Feb. 12, 1878.

(Before KELLY, C.B. and CLEASBY, B.)

EVERITT (app.) v. DAVIES (resp.) (a)

APPEAL FROM INFERIOR COURT.

Prevention of Cruelty to Animals Act 1847 (12 & 13 Vict. c. 92), s. 2—"Cruelly ill-treat, abuse, or torture"—Omission to slaughter an animal incurably diseased and suffering pain—Keeping such animal in a way that inevitably inflicts pain—What is an offence and "cruelty" under the Act.

The owner of a horse who, knowing it to be incurably diseased and in pain, merely omits to have it slaughtered, commits no offence within sect. 2 of the Prevention of Cruelty to Animals Act 1847 (12 & 13 Vict. c. 92), and cannot be convicted of "cruelly ill-treating, abusing, or torturing" such animal by reason of such omission only. But, if he keeps the animal in such a manner as that it is inevitably put to intense pain in moving about a field, in its efforts to graze in order to support its life, he thereby commits an act of cruelty and an offence under the Act, and is guilty of "torturing or causing the animal to be tortured," as much as if he had actively tortured it with his own hand.

THIS was a case stated by two justices of the peace for the county of Cardigan under the statute 20 & 21 Vict. c. 43, raising a question for the opinion of the court, whether an act of omission or neglect of duty, which causes pain or torture to an animal, is an offence within the meaning of the Act for the Prevention of Cruelty to Animals (12 & 13 Vict. c. 92) s. 2.

At a petty session holden in and for the division of Upper Genewr-Glyn, in the county of Cardigan, on the 10th Oct. 1877, a complaint preferred by the appellant (Everitt) against the respondent (Davies), under sect. 2 of the Cruelty to Animals Prevention Act, charging that the respondent, on the 30th July 1877, at Talybont, in the said county, did cruelly ill-treat, abuse, and torture a certain animal, to wit, a mare, his property, by then and there keeping the said mare, having a diseased leg, contrary to the statute, was heard and determined by us, the said parties respectively being present; and upon such hearing we dismissed

the said complaint, and the appellant, being dissatisfied with our determination as being erroneous in point of law, pursuant to sect. 2 of the 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this honourable court, &c. Now, therefore, we the said the said justices, &c., do hereby state and sign the following

CASE.

Upon the hearing of the complaint it was proved on the part of the appellant, and found as a fact, and admitted by the respondent, that the mare in question had met with an accident several months before by which one of her hind legs had been dislocated and fractured, and that the respondent had called in the assistance of a veterinary surgeon, who advised him that, in his opinion, there was no cure for the mare, and that she ought to be destroyed; that the animal's leg became worse, and that the respondent nevertheless did not have it slaughtered because, for some time after the accident, there was a probability of the recovery of the mare, although he, the respondent, admitted that for some space of time before the summons was issued the mare had been incurable. It was proved and found as a fact that the mare was kept by the respondent in a field where she was obliged to move about for the purpose of obtaining her food. It was also proved and found as a fact that the mare in question to the respondent's knowledge suffered acute pain in consequence of the injuries she had received; that her hind hoof had altogether gone, and that the leg in connection with that hoof was a mass of blood and matter swelling to a diameter of nine inches, and full of disease, the mare having no use of that leg at all; that such suffering might have been prevented by the respondent slaughtering the said mare, and that the animal was not slaughtered because the respondent desired to have a foal out of her. But it was contended on the part of the respondent, that although he knew the animal was incurable, he was not guilty of the charge preferred against him, as there was no evidence that he had performed any overt act upon the said mare; the pain alluded to arising entirely from the respondent having allowed the said mare to live, instead of having her slaughtered and destroyed, while in such a diseased and incurable state.

It was also contended on the part of the respondent that permitting the said mare to live, although in such a state and condition as hereinbefore described, was not an offence within the meaning of the said Act (12 & 13 Vict. c. 92), s. 2.

We, the said justices, being of opinion that the alleged charge of cruelty was not within the meaning of the said statute, which contemplates some act on the part of the respondent, whereas the alleged offence was merely allowing the mare to live in that state and condition when she might have been slaughtered, gave our determination, and decided against the appellant, and dismissed the charge.

The question of law arising on the above statement for the opinion of this honourable court therefore is, whether by the omission on the part of the respondent to slaughter the mare, she being at the time in great pain and incurable, was

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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sufficient to bring the alleged offence within the meaning of the 12 & 13 Vict. c. 92, s. 2, as aforesaid.

If the court should be of opinion that the said dismissal was legal, and properly made, then the said dismissal is to stand; and the court is humbly solicited, according to the power vested in the court by the 20 & 21 Vict. c. 43, to remit the case to the said justices, with the opinion of the court thereon, or to make such other order as to the court may seem fit.

The following is the section of the Cruelty to Animals Prevention Act (12 & 13 Vict. c. 92) under which these proceedings were taken.

Section 2:

That if any person shall from and after the passing of this Act cruelly beat, ill-treat, overdrive, abuse, or torture, or cause, or procure to be cruelly beaten, ill-treated, overdriven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding 5l.

The case originally came on and was partly heard on the 22nd Jan., before Cleasby, B. and Hawkins, J., when the only facts then found in the case were, that the mare was incurably diseased and suffered much pain by reason of the hind hoof having altogether gone, and that the leg in connection with that hoof was a mass of blood and matter, and much swollen and full of disease, and that the mare had no use whatever of that leg, which might have been prevented by the respondent slaughtering the mare, but that it was contended on the part of the respondent that he was not guilty of the charge preferred against him, there being no evidence of any "overt" act on his part.

The court, thinking that the facts had not been stated with sufficient fulness to enable them to come to a decision upon the question submitted to them, remitted the case to the justices, in order to have every fact stated that might have any bearing upon the decision of the case, and especially facts with regard to the knowledge of the respondent, and now, the case having been restated as above set forth, it came on again for hearing, when

Waddy, Q.C. (with whom was *Morton Smith*) again appeared for the appellant, and submitted that the decision of the magistrates was wrong and ought to be set aside. The question involves the proper construction of the words "cruelly ill-treat, abuse, or torture," or "cause to be cruelly ill-treated, &c.," in the 2nd section of the Act. The word "wilfully" is not in the Act, and to torture cruelly, even without the intention to give pain, is within the Act:

Murphy v. Manning, 36 L. T. Rep. N. S. 592; 46 L. J. 211, M. C.; L. Rep. 2 Ex. Div. 307.

The question is whether or not mere passive conduct is within the Act, or whether there must be some overt act of active cruelty:

Bridge v. Parsons, 7 L. T. Rep. N. S. 784; 3 B. & S. 382; s.c., nom. *Bridge v. Parsons*, 32 L. J. 95, M.C.

It is submitted that the respondent did "cruelly ill-treat, abuse, and torture" this mare, or "cause and procure" her to be so ill-treated, &c., within the express terms of the section, by keeping her in such a way (as detailed in the case) that the very condition of its existence was to cause continuous intense pain. Every movement of the poor animal must have caused it exquisite agony, and

all this was well known to the respondent from the first. [CLEASBY, B.—The charge does not complain of the manner of keeping, as by saying that it was a cruel mode of keeping.] The offence is laid down at first as that he did cruelly ill-treat, &c., and then states how he did it, namely, "by then and there keeping the said mare having a diseased leg," &c. It was not necessary to use the word "cruelly" again, and to allege that he "cruelly kept," and "cruelly knew her to be incurable," &c. "Keeping" is the only appropriate word to be used here, and the keeping the animal alive in such a condition, and in the way and manner in which the respondent as found by the case did keep her, was an act of commission and not a mere omission. [CLEASBY, B.—The magistrates have not found cruelty as a fact in keeping the mare in a field, though the whole question for the court was, was it cruelty not to kill her? KELLY, C.B.—I agree with the justices that it was no offence under the Act not to kill the animal, but I differ from them, if by his act the respondent caused and procured the mare to be put to torture.] The conduct which we allege the respondent to have pursued and which was proved, was equivalent to "cruelly ill-treating, abusing, and torturing," and the justices should so have decided.

No one appeared for the respondent.

KELLY, C.B.—I lay down the law in the broadest and clearest terms in which it is possible and competent for me to do, that the mere omission to put an animal to death, even in a case where humanity might dictate its being done, is not an offence or an act of cruelty within the meaning of this Act of Parliament, and that there is no power to convict the respondent by reason of any such omission of any offence under the statute. That is the only question which, in consequence of the way in which the case has been stated for our consideration, has been submitted to us, and we must determine it in favour of the respondent, and hold that he has been guilty of no offence against the provisions of the Act of Parliament in question by his omission to slaughter the mare under the circumstances that have been stated. But then the case states the charge that was made in the complaint laid against the respondent to be that he did "cruelly ill-treat, abuse, and torture a certain mare, by then and there keeping the said mare, having a diseased leg, contrary to the said statute." Now unquestionably that charge expressly involves the question of keeping the mare, and the way and manner in which she was kept, and not merely the omission to slaughter her or put her to death; and we must therefore inquire and look into all the circumstances under which the respondent dealt with, or, in other words, "kept" the mare. Here was an animal that for some months had been suffering from the consequences of an accident, by which one of her hind legs was dislocated or fractured. A veterinary surgeon had advised the respondent that the case was incurable, and that the mare ought to be destroyed. The respondent, however, nevertheless kept her alive; in the first instance, no doubt, as is stated in the case, "because there was a possibility if not a probability of her recovery;" but subsequently, and after full knowledge that the case was an utterly hopeless one, and that she was suffering great pain, he still kept her alive, because

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"he desired to have a foal out of her." And now let us see how he kept her. Had he, in the hope that she might recover, placed her in a stable, with her diseased leg in a sling or cradle, so as to prevent it from touching the ground, and had proper food been brought to her there, so that she might eat and sustain life without the necessity of locomotion, it might be that that would have been a proceeding which might have amounted, as my brother Hawkins observed on the previous hearing of this case, to what may be called "mistaken kindness." But the respondent did nothing of that sort. On the contrary, knowing that the lower part of the leg, the hoof of which had entirely rotted off, was one mass of festering and diseased matter, he turned the unfortunate animal cut loose into a field, where it was absolutely inevitable that she must either suffer the agony of being slowly starved to death for want of food, or endure the continuous and exquisite torture of putting her diseased limb to the ground as she hobbled about in her efforts to feed from off the grass of the field. Between these two terrible alternatives there was no choice for the poor creature; she must either undergo this constant intense pain and torture in the mere act of grazing to support life, or die of starvation. This was no more or less than wanton cruelty, and in my opinion the man who keeps an animal in such a way as that, knowing full well all the time the terrible state and condition of its leg, is as much guilty of "torturing, or causing the animal to be tortured," as if he were with his own hand to take up the diseased leg, and strike it violently down upon the ground. The question then is, Did the respondent cause and procure the mare to put her foot to the ground in such a manner as to cause her intense suffering? Did he, in short, cause the mare to be tortured within the meaning of the Act of Parliament? To that question, I answer, Yes, as much as if he had actively tortured her with his own hand. That is the question which the magistrates ought to have considered. They have, however, gone aside after something which there was no duty upon them to deal with. The respondent did not, according to the evidence, feed or care for this poor animal in any way, although before the information was laid against him he knew that she was incurable. Every element of the offence of "cruelty" under the Act is, in my judgment, here complete. The case should be sent back to the justices with the intimation from this court that, although the question which they have put to us is not the proper question in this case, yet, nevertheless, their decision as to the omission of the respondent to slaughter the mare, being no offence within the Act of Parliament, is right; but that the respondent did commit an offence and an act of cruelty within the statute, in keeping the mare alive in the manner in which it was proved and admitted that he did keep her.

CLEASBY, B. concurred.

Case remitted to the justices accordingly.

Solicitor for the appellant, *Leslie*.

CROWN CASES RESERVED.

Saturday, May 11, 1878.

(Before Lord COLERIDGE, C.J., MELLOR, J., LUSH, J.,
CLEASBY, B., and GROVE, J.)

REG. v. JARMAN. (a)

False pretences—Indictment—Proof—Note of a non-existing bank.

The prisoner was convicted of attempting to obtain a sewing machine by false pretences. The indictment alleged that the prisoner did falsely pretend that a paper partly in print and partly in writing, produced by the prisoner to the prosecutor, and purporting to be a bank note for the payment to the bearer of 5l., was then a good, genuine, and available order for the payment of the sum of 5l., and was then of the value of 5l., &c.; by means of which false pretence the prisoner did unlawfully attempt to obtain a sewing machine. The evidence was that the prisoner bargained for the purchase of the sewing machine for 35s., and said that a friend had told her to get one, and had sent her the money to pay for it, and at the same time gave a worthless bank note for 5l. payable to the bearer, of the Devonshire Bank, which had stopped payment many years ago. The prisoner knew at the time that the bank had stopped payment, and that the note was of no value.

Held, that the indictment, though inartificially framed, sufficiently alleged that the prisoner falsely represented the note to be a good and genuine note of an existing bank, and of the value of 5l., and that the evidence supported the conviction.

CASE stated for the opinion of this Court by the Recorder of the city of Exeter.

At the quarter sessions for the city and county of the city of Exeter, holden at Exeter, on the 4th April 1878, Jane Jarman was convicted before me of having attempted to obtain goods by false pretences.

The indictment charged that the said Jane Jarman unlawfully, knowingly, and designedly did falsely pretend to James Turner, that a certain paper, partly in print and partly in writing, produced by the said Jane Jarman to the said James Turner, and purporting to be a bank note for the payment to the bearer of the sum of 5l., was then a good, genuine, and available order for the payment of the sum of 5l., and was then of the value of 5l. By means of which said false pretence the said Jane Jarman did then unlawfully attempt to obtain from the said James Turner one chain-stitch sewing machine of the goods and chattels of Messieurs Taylor and others, with intent thereby to defraud. Whereas in truth and in fact the said paper partly in print and partly in writing was not then a good, genuine, and available order for the payment of the sum of 5l., nor was the same then of the value of 5l., as she, the said Jane Jarman, then well knew at the time when she did so falsely pretend as aforesaid, against, &c.

The evidence was that the prisoner went to the shop of Messieurs Taylor and Co., and bargained with their manager, James Turner, for the purchase of one of their chain-stitch sewing machines for the sum of 35s. That she said a friend had told her to get one of them, and had sent her the money to pay for it, and at the same time gave

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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him a bank note for the purpose of paying for it, which was partly in print and partly in writing, and of which the following is a copy :

No. A. 914, Devonshire Bank, £ Five.

I promise to pay the bearer on demand £5 value received.

Exeter, 5th day of November 1817. 914.

For Williams, Cann, Searle, and Co.
Five pounds. John Searle.

That the said James Turner told her that the note was worthless, and that he should detain it.

That the bank had stopped payment many years ago, and that the notes of the bank were of no value.

There was ample evidence to go to the jury that the prisoner knew, when she tendered the note to James Turner, that the bank had stopped payment, and that the note was of no value, and that she tendered the note with intent to defraud. There was no further evidence of any false pretence by words.

I was of opinion that the said note was not an order for the payment of money, and that there was no evidence to support the allegation in the indictment that the prisoner falsely pretended that the said paper was a good, genuine, and available order for the payment of 5*l.*, and I entertained some doubt whether there was evidence for the jury to support the indictment, and whether, having regard to the want of proof of the alleged false pretence that the said paper was an order for the payment of money, the indictment was sufficient to sustain a conviction. But I left the case to the jury, directing them to find the prisoner guilty if the evidence satisfied them that she knew when she tendered the note to James Turner that the bank had stopped payment, and that the note was of no value.

The jury found the prisoner guilty, and I postponed judgment, and discharged the prisoner on recognizance of bail to appear at the next quarter sessions for the said city and county and receive judgment, and I have stated this case for the consideration of the Court for Crown Cases Reserved as to whether there was evidence for the jury to support the indictment, and whether the indictment was sufficient to sustain the conviction, and whether the conviction ought to be affirmed or quashed.

C. G. PRIDEAUX,

Recorder of Exeter.

No counsel appeared on either side.

LORD COLERIDGE, C.J.—I am of opinion that the conviction should be affirmed. The case states that the prisoner was convicted of having attempted to obtain goods by false pretences. And the indictment alleges that the prisoner unlawfully, knowingly, and designedly, did falsely pretend to the prosecutor that a certain paper partly in print and partly in writing, produced by the prisoner to the prosecutor, and purporting to be a bank note for the payment to the bearer of 5*l.*, was then a good, genuine, and available order for the payment of the sum of 5*l.*, and was then of the value of 5*l.* By means of which said false pretences the prisoner did then unlawfully attempt to obtain from the prosecutor a sewing machine with intent to defraud. Without saying that the words of the indictment describe the legal effect of this document (and I do not pause to inquire whether they give a strictly accurate description of it—it may be they do not), yet the ingre-

dients of the offence appear to me to be set out in the indictment. It does, I think, sufficiently state that the prisoner attempted by false pretences to obtain the property of the prosecutor with intent to defraud, and that she falsely pretended that a piece of paper which she produced to the prosecutor was a genuine note of a bank then existing and having power to issue notes. It was proved that there was no such existing bank, and that the prisoner knew this, and that the note was of no value. The rest of the Court concurred.
Conviction affirmed.

HOUSE OF LORDS.

Tuesday, March 26, 1878.

(Before the LORD CHANCELLOR (Cairns), Lords O'HAGAN, and GORDON.)

COX v. RABBITS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Land tax — Exemption — Site of a hospital — 4 Will. & M. c. 1, s. 25—38 Geo. 3, c. 5, ss. 25, 29.

The Act 4 Will. & M. c. 1, enacts (sect. 25) that no hospital or almshouse shall be chargeable with land tax in respect of its site. This exemption was confirmed by the Act 38 Geo. 3, s. 25; which latter Act by sect. 29 enacted that no other lands belonging to any hospital should be chargeable, except such as were chargeable under the 4 Will. & M. c. 1.

The respondent was the lessee of land which had been the site of a hospital existing before the passing of the Act of William and Mary, but the hospital had been removed to another site after the passing of the Act of Geo. 3.

Held (affirming the judgment of the court below), that the land came within the exemptions of the above Acts, and that the respondent was not liable to pay land tax.

THIS was an appeal from a judgment of the Court of Appeal (James, Baggallay, Bramwell, and Brett, L.JJ.), reported in 36 L. T. Rep. N. S. 455, reversing a judgment of the Queen's Bench Division (Cockburn, (J.J. and Lush, J.), reported in 35 L. T. Rep. N. S. 834, in favour of the defendant, upon a special case.

The action was brought by Rabbits against Cox, who was the collector of land tax for the parish of St. George the Martyr, Southwark, for a trespass.

The Fishmongers' Company were the owners of land in the parish which had formerly been occupied by some almshouses belonging to the company. In 1849 the almshouses were removed to another site, and in 1860 the vacant land was let on lease to Rabbits. While the land was the site of the almshouses it was free from land tax, under 4 Will. & M. c. 1. s. 25, and 38 Geo. 3, c. 5. s. 29; and Rabbits refused to pay the tax on coming into possession under the circumstances above mentioned. The Land Tax Commissioners accordingly made a levy, in respect of which this action was brought.

The special case is fully set out in the report of the case when before the Queen's Bench Division, and the sections of the Acts appear in the judgments of their Lordships.

E. Clarke and Lyon appeared for the appellant.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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The *Solicitor-General* (Sir H. Giffard, Q.C.) and *Lumley Smith* for the respondent.

The following authorities were referred to:

Lord Colchester v. Keowney, L. Rep. 1 Ex. 368; 14 L. T. Rep. N. S. 888; affirmed on appeal by the Exchequer Chamber, L. Rep. 2 Ex. 253; 16 L. T. Rep. N. S. 463; and the dictum of Lord Loughborough, cited in the note to *Grant v. Aslie*, 2 Dougl. 722.

At the conclusion of the arguments, their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns).—My Lords, the question to be decided on this appeal is an extremely short one, and the argument, as it appears before you, is condensed into a very narrow compass. The Court of Appeal were unanimously of opinion that the property in question, which was formerly the site of a hospital, but is no longer so, having obtained its exemption from the land tax, took that exemption still, and I can see no reason whatever to differ from their decision. I think the view which has been presented on behalf of the respondent is the correct one, namely, that the intended operation of the Act of Parliament, though it is not perhaps in some respects clear in every word, was to impose a charge at the time that the Act was passed, and there to leave the charge so imposed where the charge was imposed; and as the Act passed there it remained, and where the Act was not in effect to impose a charge no charge could take place, and nothing has been done since to effect a charge. Looking at it in that point of view the 29th section of the Act of Geo. 3, c. 5, is perfectly intelligible, and although there may, as between the 29th and the 25th sections, be a certain amount of duplication of enactment, still the object of the 29th section is obvious: "All such lands, revenues, or rents belonging to any hospital or almshouse, or settled to any charitable or pious use, as were assessed before the fourth year of the reign of their late Majesties King William and Queen Mary, shall be, and are hereby adjudged to be, liable to be charged towards the payments of this present Act." Now it is admitted that the land in question does not come within this part of the 29th section, because it was not assessed in the 4th year of the reign of William and Mary; but the section then continues: "and that no other lands, tenements, hereditaments, revenues, or rents whatsoever then belonging to any hospital or almshouse, or settled to any charitable or pious use as aforesaid, shall be charged, taxed, or assessed under the present Act towards the sum raised, nothing herein contained to the contrary notwithstanding." Now here we have other lands which were then belonging to a hospital, and therefore we have an Act of Parliament declaring with regard to that other land that it shall not be charged, taxed, or assessed by virtue of this present Act, and that wholly irrespective of whether it continued to be, or did not continue to be, land used for the preservation of these institutions. This taxing must be construed strictly. You must find words to impose the tax, and if the words are not found which impose the tax, it is not to be imposed. Now it appears to me that, so far from there being words imposing a tax here, you have words which it is clear declare that the tax is not to be imposed: and I find nothing to shift to some subsequent period the taxing of

this property, or in effect to make this Act subservient to the purpose of imposing a tax on land which in the first instance is declared to be exempt from tax. I therefore propose to your Lordships that this appeal be dismissed with costs.

LORD O'HAGAN.—My Lords, I am of the same opinion. This is a point which, although important, I think is very short and clear. We feel it our duty as a court of construction to give effect to an Act of Parliament, if that Act is clear, simple, and unequivocal in its terms, and we are not at liberty to wander beyond its terms, or to contravene its intention. Now here we have an Act which is as plain and unequivocal in its terms as any that ever came before your Lordships. The 29th section is not open to two constructions within itself, and I think I must not pass over the admission of the counsel for the appellant that, if the 29th section had stood alone, he could not have argued the case. That section makes the matter clear. In the first place it affirmatively declares the liability of certain premises to taxation, and then in negative words it emphatically relieves other sets of premises from any liability whatever. Now it is conceded that the premises in question here are such as are so relieved from liability, and therefore it does not seem to me possible, having that section before our eyes, that we should differ from the unanimous judgment of the Court of Appeal. All that we have heard in the way of argument is this: There has not been any attempt to construe the 29th section according to the view of the appellant, but there has been an attempt to connect the 29th section with the 25th section, and to say that the 25th section deals with the subject-matter of the 29th section, and that therefore we are to forget the 29th section altogether and to go back to the 25th section. Now I rather agree with the observation of the learned counsel that if the 25th section is to be considered partial, and the 29th section universal, and we must choose between the two, that we should take the latter and more extensive section. I do not think that it is necessary for me to say more than this, that there is no conflict between those sections, and it follows that we, as a court of construction, should not fail to give our attention to the larger section. As to the policy in the matter, which has been referred to, of taxing or not taxing these charitable institutions, it is quite reasonable to suppose that these exemptions may have been made for the purpose of relieving these charitable institutions not merely for the time but permanently; and it is quite plain, if the construction put upon this Act by the decision of the Court of Appeal is not the correct construction, that the benefits which were intended to be accorded to these charities would be taken from them. On the whole I approve of the decision of the Court of Appeal, and I think that this appeal should be dismissed with costs.

LORD BLACKBURN.—My Lords, I am of the same opinion. The Act of William and Mary, which originally imposed this tax, gives in the 25th section an enumeration of the exemptions, and it is provided that nothing contained in this Act is to charge any hospital or college, and it enumerates a considerable number of hospitals and colleges by name for or in respect of the site of the said hospital (or college), so that in general words the word hospital comes in; then it goes

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on to say that afterwards none of these colleges which it enumerates, or any hospital, shall be taxable. Then it goes on to provide that it is not to extend to charge any other hospital for or in respect of the rents and revenues payable to the said hospital or almshouse, which are being received and disbursed for the use of the poor of the said hospital and almshouses only. Then the Act of 38 Geo. 3 was passed making it perpetual, and the 25th section says, "Provided that nothing in this Act contained shall extend to charge any hospital for or in respect of the site of the said hospital." Then we come to these words, "Or to charge any lands or houses which on or before the 25th of March 1693" belonged to any hospital or almshouse. Then comes the 29th section, which provides that "all such lands, revenues, or rents belonging to any hospital or almshouse, or settled to any charitable or pious use, as were assessed in the fourth year of the reign of King William and Queen Mary shall be, and are hereby adjudged to be liable to be, charged towards the payment of this present aid; and that no other lands, &c. then belonging to any hospital shall be charged, taxed, or assessed by virtue of this Act." The present hospital which you are now dealing with was not one of those enumerated hospitals. But it did exist before 1693, and came within the general words, no doubt, and it is said that at that time it was not liable to be assessed, because it was the site of a hospital as therein mentioned. Now the 25th section of the Act applies thus far, that is to say, to any hospital existing at the time of the Act of 38 Geo. 3; whether existing in William III.'s time or not, no such hospital is chargeable with respect to its site. The previous enactments had been to the effect that a large sum of money should be imposed upon each county, and that each county should be divided into parishes and districts, and that a charge should be made on the lands, or on the persons who occupied the same, and the 25th section exempts a hospital with respect to its site. Now if the hospital is not charged, nobody else would be chargeable, because in the nature of things a college or hospital must have a site, and the land tax would not be imposed upon it; but when the land ceased to be such site, unless there is some other exemption, it would be liable as land to be taxed under the previous enactment; but in this enactment any college or hospital is not liable. Now I confess it seems to me that the 29th section must have been passed with a view of meeting that, because it says that it is enacted that all lands, &c., belonging to a hospital or almshouse as were assessed in the fourth year of William and Mary shall be thereby liable to be charged, that is to say, all lands belonging to any college or hospital which were not part of the site; then it enacts in negative terms that no other lands belonging to any hospital, &c., shall be charged under the Act. Now the site, which is the site of a hospital which existed in the reign of William III. cannot according to the words of this Act be liable, and "no other lands then belonging to it shall be charged or assessed," that is to say, no other than those which are already taxed. This hospital was not liable in the reign of William III., and there is nothing whatever to reimpose the charge on the land. It seems to me, therefore, that the decision in this case of the Court of Appeal was right.

Lord GORDON.—I am of the same opinion.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Simpson and Palmer.*

Solicitors for the respondent, *O. O. Humphreys and Son.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Dec. 1, 1877; and Feb. 18, 1878.

(Before COCKBURN, C.J., and LUSH, J.)

REG. v. FRENCH. (a)

Turnpike trust fund, deficiency of—Order on parish for contribution towards repair—Non-completion of scheme of special Act—4 & 5 Vict. c. 59, s. 1.

By 4 & 5 Vict. c. 59, s. 1, justices at special sessions, on proof of the deficiency of the funds of any turnpike trust, may order payment to said trust of a portion of the highway rate.

By special Act, 5 Geo. 4, c. xciv., certain trustees were empowered to establish a ferry across the river Arun at Littlehampton in Sussex, and to make roads in connection therewith, both the ferry and the roads to be maintainable by tolls. By sect. 72 of such special Act it was enacted that, "in case the works thereby authorised should not be completed," within ten years, "so as to answer the objects thereby intended," the powers given by the Act should cease, save as to so much of the work as should have been completed within the time.

The trustees failed to construct one of the roads, but otherwise did all which the special Act empowered them to do. The tolls being insufficient for the repair of the roads generally, the trustees applied to the justices for an order under 4 & 5 Vict. c. 59, s. 1.

Held upon a case stated by quarter sessions, that such an order might be legally made.

CASE stated for the opinion of this court by the Sussex Quarter Sessions.

1. The appellants are trustees appointed under and by virtue of a public Act of Parliament (5 Geo. 4, c. xciv.), being an Act passed for establishing a ferry over the river Arun, at Littlehampton, in the county of Sussex, and making roads to communicate therewith. The respondent is the surveyor of highways for the parish of Rustington.

2. Under and by virtue of the Act the trustees are empowered both to establish a ferry and to make certain roads.

3. The preamble of the said statute (5 Geo. 4, c. xciv.) recites:

Whereas there is at present no communication between Worthing, Heene, West Tarring, Goring, Ferring, Kingstone, Angmering, East Preston, Rustington, and Littlehampton, situate on the east side of the river Arun, in the county of Sussex, and Clymping, Ford, Yapton, Middleton, Felpham, and Bognor, in the said county, situate on the west side of the said river, but by a circuitous road of several miles, except that there is a ferry for foot passengers only over the said river Arun, at Littlehampton aforesaid, and whereas from the greatly increased and still increasing population of several of the

(a) Reported by J. M. LEXY, Esq., Barrister-at-Law.

above places, there is much intercourse between the inhabitants of the east and west sides of the said river Arun, and it would greatly contribute to the advantage, convenience, and accommodation of such inhabitants to have a ferry established for carriages, horses, cattle, foot passengers, and portable articles over the said river Arun at Littlehampton aforesaid, and to have a good road from such ferry on the west side of the said river to and into the road leading from Bognor to Arundel at the west end of Grevatt-lane, in the parish of Yapton aforesaid, and also to have a good road from such ferry on the east side of the said river to and into the village of Rustington aforesaid, with a branch road from the street of Littlehampton aforesaid, by the beach houses to the east end of the lane leading from the church of Rustington aforesaid to the sea shore, and the establishing such ferry, and the making and improving such roads, would likewise be a great advantage, convenience, and accommodation to the inhabitants of many other places on the east and west sides of the said river Arun, and to all persons travelling along the sea coast of the said county of Sussex.

4. By sect. 16 power is given to the trustees for establishing a ferry.

5. By sect. 18 it is enacted *inter alia* that it shall and may be lawful to and for the said trustees to make or cause to be made a proper and commodious road for such ferry to be established as aforesaid on the west side of the said river Arun to and into the road leading from Bognor to Arundel at the west end of Grevatt-lane, in the said parish of Yapton in the said county, and also one other proper and commodious road from such ferry to be established as aforesaid on the east side of the said river to and into the village of Rustington in the said county, and also a proper and commodious branch road from the street of Littlehampton aforesaid by the Beach Houses to the south end of the lane leading from the church of Rustington aforesaid to the seashore, &c., &c., and the same roads shall be made, and all times afterwards maintained and repaired at the proper costs and charges of the said trustees by and out of the tolls by this Act granted except as hereinafter mentioned.

6. By sect. 72 it is further enacted that in case the works hereby authorised to be executed shall not be completed within the space of ten years, so as to answer the objects hereby intended, all the powers and authorities hereby given shall cease and determine, save only as to so much of the work as shall have been completed within that time.

7. A map and plan setting out the parish roads, coloured brown, the roads of the trustees coloured yellow, also the line of road not made (in dotted lines) marked "A," is annexed, and also forms part of the case.

8. Upon the 13th Nov. 1876, an application was made by the present appellants, under the provisions of 4 & 5 Vict. c. 59, to the court of petty sessions for the upper divisions of Arundel Rape upon a summons taken out by the present appellants, requiring the respondent as surveyor of highways for the parish of Rustington to contribute to the repair of a certain road hereinafter mentioned.

After hearing evidence an order, since appealed from, was made in the following words:—

County of Sussex to wit.—At a special sessions for the highways, held at the Town Hall in and for the Upper Division of Arundel Rape in the said county, and acting within the said division, on the 13th Nov. 1876.

Be it remembered that on the 16th Oct. 1876, and at this present Special Sessions, Robert French of Little-

hampton, in the county of Sussex, gentleman, the clerk to the trustees of a certain undertaking or concern called "The Littlehampton Ferry and Roads Undertaking," established by an Act of Parliament made and passed in the fifth year of his late Majesty King George the Fourth intituled "An Act for establishing a ferry over the river Arun, at Littlehampton, in the county of Sussex, and making roads to communicate therewith" hath made and exhibited an information before Arthur Prime, Esq., and Sir Peniston Milbank, Bart., two of Her Majesty's justices of the peace for the said county of Sussex, acting on the said special sessions pursuant to the authority in that behalf given in and by the Act of the fourth and fifth years of Her Majesty, c. 59 (which Act has been continued by subsequent enactments, and is now in full force and operation), who saith that a certain road from Littlehampton to Rustington was made under the Act intituled, "An Act for establishing a ferry over the river Arun at Littlehampton, in the county of Sussex, and making roads to communicate therewith."

That the funds of the said ferry undertaking or concern are insufficient for the repairs of the roads comprised therein, part whereof runs through, lies, and is situate within the parish of Rustington, in the upper division of Arundel and county aforesaid, and that the said road now lying within the said parish is now out of repair, and further that notice in writing of the intention of the said Robert French, to exhibit this information was pursuant to the said Act 4 & 5 Vict. c. 59, given by him as such clerk as aforesaid, to Robert Botting, the surveyor of highways of the said parish of Rustington, twenty-one days at least before the present special sessions, and which notice set forth the allegations aforesaid, and that at this special sessions application would be made to the justices for their examination into the state of the revenues, and debts of the said ferry, undertaking, or concern, as also to inquire into the state and condition of the repairs of the roads of the same, and the groynes or sea defences belonging thereto, and also to ascertain the length of the road within the said parish of Rustington the surveyor is liable to repair, and that then application would be made to the said justices to adjudge and order that such portion as they may think necessary of the rates or assessments levied or to be levied by virtue of the Act in that behalf, for the repair of the highways within the said parish may be made by him as such surveyor of the highways at such time or times as they the said justices may direct to the trustees of the said ferry, undertaking or concern their treasurer or other officers appointed by them in that behalf for and towards the repairs of such part of the said road as lies within the said parish of Rustington, and the said Robert French, as such clerk as aforesaid, now prayeth the consideration of us the said justices in the matter of the said information, and that two justices may adjudge and order as in the said recited notice is stated in that behalf.

And now, after having pursuant to the said information and the said recited Act of the 4th and 5th years of Her Majesty, examined the state of revenues and debts of the said ferry, undertaking, or concern, and inquired into the state and condition of the repairs of the road before referred to, we find that from the eastern border or boundary of the parish of Littlehampton in the said county to Rustington Mill in the said parish of Rustington for a length of 1029 yards fronting to and abutting on the sea, the said road is out of repair, and having duly inquired into the allegations contained in the said information before recited, the said Robert French as such clerk, and also the said Robert Botting as such surveyor of the highways as aforesaid, being present during such examination and inquiry in pursuance of the notice aforesaid, it appears to us the said justices assembled at the said special sessions for the highways on the oaths of Robert Bushby and others, that the said several allegations contained in the said information are true, and that it is necessary and expedient for the purposes of the said road so situate in the said parish of Rustington as aforesaid, that the said road (and groynes or sea defences) should be repaired, the said surveyor of the highways not having shown to us any good cause or reason to the contrary. We do hereby adjudge and order that a portion, that is to say, the sum of 150*l.* of the rates or assessments levied or to be levied by virtue of the Act 5th & 6th Will. 4, c. 50, for the parish of

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Rustington shall be paid by the said Robert Botting as such surveyor of the highways of the said parish of Rustington by two equal payments, to wit, the sum of 75s. part thereof on the 31st day of January next, and the residue thereof on the 31st day of December, 1877, to the said Robert French as such clerk to the trustees of the said ferry undertaking or concern as aforesaid, the said sum of 150l. to be wholly laid out in the actual repairs of the said roads, groynes, or sea defences which lies in the said parish of Rustington. And we do also adjudge the said Robert Botting to pay to the said Robert French on or before the 31st day of January next the sum of 11l. 15s. 4d. for his costs in this behalf.

Given under our hands and seals at the special sessions aforesaid.

ARTHUR PRIME (L.S.)
JOHN LONG (L.S.)

9. On the 7th Nov. notice of appeal to the court of quarter sessions was given, and grounds of appeal, of which the following is a copy, were delivered.

To Arthur Prime and John Long, Esquires, justices of the peace acting in and for the western division of the county of Sussex.

Take notice that I, Robert Botting, surveyor, of highways for the parish of Rustington, in the county of Sussex, do intend at the next quarter sessions of the peace to be holden for the western division of the county of Sussex, at Petworth, on the 4th day of January next, to appeal against an order of you the said justices made on the 13th day of November instant, requiring a contribution to be paid out of the highway rates of the said parish of Rustington to the trustees of the Littlehampton ferry, by which order I think myself aggrieved, and that the following are the grounds of my appeal upon all or any of which grounds I shall rely at the hearing of the said appeal.

1. That the road towards the repair of which a contribution was ordered by the said order to be made is not a turnpike road within the meaning of the Act 4 & 5 Vict. c. 59.

2. That the road in respect of which the said order was made is a road from the Beach Houses, at Littlehampton to Rustington Mill, and is the road or part of the road in the Act of the 5th George 4., cap. xciv., described as a branch road, and the said trustees not having made the main road contemplated by the said Act from the ferry over the river Arun to Rustington, there was no power to order a contribution towards the repair of such branch road, or at all events if you the said justices had a discretion in the matter, a contribution ought not to have been ordered.

3. That the said branch road is little used, and, if the said trustees had made the main road above-mentioned, would be useless or nearly so.

4. That the said order was applied for and made upon an allegation that certain groynes and sea defences, which are adjacent or near to the said branch road were out of repair, and was applied for and made in order to enable the trustees not only to repair such branch road, but also to repair groynes and sea defences, it being no part of the duty of the said trustees to repair such groynes or sea defences.

5. That the deficiency of funds in the hands of the trustees was wholly or partly caused by their having expended funds beyond their powers in making and maintaining groynes and sea defences, and by other unauthorised or unexpedient expenditure by the trustees.

6. That so far as the contribution ordered was made to enable the trustees to repair the said branch road, the same was made on the footing of the repairs to a greater width and otherwise to a greater expense than necessary or expedient for the purposes of the said branch road.

7. That the said order was made upon an estimate of costs in excess of the works necessary.

8. That the said order is bad and defective on the face thereof.

9. That you the said justices had no jurisdiction to make the said order.

10. That if the said order is good and within your jurisdiction, to make the same is for a larger amount than ought to have been ordered, and the amount ordered ought to be reduced.

Dated this seventeenth day of November 1876.

(Signed) ROBERT BOTTING.

10. The said appeal came on to be heard before the court of quarter sessions for the western division of Sussex upon the 4th Jan. 1877.

11. At the hearing of the said appeal, and before the case was opened on behalf of the then respondents, the then appellant objected that the said order was bad upon the face thereof, upon the following grounds, viz., that the said order does not find the said road to be a turnpike road, and also upon the ground that the said order provides for the repair of the groynes or sea defences, as well as of the road itself, the Act under which the order was made only authorising a contribution for the repairs of roads, and further that the order leaves it optional with the said trustees to which of the said purposes the said money shall be applied. The court of quarter sessions overruled the said objections.

12. The following facts were then proved or admitted.

13. It is admitted that the road which is described as the other proper and commodious road from such ferry to be established as aforementioned on the east side of the said river, to and into the village of Rustington, in the said county, has never been made by the trustees or at all.

14. Proof was given by the appellant, but objected to by the respondents as immaterial to the issue, that the said road, if made, would have been of considerable advantage to the inhabitants of the parish of Rustington, whereas the other roads provided for in the said Act, and especially the road in the 5th paragraph mentioned, in respect of which contribution is sought from the said parish, has been and is of little or no value to them, and is principally used by residents in, and visitors to, the neighbouring watering place of Littlehampton.

15. With the exception of the aforesaid proper and commodious road from such ferry on the east side of the said river to and into the village of Rustington, and with the exception of a portion of the road (in the next paragraph mentioned) lying at the extreme west thereof (which portion was made by and at the expense of the parish of Rustington), the trustees have made the several roads mentioned in the Act of Parliament, and have taken thereon the full amount of tolls specified in their said Act, and have up to the present time received and expended the tolls (in addition to other purposes authorised by the said Act) in the maintenance of the said roads, and of the groynes and sea defences hereinafter mentioned.

16. The road described in sect. 18 of the said Act (being the road to the repair of which the present respondent was by the above-mentioned order ordered to contribute) leads from the street of Littlehampton aforesaid by the Beach Houses to the south end of the lane leading from the church of Rustington aforesaid to the seashore passes along the east front, and is 1029 yards in length.

17. From time to time groynes and sea defences have been erected and maintained at the expense of the trustees between the road and the sea for the purpose of protecting the said roadway and certain private properties adjoining thereto from the sea, which has lately been rapidly encroaching, and has as a result been gradually washing away the said roadway. During the twelve months previous to the said order, there had been three such encroachments of a serious nature, washing away large portions of the road. At the date when the said

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order was made considerable portions of the said road had been washed away, the width of the roadway being in some places reduced from 30ft. to 9ft. only; the groynes and sea defences had been also greatly damaged. Between the date of the said order and the date of the appeal, there was a severe storm at Littlehampton, which caused serious further damage to the said roadway, groynes, and defences.

18. The then respondents' road surveyor, being called as a witness on behalf of the then respondents, stated (as the facts were) that the works contemplated by the trustees if carried out would put the said roadway in temporary repair only, and that the period such repairs would last before being again carried away by the sea would depend upon the weather, and that if the repairs contemplated had been executed previous to the occurrence of the storm in the last paragraph mentioned they would have been in all probability swept away in the course of it. He estimated the cost of making a roadway capable of permanently resisting the encroachment of the sea at 5000l.; but this would involve the creation of a fresh roadway at different levels and the construction of expensive sea defences. The rateable value of the parish of Buxington is 3183l. 19s., and the highway rate at the time of the order amounted to 6d. in the pound.

19. The funds in the hands of the trustees (which have never exceeded the income guaranteed, viz., 450l. per annum) were at the date of the order quite inadequate to do the heavy and necessary outlay for the maintenance of the road, and to put both it and the groynes and sea defences belonging to it into a proper state of repair.

20. The court of quarter sessions gave judgment in favour of the then appellant, subject to a case to be stated for the opinion of this court upon the ground that the completion by the then respondents of the whole system of roads specified in the Act was as a matter of law a condition precedent to the right to call upon the parish to contribute to the repair of any part thereof. The court decided, however, in favour of the respondents upon all the objections raised in the grounds of appeal, with the exception of that contained in paragraph 2, as mentioned above. They were of opinion that the expenditure upon the groynes and sea defences was a justifiable expenditure.

The questions for the opinion of the court are: 1. Whether the said order is valid upon its face. 2. Whether the decision of the court of quarter sessions in favour of the appellant was right in point of law. 3. Whether in point of law, under the circumstances in the case mentioned, the appellant can be called upon to contribute to the said repairs. 4. Whether the court of quarter sessions was right in their views upon the facts.

The court are to be at liberty to draw any inferences of fact or deductions of law, and in all respects to exercise the power of the sessions to confirm, amend, alter, vary, modify, or reverse their decision in such manner and to such extent as to such court shall seem expedient and proper.

Costs to follow event.

J. J. CARNEGIE, Chairman.

It is further ordered by this court that the costs of the said appeal shall abide the event of the decision of the said Court of Queen's Bench and be paid to the clerk of the peace for the said

county to be by such clerk of the peace paid over to the party entitled to the same.

By the Court,

J. LANGRIDGE, Clerk of the Peace.

Cave, Q.C. (with him *Gore*), for the appellants, cited

R. v. Cumberworth, 3 B. & Ad. 108;

E. v. Edge Lane, 4 Ad. & E. 723;

Roberts v. Roberts, 3 B. & S. 183;

R. v. York and North Midland Railway Company, 1 E. & B. 858;

relying especially on *R. v. Cumberworth*.

Willoughby and Lumley Smith, for the respondents, cited

Trustees of Sunk Island v. Inhabitants of Patrington, 1 B. & S. 747;

R. v. Greenhow, 45 L. J. 141, M. C.;

R. v. White, 4 Q. B. 101;

R. v. South Shields, 3 E. & B. 599.

Cave, Q.C. was heard in reply.

Our. adv. vult.

Feb. 18.—The written judgment of the Court (Cockburn, C.J. and Lush, J.) was delivered as follows by

LUSH, J.—We entertained for a time considerable doubt whether this road could be considered a turnpike road within the meaning of 4 & 5 Vict. c. 59, inasmuch as by sect. 90 of 4 Geo. 4 c. 95, it is taken out of the General Turnpike Acts, because made under an Act of Parliament passed for an unlimited period. But on further consideration we are of opinion that 4 & 5 Vict. c. 59, is not so limited in its application, and that the sessions were right in so holding. The road is a turnpike trust, inasmuch as tolls are payable upon a part of it, which tolls are applicable to the maintenance of the entire undertaking, and constitute the fund which it was originally considered would be sufficient for that purpose; and the reason for the exceptional provision made by 4 & 5 Vict. c. 59, is as applicable to this road as to one governed by the General Turnpike Acts. Moreover, these portions of the line of road, which formed part of an ancient highway, would have been entitled to statute labour if that auxiliary had not been abolished by the General Turnpike Act (see sect. 86). We, therefore, adopt the larger construction of the phrase "turnpike road," which was adopted by the Court of Exchequer in *The Company of Proprietors of the Northam Bridge and Roads v. The London and Southampton Building Company* (6 M. & W. 428), and hold this to be a road in respect of which it is competent to the justices to appropriate a portion of the highway rate, supposing the road to be otherwise within the purview of that Act. Were it not for the comparatively recent case of *Reg. v. The York and North Midland Railway Company* (1 E. & B. 858) in error, we should probably have felt ourselves bound by the cases of *Rea v. Cumberworth*, 3 B. & Ad. 108, and 4 A. & E. 731, and *Rea v. Edge Lane*, 4 Ad. & El. 723. The first case, *Rea v. Cumberworth*, was put upon two grounds: first, that the Act was to be construed as a contract between the promoters and the public, based upon an entire consideration, which created a duty to complete the whole undertaking; and that the statute was to be read as enacting by implication that until the whole line was completed no part was to be deemed to have been done under the authority of the Act, so as to become a public highway; and, secondly, that an acquiescence or adoption by the parish was necessary, in order to

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cast upon the parish the burden at common law of keeping a newly dedicated road in repair. So far as the decision proceeded upon the necessity of an adoption by the parish, it was overruled by *Reg. v. Peake*, 5 B. & Ad. 469. The judges differed in that case upon the question whether the commissioner in whom the land was vested had the power to dedicate to the public, but they all agreed that if a road has been dedicated, and used by the public, the acquiescence or refusal of the parish is immaterial. The subsequent cases of *Reg. v. Edge Lane* and *Reg. v. Cumberworth*, 4 A. & E. 731, are therefore put solely upon the authority of *Reg. v. Cumberworth*, 3 B. & Ad. 108, as cases of contracts founded on an entire consideration. This doctrine was afterwards put to the test by an application for a *mandamus* to a railway company who had made part of their line to compel them to complete the remainder. This court, with the exception of Erle, J., who delivered a judgment the other way, upheld the doctrine propounded in *Reg. v. Cumberworth*, and affirmed in the two subsequent cases, but the Exchequer Chamber, in a well-considered and elaborate judgment, reversed it; and their decision was mentioned with approval in the House of Lords, in the *Edinburgh, Perth, and Dundee Railway Company v. Philip* (2 Macq. 514). These cases reaffirm the old canon of construction, which appears to have been lost sight of in the former cases, namely, that it is not for the court to speculate, apart from the words they have used, what the intention of the Legislature was, but to construe the language of the Act in its plain and ordinary meaning, except where the context requires a different sense to be put upon it. In the judgment of Erle, J. in this court, as well as in the judgment of the Exchequer Chamber, it is pointed out that Lord Eldon's dictum in *Blakeman v. The Glamorganshire Canal Company* (1 Myl. & K. 162), has been either misquoted or misunderstood, his language being, "Those who come to Parliament for statutes of this description do in effect undertake that they shall do and submit to whatever the Legislature empowers and compels them to do" (and not that they undertake to do)—"whatever the Legislature empowers them to do," which is the sense in which the court seems to have understood them in the former cases. The Act for making the roads in question nowhere requires the trustee to complete them or either of them. The words of the 18th section are permissive only—"it shall and may be lawful," &c.; and this is the language used as applicable to both sections of the main road as well as to the branch in question. The same words are used in the 16th clause, which authorises the trustees to establish the ferry. "The Act gives," to use the language of Jervis, C.J. in the *York and North Midland Company v. The Queen*, "conditional powers which, if acted upon, carry with them duties; but which if not acted upon, are not, either in their nature or by express words, imperative upon the persons to whom they are granted." The duty of fencing from the adjoining land, and of applying the tolls to keeping the road in repair, are instances of the duty which follows from the making of the road as a legal consequence of the execution so far of the powers of the Act. This Act contains also the clause which was much commented on in the Exchequer Chamber, namely, that "in case the works hereby authorised to be executed shall not be completed within the space of ten years, so as to

answer the objects hereby intended, all the powers and authorities hereby given shall cease and determine, save only as to so much of the work as shall have been completed within the time." Upon a similar clause in the Railway Act which was before the Exchequer Chamber judges, but which commenced with the words "the railway shall be completed within five years, and if not completed &c., the powers of the Act shall expire except as to so much as shall have been completed," the court in their judgment say: "If this section was intended to be obligatory, it would not contain that exception which contemplates that the line may be made in part. It is inconsistent to suppose that the Legislature would say in the same section, 'You may complete in part only if you can in five years, and then as to that part the powers of the Act shall continue, but you must complete the entire line in that time.' Upon the whole, therefore, we find no duty cast upon the company to make the railway in any part of this Act of Parliament. On the contrary, the Legislature seems to contemplate the possibility of the railway being made in part or being totally abandoned. In the latter case the powers expire in five years, in the former the statute remains in force as to so much of the railway as shall have been completed within that time, and expires as to the residue. This provision is inconsistent with the intention to compel the company to make the entire line as the consideration for the powers granted by the Act." This reasoning applies with equal force to the Act we are construing as to the Act which was before the Exchequer Chamber, and is entirely at variance with the doctrine laid down as the ground of the decision in the cases upon which the sessions founded their judgment. We cannot help remarking that any other construction would disentitle the trustees to take any tolls either upon the ferry or the west road. We are therefore of opinion that the clear intent of the Act was that so much of the roads and branch as was completed within the ten years should become and remain in perpetuity a public road, that having been thus dedicated to and used by the public it became a highway, and that as the funds of the trust were found to be inadequate to keep it in repair the justices had a discretion to appropriate a portion of the highway rate to its maintenance. The order of sessions must therefore be quashed.

Judgment accordingly.

Solicitors for appellant, *Palmer, Bull, and Fry*.
Solicitors for respondents, *Senior, Attree, and Johnson* (for *French, Hardwick, and Harvie*),
Littlehampton.

Monday, May 6, 1878.

(Before COCKBURN, C.J., and MELLOR and LUSH, JJ.)

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County bridges—Direction of surveyor—Private expenses—Repairable by trustees—43 Geo. 3, c. 59, s. 3—33 & 34 Vict. c. 73, s. 12.

By 43 Geo. 3, c. 59, s. 5, the inhabitants of a county were compelled to repair no bridge thereafter erected or built by a private person or body corporate, unless under the direction or to the satisfaction of the county surveyor or some person appointed by the justices.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

By a local Act of 1827 a road passing over a bridge was made repairable by trustees; but at no time was the bridge or its approaches actually repaired by them. The road became an ordinary highway.

By another local Act of the same year a canal company was empowered to make, maintain, and support bridges across their navigation, provided no existing liability to repair a bridge not erected or altered by the company should be affected. The company raised the surface of this bridge, without altering the structure, in order to give the approach to another bridge over their navigation the incline required by their Act. They did this without reference to the county surveyor or justices.

By 33 & 34 Vict. c. 73, s. 12, where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly.

Held, that by this alteration this bridge had not become repairable by the canal company, and that this general provision of the last Act was not limited to those bridges erected by private expense, which alone were repairable by a county under 43 Geo. 3, c. 59, s. 5; nor to bridges which had been actually repaired by trustees.

THIS was an indictment against the inhabitants of Somerset for the non-repair of a bridge over the river Brue, between the highway districts of Wells and Bridgwater, the boards of which districts were the joint prosecutors.

The indictment had been removed by *certiorari* into the Queen's Bench Division, and was tried at the last summer assizes at Wells before Lord Coleridge, who directed a verdict to be entered for the defendants.

A rule *nisi* had been obtained on behalf of the prosecution, calling upon the defendants to show cause why a new trial should not be had on the ground that the learned judge misdirected the jury, in that he directed them that the liability to repair was by 7 & 8 Vict. c. 41, s. 100, imposed on the Midland Railway Company, and on the ground that the learned judge improperly received evidence, under the plea of Not guilty, of an alleged alteration of the bridge over the South Drain, and improperly directed the jury that there was evidence of such alteration.

The following are the words of the 5th section of 43 Geo. 3, c. 59, commonly called Lord Ellenborough's Act, which was passed in consequence of the decision of the Queen's Bench in *Reg. v. The Inhabitants of the West Riding of Yorkshire* (2 East 342):

And for the more clearly ascertaining the description of bridges hereafter to be erected, which inhabitants of counties shall and may be bound or liable to repair and maintain; be it further enacted that no bridge hereafter to be erected or built in any county, by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor or person appointed by the justices of the peace at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster at their annual general sessions, and which surveyor or person so appointed is hereby required to superintend and inspect the erection of such bridge,

when thereunto requested by the party or parties desirous of erecting the same; and in case the said party or parties shall be dissatisfied the matter shall be determined by the said justices respectively at their next general quarter sessions or at their annual general sessions in the county of Lancaster.

By 7 & 8 Geo. 4, c. v, passed the 21st March 1827, trustees were appointed for keeping in repair a road from Chappel's Corner through Shapwick "unto and across the South Drain dividing Shapwick and Westhay" to a place mentioned beyond, therefore including as part of that road the surface of this bridge.

By 7 & 8 Geo. 4, c. xli, passed the 28th May 1827, the Glastonbury Navigation and Canal Company was incorporated for the purpose of improving and supporting the navigation of the river Brue, and for making and constructing a canal.

By sect. 4 the company was empowered to take lands for the canal, and amongst other things to make bridges "as the said company should think necessary and proper for the purposes of the said undertaking upon the said lands and hereditaments, and upon any lands adjoining to the same, and also from time to time to alter, repair, and amend or discontinue the same, or any of them."

By sect. 100 it was enacted:

That the said company shall, at their own costs and charges, from time to time make, maintain, and support a good and sufficient bridge or bridges, arch or arches, passage or passages across the said navigation and canals in all places where the same shall cross any carriage road or horse road or footway, either public or private, for the use of the public or of the persons entitled to use such roads or ways respectively; and shall, also at their like costs and charges, from time to time make, maintain, and support such and so many other convenient bridges, arches, or passages over or across the said navigation, or canals or any brooks, streams, drains, or watercourses running into the same, or into the said river Brue in such places and in such manner as the justices of the peace of the county or liberty where such bridges, arches, or passages shall be situate shall, at their general or quarter sessions, from time to time judge necessary and appoint for the use of the owners and occupiers of the lands, grounds, and hereditaments adjoining to the said navigation and canals or any of them. Provided always that nothing herein contained shall extend to exempt any person or party from the repairs of any bridges, arches, ways, or passages already built or made or to be hereafter built or made, to the repairs of which such person or party is or are or may be liable by law, and which shall not have been erected or altered by the said company; provided also that the several bridges to be erected over the said drains called Out and the South Brue Drain shall not be of less breadth of waterway than sixteen feet at the least.

By sect. 101 it was enacted:

That the ascent to every bridge made, or to be made, over the said navigation or canals, for the purpose of any public road, shall not be more than 1ft. in 13ft., and that the fence on each side of such bridge shall not be less than four feet above the surface of such bridge.

The company constructed their canal so as to pass under this highway about 45ft. from, and nearly parallel to, the river Brue. They built a good and sufficient bridge over the canal, in accordance with sect. 100; and they were bound by sect. 101 to raise the surface of the existing bridge over the river Brue about 2ft., so as to make the ascent to their own bridge in accordance with the incline thereby required. This was not done under the direction or to the satisfaction of the county surveyor, nor of any person appointed by the justices required. They made no alteration in the arch or structure of the bridge.

Afterwards the Midland Railway acquired the canal, and turned it into a railroad; the bridge

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over the canal was removed, and the highway was carried over the line of railway by a level crossing; no alteration, however, was made in the bridge over the river Brue.

It was admitted that the road over the bridge, which was made a turnpike road by 7 & 8 Geo. 4, c. 5, had become an ordinary highway; but the bridge and its approaches had never at any time been actually repaired by the trustees appointed by the earlier of the two local Acts of 1827.

By 33 & 34 Vict. c. 73 (the Annual Turnpike Acts Continuance Act 1870), sect. 12:

Where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly.

Kingdon, Q.C. and Hooper, for the defendants, showed cause against the rule.—The important questions in this case, which relate to bridges on highways in nearly every county, are whether the general provision of sect. 12 of this Act of 1870 is anything more than declaratory of the existing law, and further whether it overrules the particular provisions of local Acts concerning particular bridges without expressly mentioning them. *Thorp v. Adams* (L. Rep. 6 C. P. 125) is an authority that a general Act is not to be construed to repeal a previous particular Act unless there is some express reference to the previous legislation on the subject, or unless the two Acts are necessarily inconsistent. The canal company by their alteration of this bridge incorporated it into their works, and rendered it subservient to their purposes. Lord Coleridge therefore rightly held that the liability to repair the bridge was from that time upon the canal company and their successors, and the general provision of the Act of 1870 did not affect it. The inhabitants of the county are therefore entitled to the protection of Lord Ellenborough's Act, and are not liable to repair a bridge which is not shown to have been constructed to the satisfaction of the county surveyor. As to the second ground of the rule, the case of *Bees v. The Inhabitants of St. George's, Hanover-square* (3 Camp. 222), is conclusive against the prosecution.

Charles, Q.C. and Warry supported the rule.—This is a bridge which exactly fulfils the description of those bridges to which sect. 12 of the Act of 1870 applies. There is an ordinary highway over it, which was once a turnpike road; and the bridge was by the earlier local Act of 1827 made repairable by the trustees of such turnpike road. The alteration in the bridge by the canal company was not sufficient to relieve the trustees of their duty so to repair it. [The rule was not attempted to be supported on the second ground.]

COCKBURN, C.J.—We are all agreed that the judgment of Lord Coleridge cannot stand. The first question is whether the case comes within sect. 12 of the 33 & 34 Vict. c. 73, which provides that "when a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly." Now it seems to be agreed upon all hands that the words "which were previously repaired" must be extended to mean all bridges "which were previously repairable" by the turnpike trustees. So that, although the trustees have not, in fact, repaired the bridge in question, the county is yet liable to repair, if the

case in other respects comes within the 12th section. Now, this was a turnpike road including a bridge, and the road has now become a highway, and the bridge has, therefore, become a county bridge. But it is then said that the bridge was not repairable by the turnpike trustees before the 33 & 34 Vict. c. 73, because, the canal company having altered the bridge, the proviso at the end of sect. 100 of their Act applies to throw the burden of repairing upon them. I think this contention cannot be sustained. It is true that the canal company did interfere with this bridge, and at first sight there would appear a good foundation for the argument that when the canal company has materially altered the bridge, the liability to maintain it in repair would be upon them and not upon other persons. But I think this is not the true construction of sect. 100, and that if it were, there was not here such a material alteration as to be within the section. Sect. 100, in my opinion, refers only to such bridges as they were obliged to alter in order to use them for the purposes of their canal traffic, and not to a case like this, where the alteration was for the purpose of providing a better approach to their other bridge. But if that is not so, I think there was not, in fact, here a material alteration of the bridge. The alteration must be a structural one. Here the structure was left untouched, and the turnpike bridge was made available for the purpose of approach to the other bridge. I do not think that is a substantial alteration within the meaning of the 100th section.

MELLOR, J.—I am entirely of the same opinion. Sect. 12 of the 33 & 34 Vict. 73 was intended to make provision for the repair of bridges on turnpike roads which have become ordinary highways; and the most reasonable mode of doing so was to make them become county bridges. The object of the Act would not have been answered if it required that in all cases the bridges should have been built with the approval of the county surveyor.

LUSH, J.—One question for us is whether this was a bridge repairable by the trustees of this turnpike road, such as might become a county bridge within the meaning of sect. 12 of the Act of 1870. The other question is whether if it be so, the local Act of 1827 has not under the circumstances imposed the duty of repairing the bridge upon the canal company and their successors. The latter point depends upon whether the alterations of the surface of the bridge by the canal company was sufficient to compel the company and its successors to keep the bridge in repair by force of the 100th section of the local Act. The company made a new cut through the road, and duly constructed their own bridge over it; in order to carry out the requirements of sect. 101 as to the incline of the approach to their own bridge, they had to raise the roadway of the bridge now in dispute. The 100th section requires the company to make, maintain, and support sufficient bridges across the navigation and canals in all places where the same shall cross any road. The proviso relates to the repairs of bridges "which shall not have been erected or altered by the said company," and preserves the existing liability to repair such bridges. The alteration mentioned in the proviso must refer to the bridges mentioned in the enacting part, and cannot mean a mere raising of the surface of this

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GUARDIANS OF KEYNSHAM UNION v. GUARDIANS OF BEDMINSTER UNION.

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bridge. I think, therefore, this bridge not having been erected nor altered in the sense intended, was still repairable after the raising of the roadway by the trustees as before. It does not matter that it was not actually repaired by them. I think too that, even if we could consider the bridge to have been erected by a body corporate within the words of sect. 5 of 43 Geo. 3, c. 59, the fact of there having been no sanction of the county surveyor would not be enough to prevent the general provision of the 12th section of the Act of 1870 from applying. The decision being wrong, there must be a new trial.

Rule absolute.

Solicitors for the prosecution, *Prior, Bigg, Church, and Adams*, for W. J. Welsh, Wells; and *Reed and Cook*, Bridgwater.

Solicitors for defendants, *Whites, Renard, and Co.*, for Edwin Lovell, Wells.

Saturday, May 4, 1878.

GUARDIANS OF KEYNSHAM UNION (apps.) v. THE GUARDIANS OF BEDMINSTER UNION (resps.) (a)

Settlement of children under sixteen—Second marriage of mother—39 & 40 Vict. c. 61, s. 35.

By 39 & 40 Vict. c. 61, s. 35, "no person shall be deemed to have derived a settlement from any other person . . . except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be."

Held, that the words "widowed mother" do not include the case of a mother marrying a second time.

THIS was an appeal against an order of justices for the removal of three paupers, Mary Ann Fuse, Edwin George Fuse, and Sarah Jane Fuse, from the respondents' union to the appellants' union as the place of their last legal settlement.

The appeal was tried at the Somersetshire Quarter Sessions, holden at Wells, on the 17th Oct. 1877, when the said order was confirmed with costs subject to the opinion of the Divisional Court for hearing appeals from inferior courts on the following

CASE.

1. Samuel Fuse, the father of the paupers, was born in the parish of Bitton, in the appellants' union, in the year 1832.

2. Ann Woodrington, the mother of the paupers, was born in the parish of Liston, in the appellants' union, on or about the 20th Aug. 1839.

3. The said Samuel Fuse and Ann Woodrington intermarried in 1859.

4. The three paupers were the children of the above-named Samuel Fuse and Ann his wife, and were born at Caerphilly, in the Pontypridd Union, and are all under the age of sixteen years, and unemancipated.

5. The said Samuel Fuse died in the year 1873, leaving his widow Ann Fuse (formerly Ann Woodrington) and the three paupers him surviving.

6. In 1875 Ann Fuse, the widow of the said Samuel Fuse, married Alfred Warden.

7. The said Alfred Warden was born at the parish of Thornbury, in the Thornbury Union, on or about the 5th of August 1839.

(a) Reported by J. M. LELY, Esq., Barrister-at-Law.

8. The said Alfred Warden deserted his wife and her children, the said paupers, in 1876, leaving them chargeable to the respondents' union.

9. The respondents' union obtained an order on the 1st June 1877 for the removal of Ann Warden, the mother of the paupers, to Thornbury Union, which said order has not been appealed against.

If the court should be of opinion, upon the facts above stated, that the last legal place of settlement of the three paupers was in the appellants' union, the said order of removal and the order of sessions are to be confirmed.

If the court should, upon the facts stated, be of a contrary opinion, then the said order of removal and the order of sessions are to be quashed.

The case turned upon the construction of the words "widowed mother," in the following section (35) of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61):

No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother as the case may be up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of his mother until such child acquires another settlement.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

Hooper (with him *A. Stonehouse Vigor*), for the respondents, cited *R. v. Inhabitants of Woodyeat* (2 Ld. Raymond, 1473), and argued that the words "widowed mother" must be strictly construed, so as not to apply to a mother marrying again.

Petheram, for the appellants, *contra*, contended that the intention of the Act was that the children should not be separated from their parent, that the court ought to give effect to such intention unless there were strong words pointing the other way, and that in this case there were no such strong words. [MELLOR, J.—How can the statute apply? When the mother marries again she ceases to be a widowed mother. LUSH, J.—In the case of a second marriage, I do not see the necessity of keeping the children together. However, that may be, I think that the second marriage alters the status of the mother, and takes her out of the section.]

By the Court.—This rule must be discharged.

Rule discharged.

Solicitors for the appellants, *T. White and Sons*, for *Stanley and Wasbrough*, Bristol.

Solicitors for the respondents, *Guscotte, Wadham, and Daw*, for *O'Donoghue and Anson*, Bristol.

Wednesday, May 8, 1878.

(Before MELLOR and LUSH, JJ.)

WATKINS v. SMITH. (a)

Jurisdiction of justices—Claim of right—Bona fides—Not supported by evidence—1 & 2 Will. 4, c. 32, s. 30.

The appellants were charged before justices under 1 & 2 Will. 4, c. 32, s. 30, with trespassing in

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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pursuit of conies, and were proved to have shot rabbits on land which one of the appellants claimed to be his property. They called witnesses who stated that the appellant purchased the land adjoining that occupied by the informant, and that close to this particular spot the persons from whom he purchased had been accustomed to stack timber. It was however shown on the informant's part that, by a plan attached to the conveyance of the land to the persons from whom the appellant purchased, this particular spot was a long way outside the boundary of the land conveyed.

The justices decided that the appellant's claim was unfounded and unsustainable, and that although it might have been made bona fide, it was not reasonable, and was not supported by evidence; and they therefore convicted the appellants.

Held, upon a case stated, that this was not a claim of right sufficient to oust the jurisdiction of the justices.

This was a case stated by two of Her Majesty's Justices of the Peace in and for the county of Somerset, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law which arose as herein-after stated.

At a petty session holden at Dunster in the said county on the 4th Jan. 1878 an information (hereinafter referred to as the first-mentioned information) was preferred by the said James Smith (hereinafter called the respondent) against the said William Theodore Pitt Watkins, William Theodore Watkins, and John Smith (hereinafter called the appellants), under sect. 30 of the statute 1 & 2 Will. 4, c. 32, charging for that they, the appellants, on the 17th Oct. 1877 at the parish of Dunster, in the said county, in the day time of the said day, to wit, about the hour of three o'clock in the afternoon, unlawfully and wilfully did commit a trespass on certain land situate in the parish of Dunster, called "The Warren," and then and there being in the occupation of the said James Smith, by then and there wilfully entering and being in the daytime as aforesaid on the said land, in search and pursuit of conies without the license and consent of the said James Smith, or of any person having the right of killing the conies upon such land, contrary to the form of the said statute.

At the same petty session a similar information (hereinafter referred to as the secondly-mentioned information) was preferred by the said respondent against the said appellants, William Theodore Pitt Watkins and William Theodore Watkins, for a similar offence committed on the 9th Nov. 1877 on the same land.

And the said informations were heard and determined by the said justices, the said parties respectively being then present, and upon such hearing the said three appellants named in the first-mentioned information were convicted before them of the said offence named in the said first-mentioned information; and the justices adjudged the said appellant William Theodore Pitt Watkins to pay a penalty of 10s., and each of them the said William Theodore Watkins and John Smith to pay a penalty of 1s.; and the two appellants named in the said secondly-mentioned information were convicted before them of the said offence named in the said secondly-mentioned information, and the said appellant William Theo-

dore Pitt Watkins was adjudged to pay a penalty of 1l., the said appellant William Theodore Watkin to pay a penalty of 1s.

And whereas the said appellants, being dissatisfied with these determinations upon the hearing of the said informations as being erroneous in point of law, duly applied to the said justices in writing to state and sign a case setting forth the facts and the grounds of such determinations as aforesaid for the opinion of this court; and on their behalf a recognisance had been entered into as required by the said last-mentioned statute.

The said justices, in compliance with the said application, stated the following case:—

Upon such hearing it was proved by the evidence on the part of the informant in that behalf, and was admitted by the appellants, that the said three appellants named in the said first-mentioned information were present together on the land in question on the 17th Oct. 1877, in the daytime, in search or pursuit of conies; and that the said appellant, William Theodore Pitt Watkins did then and there shoot at and kill a rabbit or cony. And that the said two appellants named in the said secondly-mentioned information were present together on the land in question on the 9th Nov. 1877, in the daytime, in search or pursuit of conies, and that the said appellant, William Theodore Pitt Watkins did then and there shoot at and kill a rabbit or cony. And it was stated and deposed on oaths by "The said informant that he rents the land called the Warren," of Mr. Luttrell, and had done so for over twenty-three years; that he occupies it as a rabbit warren, and pays rent for it, and is entitled to the rabbits thereon. And that the land on which the trespasses mentioned in the informations were committed is part of the tract of land called "The Warren" so rented by him in the said parish of Dunster. And that on the days mentioned in the informations he saw the appellants respectively trespassing there, and saw the appellant William Theodore Pitt Watkins shoot the two rabbits there. On cross-examination the informant stated that he came up to the said William Theodore Pitt Watkins when he was shooting the rabbits, the said William Theodore Pitt Watkins requested him to leave his (the appellant's) land, and ultimately put his hand on him, and put him off the land; that he did not tell Morgans and Guard, the proprietors of the chemical works, that the land in question was his land, that they had never asked him, that they did put stuff there, and that he had it removed, that he asked them to remove it, and they did so within a day.

It was contended by William Theodore Pitt Watkins on behalf of himself and the other appellants that the land on which the alleged trespasses were committed formed part of land and premises known as The Warren Chemical Works, which were demised by Mr. Luttrell to Messrs. Morgans and Guard, for a term of eighty years, from the 25th March 1872 by lease at the rent of 20l. per annum, and which land and premises so demised had been assigned by Morgans and Guard to a limited liability company, and had been purchased of that company by him the appellant William Theodore Pitt Watkins, and that the alleged trespasses were done by his authority and direction, and in exercise of his legal right and title to a yard and premises known as The Warren Chemical Works;

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that questions of title of the appellant William Theodore Pitt Watkins were involved in the case, and that therefore the said justices possessed no jurisdiction to determine the same.

To support that contention he called Mr. James Milne, who deposed that he was engaged by the company in treating with Morgans and Guard for purchasing the chemical works, and asked Mr. Morgans to show him the boundaries, and that Mr. Morgans did so, and stated that they included the land on which the trespasses were alleged to have been committed; that there was a quantity of timber—some stacked and some lying on the ground at that time—that he inspected the chemical works from Sept. 1873 to July 1875, and that about the end of 1874 he took the management of the business and managed it for about eight months altogether. The company took over from Morgans and Guard their stock of timber; the bulk of the timber belonging to the company was lying outside the space marked pink in the plan referred to and annexed to the case, and a portion of it was near the ground where the trespasses were alleged to have been committed. The space of ground between the wall of a cottage and garden and an elder bush, and which comprised the spots where the trespasses were alleged to have been committed, was constantly covered by the company's timber, and that the respondent never spoke to him on the subject.

Two other witnesses, namely, Walter Allen and James Baker, one a waggoner, and the other a labourer, who had worked for Morgans and Guard and for the company, were called by the appellant William Theodore Pitt Watkins, and deposed as to the depositing of timber outside of the alleged boundary chemical works as shown by the plan, and on the land claimed by the appellant as part of the chemical works. The witness Allen said they used to put the timber anywhere between the chemical works and the seashore.

No documentary evidence was produced by the appellants, nor was any evidence adduced of the transfer of the chemical works from Morgans and Guard to the limited liability company, or from the company to the appellant William Theodore Pitt Watkins.

In anticipation of and in answer to the claim of right set up by the appellant William Theodore Pitt Watkins, the informant (now the respondent), called Mr. Thomas Hawkes, a surveyor, who produced and proved a plan made by him on measurement and scale, showing the chemical works marked pink on the plan, and the part of "The Warren" where the trespasses were alleged to have been committed; and he also produced a counterpart of the lease granted to Morgans and Guard, such counterpart having been executed by them, and on which counterpart is indorsed a plan (described in the counterpart of the lease as being a plan of the demised premises, corresponding with the plan produced by the witness). The demised premises are stated on the lease to contain by admeasurement one acre and one rood, and the witness said that the quantity so stated corresponds by scale and admeasurement with the part marked pink on the plan. The spots where the alleged trespasses were committed are marked with a red dot on the plan, and were pointed out by the witness Hawkes and by the respondent and were stated by Mr. Hawkes to be

sixty-eight yards from the boundary of the premises as shown on the plan called the chemical works. He also deposed that the land where the trespasses were alleged to have been committed had been included in the lease, the quantity of land would have been double what it is stated in the lease to be. Mr. Hawkes also stated that the quantity marked pink on the plan is one acre one quarter and six perches, and that it included a portion of the sea beach perhaps. Mr. Watkins denied the accuracy of the plan.

It appeared to the justices from the evidence that the land called "The Warren" is a rabbit warren, and that the ground adjoining and outside of the boundary of the chemical works, as shown in the plan, is in a rough and uncultivated state, and not liable to be damaged by timber being placed upon it.

The justices being of opinion that it was clearly shown by the evidence of Mr. Hawkes and by the counterpart of the lease produced that the land on which the trespasses were alleged to have been committed was not comprised in the lease to Morgans and Guard; that by the alleged user of such land by Morgans and Guard, and by the limited liability company, they did not acquire any right thereto; and that the claim of right to such land set up by the appellant William Theodore Pitt Watkins was unfounded and unsustainable; and that although it might have been made *bonâ fide*, it was not reasonable and was not supported by any evidence, and did not take the case out of their jurisdiction; and the said justices gave their determination against the appellants in the manner hereinbefore stated.

The question of law arising on the above statement for the opinion of the court therefore is. Was the claim of right set up by the appellant William Theodore Pitt Watkins sufficient to oust the jurisdiction of the magistrates?

If the court should be of opinion that the said convictions were legal and properly made, then the said convictions were to stand. But if the court should be of opinion otherwise, then the said informations were to be dismissed.

Cole, Q.C. argued for the appellants.—I admit that magistrates are not bound to recognise an impossible or even unreasonable claim of right, and they may ignore a mere subterfuge; but it is not in their power to give themselves jurisdiction by their own finding; the facts must show the want of reason in the claim. Here it appears that the defendant had a reasonable and substantial ground for believing his right to shoot at this spot, and the magistrates find that he did so believe. In *Reg. v. Cridland* (7 E. & B. 853) the general rule was said to be that in case of summary convictions of this kind justices have jurisdiction to determine whether the claim to title to real property is set up *bonâ fide*; but if it is *bonâ fide* set up, they have no jurisdiction to proceed further in the matter; and that the proviso in the 30th section "that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass," does not give justices jurisdiction to determine a claim of title to land against the wish of the defendants. This rule was acted upon in *Legg v. Pardo* (9 C. B. N. S. 289) and in *Reg. v. Stimpson* (32 L. J. 208, M. C.).

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Charles, Q.C. appeared for the respondent, but was not heard.

MELLOR, J.—I certainly for some time was under the impression that the justices had gone into a consideration of the circumstances which they thought could not sustain the defendant's title, but, looking at all the circumstances, what occurred comes to this: Defendant says: "Under the lease made to the chemical works, under which I claim as a purchaser, the particular spot in question is within the boundary of the parcels demised by the lease: and the plan which appears to negative that view is certainly incorrect as regards the position of a cottage and pigsty which I occupy." But by no possibility can the plan produced be made to include the spot where the trespass was committed. The justices have only said: "You have produced no evidence at all to show your title. You may *bonâ fide* believe that the particular spot comes within your boundary, but there is nothing on the face of the evidence to show that it was so." I think the justices have decided nothing but that the title set up by the defendant cannot include the spot in question: and that this is rather like the cases which go to show that where a *bonâ fide* belief exists in a right which the law does not recognise or sanction, then the justices need not recognise the right.

LUSH, J.—I am of the same opinion. I think the justices were right in holding that although the present defendant might have *bonâ fide* believed in the existence of the right he claimed, yet that his belief was not a reasonable one or supported by evidence, and that his claim cannot be supported at law. The statute provides that a person charged may prove any defence which would in law be an answer to an action for the trespass. I quite agree with Mr. Cole, that if there was any evidence which could have supported the claim of the appellant, the jurisdiction of the justices would have been ousted. I think it is clear that there is no such evidence here. *Prima facie*, perhaps, the stacking of timber would show that the land was included in the demise; but the lease itself is produced, and the quantity of the parcels as described therein is conclusive that they were never intended to include that land. The description is of a specified quantity of land, and the particular spot in question is shown on the plan drawn in the margin of the lease to be about sixty yards away from any part of the premises demised. If so, it is utterly impossible that the piece of land on which the trespass was committed could be included in the lease; and the defendant does not claim by any other title. Although the plan appears not to be strictly correct, yet it cannot be altered so as to include the spot of land in question without altering altogether the shape of the piece of land demised, and making it include twice as much land as is comprised in the lease. I am of opinion, therefore, that the defendant has not produced such evidence as could show that he was entitled to the spot of land upon which the trespass was committed, and that the justices had jurisdiction to determine the case.

MELLOR, J.—I see that the case of *Watkins v. Major* (L. Rep. 10 C. P. 662; 33 L. T. Rep. 352) was a decision consistent with ours.

Judgment for respondent.

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Solicitor for appellants, *Bridges, Sawtell, and Co.*, for *W. T. Watkins*, Alcombe, Somerset.
Solicitors for respondent, *Gregory, Bowcliffes, and Co.*

COMMON PLEAS DIVISION.

Friday, March 1, 1878.

(Before GROVE and LINDLEY, JJ.)

GUARDIANS OF TENTERDEN POOR LAW UNION (apps.)
v. GUARDIANS OF ST. MARY, ISLINGTON (resps.)^(a)

Poor law—Settlement—Derivative and birth settlement—Poor Law Amendment Act 1876 (39 & 40 Vict. 61) s. 35—Retrospective effect of statute.

E. S., the bastard daughter of A. S., was born in 1856, in the parish of T., in Sussex, A. S. being then and afterwards settled in the parish of R., in the appellants' union. E. S. had not acquired a settlement in her own right.

Held, that E. S. was settled in the parish where she was born, and was not chargeable to the appellants' union.

Sect. 35 of 39 & 40 Vict. c. 61 (the Poor Law Amendment Act 1870), so far as it provides that an illegitimate child shall retain the settlement of its mother until it acquires another settlement, is not retrospective so as to affect a pauper who has acquired a birth settlement by attaining the age of sixteen before its passing.

APPEAL from the order of justices, adjudging Ellen Sherwood, a pauper, to be settled within and chargeable on the union of the appellants.

Ellen Sherwood went into service in the parish of St. Mary, Islington, on the 17th May 1874, and after staying seven months, received serious injuries by accidental burning. She was sent to St. Bartholomew's Hospital, where she remained sixteen months, and was then removed to the work-house of the Islington Union as incurable.

On the 21st July 1877 the justices for Middlesex made an order for her removal to the Tenterden Union, which was the order appealed against.

Ellen Sherwood was the illegitimate daughter of Ann Sherwood, who was settled at the time of the birth of Ellen Sherwood, and afterwards, within the appellants' union. Ellen Sherwood was born in 1856, in the parish of Ticehurst, in Sussex, not in the appellants' union. Under the poor law previous to the passing of the Poor Law Amendment Act 1870 (39 & 40 Vict. c. 61), a bastard child took and followed a settlement of its mother until it attained the age of sixteen (4 & 5 Will. 4, c. 76, s. 71), and at the age of sixteen took the settlement of its birth. Sect. 35 of the Poor Law Amendment Act 1870 (39 & 40 Vict. c. 61) enacts that no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child should take the settlement of its father or widowed mother, as the case might be, up to that age, and should retain the settlement so taken until it should acquire another; and that an illegitimate child should retain the settlement of its mother until such child acquired another settlement.

Neither Ellen Sherwood nor Ann Sherwood the mother had ever acquired a settlement in her own right.

(a) Reported by J. A. FEORR, Esq., Barrister-at-Law.

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C.P. Div.] THE BENFIELDSIDE LOCAL BOARD v. THE CONSETT IRON COMPANY (LIMITED). [Ex. Div.]

Mead, for the appellants, contended that the pauper Ellen Sherwood, on attaining the age of sixteen, took her birth settlement in lieu of that which she had previously taken by derivation from her mother under 4 & 5 Will. 4, c. 76, s. 71, citing

Ipswich Union v. Guardians of Great Yarmouth, 38 L. T. Rep. N. S. 317; L. Rep. 2 Q. B. Div. 269.

Tickell, for the respondents, argued that that portion of sect. 35 of the Poor Law Amendment Act 1870 which provided that an illegitimate child should retain the settlement of its mother until such child acquired another settlement, was retrospective; and that consequently Ellen Sherwood, though she attained the age of sixteen before the passing of the Poor Law Amendment Act, must be regarded as retaining her derivative settlement in the appellants' union. He cited

Yarmouth v. City of London, 38 L. T. Rep. N. S. 217; and

Guardians of Westbury-on-Severn v. Overseers of Barrow-in-Furness, L. Rep. 3 Ex. Div. 88.

DENMAN, J.—Our judgment must be for the appellants. Sect. 71 of 4 & 5 Will. 4, s. 76, enacts that every bastard shall have and follow the settlement of the mother until such child shall attain the age of sixteen, or shall acquire a settlement in his own right. Under this section it was held that after the age of sixteen the place of the birth of the child became the place of his settlement, and the child might be removed there. That was the state of the law when the new Act came into operation, and sect. 35 of that Act is relied on by the respondents. Sect. 35 of the Poor Law Amendment Act 1876 enacts, that no person shall be deemed to have derived a settlement from any other person, whether by parentage or otherwise, except in the case of a wife or of a child under the age of sixteen; and that an illegitimate child shall retain the settlement of its mother until such child acquires another settlement. Now that is a general enactment, and is not intended to repeal former statutes. The former statute is not repealed in any other way and remains in force, except so far as it may be actually repealed by the Act of 1876. It is a canon of construction that no statute is to be construed so as to repeal another statute, unless such construction is absolutely necessary, because the two cannot stand together. I can see nothing in this statute which necessarily prevents the older one from remaining in force, so far as relates to illegitimate children who had passed the age of sixteen when the latter statute came into operation. The words relied upon are "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement," and it is argued that these words are sufficient to make this child, who was sixteen years old before this Act came into force, and whose settlement then was the settlement of her birth, take the settlement of her mother until she acquires another settlement of her own. I do not think that is the right interpretation, or that the cases cited go to that extent. I think the *ratio decidendi* in those cases applied only to derivative settlements that were actually in existence when the Act was passed, derived from another person by birth, parentage, or otherwise. In this particular case the child had long lost her settlement when the Act was passed. I think therefore that sect. 35 of the Act of 1876 has not a retrospective effect upon her, and that the appellants are entitled to succeed.

LINDLEY, J.—I am of the same opinion. I think there is no serious difficulty in this case, when the language of the sections referred to is looked at and understood. At the time the Act was passed the pauper had lost her derivative settlement. It is argued that the language of the Act is intended to be retrospective, and in some sense, and to a certain extent, it may be so; but it is quite obvious that we cannot give it retrospective operation absolutely and without limit; nor was such a retrospective operation declared by the cases which have been cited of the *Westbury* and *Yarmouth Unions* (*ubi sup.*). In both those cases the pauper had a derivative settlement at the time the Poor Law Amendment Act was passed. Now, we are asked to make it retrospective in this sense—that it applies to all persons who, at any time, have had a derivative settlement. I think that we should be acting contrary to the principle of the case in the Queen's Bench Division (*Reg. v. Ipswich Union* (*ubi sup.*)) and to every true canon of construction, if we held that this Act applied to a person whose derivative settlement had long since ceased to exist when it was passed, and to say that it did apply because she had in days long past a derivative settlement from her mother, would be to put an unnecessary and strained construction upon the statute.

Judgment for the appellants.

Solicitors for the appellants, *Munn and Macs.*

Solicitor for the respondents, *Layton and Jaques.*

EXCHEQUER DIVISION.

Wednesday, Nov. 28, 1878.

(Before KELLY, C.B. and CLEASBY, B.)

THE BENFIELDSIDE LOCAL BOARD v. THE CONSETT IRON COMPANY (LIMITED). (a)

Local Inclosure Act—Highways set out under—Reservation of mining rights to lord of manor—Mines under the highways—Support of surface to highways—Working mines so as to withdraw support—Liability of mine owner for consequent injury to highways—Reservation of lord's rights subject to paramount public rights—Construction of Act.

A lord of a manor or his lessees or assigns, to whom, in the widest terms, were reserved in a Local Inclosure Act all rights belonging to the manor, and all mines, &c. under the commons of the manor to be inclosed under the Act, with power to do all necessary acts for draining, winning, and working the said mines, &c., "as fully and freely as he or they could have had, held, used, or enjoyed the same in case the Act had not been made, and that without paying any damages or making any satisfaction for so doing," cannot, notwithstanding such reservation, work the mines underneath the public highways set out in and over the said commons under the Act, and thereby directed to be for ever maintained and kept in repair by the inhabitants and occupiers of the district in which the same are situated, in such a way as to injure the said highways by withdrawing the natural support of the surface and causing them to sink below their ordinary level, without rendering themselves liable, at the suit of the persons upon whom by law the duty of keeping such highways in repair is cast, to an action for the

(a) Reported by H. LING, Esq., Barrister-at-Law.

recovery of the cost of repairing the injury so done; and such reservation of rights and powers to the lord and his lessees and assigns must be taken to be subject to the paramount right of the public to have the highways in question preserved and maintained in a fit and proper condition for the free use of them by all the Queen's subjects.

So held by the Exchequer Division (Kelly, C.B. and Cleasby, B.), distinguishing the case of the Duke of Buccleugh v. Wakefield (in the House of Lords) (23 L. T. Rep. N. S. 102; L. Rep. E. & I. App. 377; 39 L. J. 441, Ch.)

THIS is an action brought by the Benfieldside Local Board to recover damages for injuries done to certain highways within their district by the defendants, and by consent there has been stated for the opinion of the court the following

CASE.

1. In the year 1773 an inclosure Act, known as "The Lancaster Common Division Act," was passed for the purpose of dividing and inclosing certain moors, commons, or tracts of waste land within the parish and manor of Lancaster, in the county palatine of Durham, containing by estimation 20,000 acres or thereabouts.

2. The preamble recited that the Bishop of Durham, in right of his church and see of Durham, was lord of the manor of Lancaster aforesaid, and as such seised of and entitled to the soil of and royalties within and under the said moors or commons or tracts of waste lands, and certain commissioners were appointed for the purpose of making the division. The commissioners made their award on the 13th June 1781. So much of their award as is essential to this case is hereinafter set out.

3. The Act enacted that the commissioners should

Assign, set out, and appoint such public highways and roads in, through, and over the residue or more improveable parts of the said moors or commons, intended to be divided and inclosed, as they should think proper and convenient (which highways and roads should not be less than sixty feet of assize in breadth between the ditches) and should also assign, set out, and appoint proper parts of such residue or more improveable parts of the said moors or commons for common quarries, common watering-places for cattle, and common wells, and should also assign and set out such common public and private, horse, and other roads, ways, passages, and bridges, and such gates, stiles, hedges, sewers, drains, and water-courses in, over, upon, and through the said lands and grounds so to be inclosed as they should see proper, useful, and convenient.

4. And it further enacted:

That the said commissioners and their successors, or any two of them, should and might order all public highways, roads, bridges, and drains by the Act appointed to be set out, to be well and sufficiently made, &c., in manner therein named, and that the charges and expenss thereof should be borne, raised, and paid as and in manner therein mentioned, and should order, direct, and appoint the manner in which the said highways, roads, &c., to be so made, &c., should be for ever maintained and kept in repair; and that after the making of the award, and of such highways and roads and other ways, it should not be lawful for any person or persons to make or use any roads or ways, either public, common, or private, in, over, or through the said allotments, or any of them, or any part thereof (other than and except the said lord bishop and his successors, and his and their lessees and assigns as thereafter mentioned), either on foot or on horseback, or with horses, cattle, carts, or carriages, or otherwise, other than such as should be so set out and appointed by the said commissioners as aforesaid, and that all former roads and ways which should not be set out and appointed as roads and ways through the said intended inclosures should be deemed part of the lands to be inclosed, and should be divided and

allotted, held and enjoyed, as part of such lands accordingly.

5. And it was further enacted:

That nothing in the Act contained should be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of the said Lord Bishop of Durham, as lord of the said manor of Lancaster, or his successors, or his or their lessees or assigns, or any of them, of in and to the seignior and royalties incident and belonging to the said manor; but the lord of the said manor for the time being, and his lessees and lessees and assigns, should and might, from time to time and at all times for ever thereafter, hold and enjoy all courts, perquisites, and profits of courts, rents, services, waifs, estrays, and all royalties, jurisdictions, matters, and things whatsoever to the said manor, or to the lord thereof for the time being, incident, belonging, or appertaining, other than and except such common right as could or might be claimed by him or them as owner or owners of the soil and inheritance of the said moors or commons, in as full, ample, and beneficial a manner to all intents and purposes as he or they could or might have held or enjoyed the same if this Act had not been made; and also that the said Lord Bishop of Durham and his successors, and his and their lessees and lessees and assigns, should and might from time to time, and at all times thereafter, have hold work, and enjoy all mines, minerals, and quarries, of what nature or kind soever lying and being within or under the said moors or commons intended to be divided or allotted as aforesaid, together with all convenient and necessary ways and wayleaves in, through, over, and along the said moors or commons, or any part thereof, not only before, but also at all times after the same shall be divided in pursuance and by virtue of this Act, and full and free liberty at all times thereafter of making, laying, repairing, and using any new road or roads, waggon way, or waggon ways, or any other way or ways whatsoever, in, through, over and along the same or any part thereof, and for that purpose to take away and remove any hedges, fences, trees, partitions, or other obstructions which shall be made for dividing the said moors, or commons, or otherwise, or which shall be standing or growing thereon, and to do every other act which shall be necessary to be done for the purpose aforesaid, and of searching for, draining, winning, and working the said mines and quarries, and also all other mines and quarries belonging to the see and bishopric of Durham, wheresoever the same are or be, by any ways or means now in use or hereafter to be invented, and also of leading and carrying away all and every the coals, lead, minerals, stones, the manure bred at the said mines, and other things to be gotten thereout, or out of any other land or grounds whatsoever, and also of leading and carrying all iron, wood, materials, and things unto the said mines and quarries, needful, necessary, or proper for the draining, winning, working, and use of the same respectively, and of making pits, shafts, pit rooms, heap rooms, drifts, levels, watercourses, and drains, and of using as theretofore all those buildings, workshops for smiths and wrights, hay yards, and raff yards, already erected for the purpose of working the coal mines under the said moors or commons, and of erecting and using fire engines and other engines, and other buildings, workshops, hay yards and raff yards, pit rooms and heap rooms, and all and every other necessary and convenient works, buildings, erections, liberties, powers, and authorities either now in use or hereafter to be invented, together also with full and free liberty, power, and authority, from time to time and at all times, at his and their will and pleasure, to remove and take away from off the said moors or commons, convert to their own use or uses, all and every the rails, sleepers, iron, timber, and other materials of the said waggon ways and other ways, pits, shafts, fire engines, and other engines, shops, and other works, buildings, and erections whatsoever, already laid, placed, built, or erected, or hereafter to be laid, placed, built, or erected as aforesaid as fully and freely as he or they might or could have had, held, used, and enjoyed the same in case this Act had not been made, and that without paying any damages or making any satisfaction for so doing.

Provided always,

That in the leading or carrying away any of the coals, stone, rubbish, or other things, to be gotten out

of any coal pit or pits wrought or used for land sale only, and which shall and may be led or carried away by any carts, or waines, or other carriages than coal waggons, and in the leading or carrying away any materials, utensils, or things to or from such pit or pits the nearest and most direct roads, ways, or courses, in or through the allotments to be set out as aforesaid, shall be used to and from such pit or pits into and from the next adjoining public or common highways, and no such roads, ways, or courses shall exceed sixty feet in breadth, and as little damage and spoil of ground as may be shall be done or made in or to such allotments by the winning or working of such land-sale pit or pits, or passing or repassing of such carts, waines, or carriages.

6. In order to provide compensation for surface damage to the allotments by the working of the mines, minerals, and quarries, the commissioners were empowered to allot to the justices of Durham any quantity of the moor not exceeding 500 acres, and not less than 300 acres, in one entire plot or parcel, to be held and enjoyed by them upon the several trusts, and for the intents and purposes thereafter mentioned; and in reference thereto the Act contained provisions,

That when and so often as any person or persons shall suffer or sustain any loss or damage in his allotment by the searching for, winning, or working of the said mines and quarries therein, or the leading or carrying away the coals, &c., to be gotten thereout, or out of any other mines or quarries belonging to the said Lord Bishop of Durham and his successors, or by the using any of the powers or liberties thereby reserved to and for the said Lord Bishop and his successors, and his lessee and lessees and assigns as aforesaid, such person so damaged, upon making such complaint, shall receive such satisfaction for such damage as thereafter is directed in that behalf.

7. Then follow directions for letting the allotment, and powers to appoint a steward. And then, after charging the rents with the expenses of management, it is provided,

That the residue or clear balance thereof shall from time to time be paid, applied, and disposed of in manner following: Upon the complaint of any person so to be damaged as aforesaid, the justices of the peace at the sessions as therein mentioned shall examine and inquire into such complaint in a summary way in manner therein directed, and finally settle, ascertain, and determine the damages sustained by the person complaining as aforesaid, and thereupon shall order their steward, clerk, agent, and receiver forthwith upon demand to pay the same, together with reasonable charges on account of making and prosecuting such complaint, unto the person so complaining, or to such other person as the said justices shall direct; and the residue or surplus (if there be any) of the said rents, &c., shall from time to time be applied and laid out in the repairing, amending, and supporting the public and common highways, causeways, and other ways set out and made upon or through the said moors or commons by virtue of this Act, in such manner as the said justices shall from time to time order, direct, and appoint; and whereas it may happen in some years that the clear rents and profits of the said last-mentioned allotment or parcel of ground may not be sufficient to satisfy and pay all the damages and charges which may be so sustained, and so settled, ascertained, and determined by the said justices as aforesaid; Be it therefore enacted that in every such case so happening the deficiency, after such application of the said rents and profits as aforesaid, shall be paid and borne by the owners or occupiers of all the several allotments of the said moors or commons (save and except the said allotments so to be vested in the said justices, but including that or those of the persons so damaged and making complaint), according to the respective yearly rents or values of the same, as they shall respectively be rated or charged for or towards the relief of the poor of the several parishes, townships, or places wherein they shall respectively lie, in such shares and manner as the said justices shall direct or appoint.

A power to levy such damages by distress under an order of justices, in case of refusal or neglect

to pay the same, was then given, and a proviso followed enabling every occupier or tenant who had paid such damages to deduct the same from his rent.

8. In 1779, before the commissioners made their award, a further Act was passed, by which the provisions of the Lanchester Act with reference to the allotment set out to the justices were considerably varied, and the commissioners were authorised to allot to the purchaser the said plot free of all rents, tithes, and only subject to the payment of a perpetual yearly rent-charge of 30*l.* to the Justices of Durham, or such advanced rent as the same might be sold for; and whereby it was further enacted that the said yearly rent should be paid, applied, and disposed of, under the direction of the justices, in the same manner and form, upon the like complaints, inquiries and proofs, and for the same uses, ends, and purposes, as the rents and profits of the said plot in case the same had been let by the justices according to the first-mentioned Act.

9. The commissioners by their award, in pursuance of these provisions, allotted the said allotment of 300 acres, subject to the perpetual rent-charge of 30*l.*, which sum has ever since been paid to the treasurer of the county by the owners for the time being of the allotment; but it is quite insufficient to meet all the claims for compensation upon it.

10. The commissioners by their general award, made in accordance with the foregoing provisions, set out among other roads a public highway sixty feet in breadth in, through, and over the more improveable parts of the said moors and commons called the Shotley-bridge and Durham-road, and also another public highway sixty feet in breadth in, through, and over part of the said moors and commons called the Shotley-bridge and Newcastle-road, and thereby directed that the same should be (as to the portions within the township of Benfieldside) for ever thereafter maintained and kept in repair by all and every the inhabitants and occupiers for the time being of lands, tenements, woods, tithes, and hereditaments within the township of Benfieldside, in like manner as the said inhabitants and occupiers were by law liable to repair other highways within the said township.

11. And the commissioners by their general award further ordered and directed,

That all and every the before-mentioned public highways by them set out and appointed, as well those of the breadth of sixty feet, as also the public roads or ways which are less than sixty feet in breadth, should at all times thereafter be and continue of the several and respective breadths thereinbefore mentioned and prescribed, and that it should and might be lawful to and for all persons whomsoever, at all times thereafter, to go, pass, and re-pass on foot and on horseback, and with horses, coaches, carts, and carriages, and also to lead and drive all and all manner of cattle and other things, in, through, over, and along the said respective public highways and roads at their free will and pleasure.

12. Under a large portion of the 20,000 acres so allotted, including the part of the land so allotted near to the said highways, and under the said highways themselves, there were and are valuable seams of coal, which, as before stated, were at the time of the passing of the Act of 1773 the property of the Bishops of Durham, and were specially reserved to them under the clauses of the Act before set out. These coal seams now belong to the Ecclesiastical Commissioners, who are now

lords of the manor, with the same powers of working and leasing the coal seams and minerals as the Bishops of Durham previously enjoyed. The coal seams have been leased by them to and are worked by the Consett Iron Company, the present defendants.

13. In consequence of the mining operations of the defendants, which have been carried on near to and underneath the two highways so set out as above mentioned, portions of these roads near to Blackline and Shotley-bridge railway station, and being within the township of Benfieldside, sunk below their original level and became, until repaired, dangerous to travel over.

14. The Benfieldside local board, in whom the roads within the township of Benfieldside are now vested, and whose duty it is to repair them, have been put to an expense of about 30% up to the present time in filling in the cracks and falls caused by the shrinking of the surface of those roads in consequence of such mining operations, and in keeping such roads level and in good repair.

15. The defendants admit the damage done to the roads, but they refuse to reimburse the local board the expenses they have so incurred, on the ground that, under the mining powers and reservations contained in the Lanchester Inclosure Act of 1773, they are entitled to work the whole of the coal without being under any obligation to leave any support for the surface, and without making any compensation for injury thereto.

16. At the time of the passing of the Lanchester Inclosure Act of 1773 the customary mode of working coal in the county of Durham was by leaving ribs or pillars of coal to support the surface, and such continued to be the practice till shortly after the passing of the Act, since which time it has become customary to take the whole of the coal where the owner of the coal is not liable for surface damage in working such coal, it being usual to begin by leaving pillars of coal to support the roof, which pillars in working back again are removed. Some of the seams of coal under and near to the roads in question are on the outcrop, and so near the surface that the coal could not be worked, even by leaving pillars of coal, without probably causing some, although slight, damage to the roads.

17. It is admitted that the coal has been and is worked by the defendants in the usual manner, according to the present mode of working coal, when the object is to extract the whole of the coal without regard to the damage done to the surface, but that the effect of such working has been and is to damage the said highways, and to cause them to be out of repair, and of such mode of working is pursued under the said roads, that many parts thereof will become, where they are near the outcrop, quite impassable.

18. The owners and lessees of the coal rely on what they contend is the unmistakeable meaning of the Act, which grants to them right, at all times after the passing of the Act, to hold, work, and enjoy all mines, minerals, and quarries lying under the said moors and commons, and full and free liberty at all times thereafter of making any new road or roads or waggon way, over and along the same, with power to remove the fences made for dividing the moors, and to do every act necessary for searching for and winning and working the mines by any ways or means then in use, or

thereafter to be invented, and that without paying any damages or making any satisfaction for so doing. They also rely on the fact that the award made in pursuance of the Act points out fully the mode in which all roads set out under the Act shall be maintained.

And, moreover, that the Act itself provides a special fund, out of which any damages to be caused by working the mines shall be paid, and in the event of that source proving insufficient, it enacts that the deficiency shall be made good by the proprietors of all the allotments.

They also contend that, if the improved method of mining, under which the whole of the coal came to be removed, was not put in practice until after the date of the Act, yet such altered mode of working is nothing more than is permitted by the Act, in giving power to work the mines without limitation of any kind, and in describing the powers and authorities conferred as being those either now in use or hereafter to be invented.

19. The Benfieldside Local Board, on the other hand, contend that by every rule of construction, and on grounds of public policy, the roads referred to, being set out under the authority of the Act as public highways, every other clause in the Act must be construed as subject to the paramount right of the public to have the highways supported by all or so much of the coal as is necessary for their support, and kept free from pitfalls; also that from the mode of working coal at the time the Act was passed, it was not contemplated any serious injury would follow from the working of the coal such as now results from the entire removal of the coal, and that the compensation clauses have consequently relation to surface injuries by acts done on the surface; but that, in any view of the case, the compensation clauses do not affect the present question, as those clauses were only intended to cover damage done to the allottees in their allotments under the powers reserved to the owners of the minerals and their lessees.

20. On these facts the question for the opinion of the court is, on the proper construction of the Lanchester Inclosure Act, are the owners of the minerals, and their lessees, entitled to work the coal as claimed in paragraph 15, and so as to withdraw the natural support of the roads set out under the Act, and that without making any compensation for injury thereby caused to such roads?

If the court should be of opinion that they are not so entitled, the judgment in this action shall be entered for the plaintiffs for 30% damages and costs, otherwise judgment shall be entered for the defendants with costs.

Hugh Cowie (with whom was *J. D. Fitzgerald*), for the plaintiffs, contended that the roads in question having been set out under the Inclosure Act of 1773 as public highways, the defendants were not empowered or entitled by that Act, notwithstanding the wide terms of the clause reserving all mining rights and powers to the lord and his lessees and assigns, to work these mines in such a way as to injure the highways lying above them. The argument on the part of the defendants, if good to the extent that the present lessees may do with impunity the injury to the highway now complained of, must go still further, and say that the lord of the manor might, the moment after the highways were first set out,

have blocked them up, or even have utterly destroyed them, and that the defendants, as lessees of the present lords, may do so now. These roads were set out under the Act as public highways, and were not included in the words of the reservation (paragraph 5 of the case), "moors or commons intended to be divided and allotted as aforesaid," under which the mine owners were entitled to work mines without paying any damages. The compensation clauses in the Act referred only to damage done to the allottees, and the Act contained no provision for compensating the public for any injury to them or their rights, unless there were a surplus after the claims of the allottees had been satisfied. The Act gave no power to the lord or his lessees to work the mines so as to injure the highways set out under it, and the right of the public to the free user of such highway was paramount to the reserved rights and powers of the mine owners. The present was not, as in many previous cases it had been, a question of the right to interfere with the exercise of a private right, but it was a case in which the right of the public and the private right of the lord and his lessees were in conflict, and the question was, how, under such circumstances, and the rights of both the public and the private owner having been created under the same Act, the Act itself was to be construed, and what effect was to be given to it. It must be remembered, too, that at the date of the Act (1773) it was not the practice to work mines in such a way as to let down the surface at all, so that much less could the lord at that time have worked them so as to let down these highways. He cited and commented on the following cases:

Blackett v. Bradley and others, 5 L. T. Rep. N. S. 832; 1 B. & S. 940; 31 L. J. 65, Q. B.;

Roberts v. Haines, 6 E. & B. 648; 25 L. J. 353, Q. B.; affirmed in error, 7 E. & B. 625;

Hest v. Gill (before the Lord Justices), 27 L. T. Rep. N. S. 291; L. Rep. 7 Ch. App. 699; 41 L. J. 761, Ch.;

The Duke of Buccleuch v. Wakefield (in the House of Lords), L. Rep. 4 E. & L. App. 377; 39 L. J. 441, Ch.; a. c. nom. *Wakefield v. The Duke of Buccleuch*, 23 L. T. Rep. N. S. 102

Herschell, Q.O. (with whom was *Crompton*), for the defendants, *contra*.—The question before the court involves the right to work as well mines lying under land adjacent to these highways as those immediately subjacent; and if the contention on the part of the plaintiffs is upheld, it follows that the defendants will be prevented from working not only the subjacent but the adjacent mines, if their working shall in either case cause the surface to sink. Under the old mode of working, even when intermediate pillars were left, some amount of injury, though it may be it would have been of a trifling character, would have resulted to the highway. Originally the entire right of soil, both above and below, subject only to rights of pasturage, was in the lord, and the Inclosure Act took from him a portion of the surface and vested it, partly in the allottees, partly in himself as compensation for loss of rights of common, and partly in trustees, but all mining rights were left wholly and solely in him. The Act made no distinction between mines lying underneath the highways directed to be set out and those lying under the rest of the commons and allotments, but gave full power to the lord and his lessees and assigns of mining underneath

every part of the common, and that, expressly, "without paying any damages or making any satisfaction for so doing." Moreover, not only does the Act give the power to the lord, &c., but it goes on to prescribe the mode of compensating for any damage resulting from such working, a portion of the lord's common being set apart, without any compensation to him for the same, to meet such damage after the claims of the allottees shall have been satisfied. The lord's rights, therefore, which have been in express terms reserved to him by the Act, will be seriously and injuriously affected and abridged if he or his lessees are to be precluded from working the mines lying either under or adjacent to these highways. No doubt the claim of the defendants is one that can be supported only by express statutory enactment, and that it is confidently contended is clearly the case here. It might possibly be that the lord would not be justified in working the mines so as to entirely destroy the highway; but he is clearly, it is submitted, entitled to work them so as only to cause such amount of injury to the roads as can easily be repaired, as in the present instance, and the court will not construe the Act so as to hold that the mines are to remain unworked because some small amount of damage may accrue to the highways by the working. He commented on the cases cited on the other side, and relied on *The Duke of Buccleuch v. Wakefield* (*ubi sup.*); and cited in addition

Buchanan and others v. Andred (in the House of Lords) L. Rep. 2 Sc. & Div. App. Cas. 286; *Aspden v. Seddon* (before the Lords Justices), 32 L. T. Rep. N. S. 415; L. Rep. 10 Ch. App. 394; 44 L. J. 359, Ch.

KELLY, C.B.—I am of opinion that the plaintiffs in this action are entitled to the judgment of the court. The question arises under an Inclosure Act passed so far back as the year 1773 for inclosing Lanchester Commons in the county of Durham, under the provisions of which Act certain public roads have been constructed and established for the use of the public at large, and have existed for a great many years. Now, upon looking to the case, we find in paragraph 3 the power and duty conferred and imposed on the commissioners to "assign, set out, and appoint such public highways and roads, in, through, and over the residue or more improveable parts of the said moors and commons intended to be divided and inclosed as they shall think proper and convenient;" and then in paragraph 4 there is a provision under which, in effect, all former roads and ways whatsoever, which were existing when the Act was passed, are extinguished, and an implied, or I might almost say an express, prohibition of the making or using any other roads whatever over the lands within the jurisdiction, and under the power of the commissioners, subject indeed to the power reserved to the lord of the manor, the then Bishop of Durham, and his successors, to make such other roads and ways for the use of the tenants of the manor, and for the purpose of working the mines. But as regards the public, the commoners, and all others interested in the matter, it was the duty of the commissioners to set out these public roads, and the same having been accordingly made, it is stated that certain mines situated underneath these roads, which were reserved to the lord of the manor, and which are now the property of the representatives of the then Bishop of

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Durham, have been worked in such manner as to cause considerable damage and injury to the public highways in question, and, as stated in paragraph 13 of the case, to cause portions of them to "sink below the original level, and to become dangerous to travel over." The question therefore arises, whether the act of the lords of the manor, the present owners of the mines, or of their lessees, the defendants, in so working the mines as to cause that injury to the highways, is lawful or not? We find from paragraph 15, that the defendants claim to be entitled to work the whole of the coal without being under any obligation to leave any support for the surface, and without making any compensation for injury thereto;" and in paragraph 20 the question is put for the court, whether "the owners of the minerals and their lessees are entitled to work the coal in the manner claimed in paragraph 15, and so as to withdraw the natural support of the roads set out under the Act, and that without making any compensation for injury thereby caused to such roads?" Now, the bare statement of that question is such as to create surprise; and the proposition involved in the claim put forth by the defendants is so extraordinary that it becomes necessary that we should endeavour to ascertain on what ground such a claim is founded. At the date of the passing of the Act in question the then Bishop of Durham, as the lord of the manor, was the owner of certain mines, and there are provisions in the Act of Parliament, as set out in paragraph 5 of the case, which reserve to the lord of the manor, and his successors and assigns, certain rights and powers; and as it is material to consider the precise terms of the provisions in question, I will refer to them rather more in detail than I should otherwise do. By the Act, then, the right is reserved to the lord to hold, work, and enjoy all mines, minerals, and quarries, together with all necessary ways, wayleaves, and means of access in and over the commons, and all means of making, laying, repairing, and using any new roads or waggon ways in, through, and over the same, and to do every act necessary to be done for the purposes aforesaid, and of searching for, draining, winning, and working the said mines and quarries, and also of leading and carrying away all the coals and minerals to be gotten thereout, and of using as theretofore all buildings, &c., necessary for the purpose of working the said mines, and of erecting and using fire and other engines, pit rooms and heap rooms, and all other necessary and convenient works, buildings, liberties, powers, and authorities either now in use or hereafter to be invented, &c., "as fully and freely as he or they might or could have had, held, used, and enjoyed the same in case this Act had not been made, and that without paying any damages or making any satisfaction for so doing." Now taking the whole of that clause together, what is the plain meaning of the words used? Do they give to the owner of the mines a right to work them in such a way as to take away the natural support of the surface of the roads above them, and to work the whole of the coal without being under any obligation to leave any support for the surface, and without making any compensation for injury thereto? If they do they must equally entitle the mine owner (and the right would arise under the same clause) to erect

and use fire and other engines and workshops upon the surface, and in the very centre of these highways, and thus deprive the public of the use of them altogether. The plain answer to such a claim and to the contention of the defendants is simply, that whatever power was reserved to the owner of the mines must be subject to the other express provisions of the Act of Parliament, and if one of such provisions is to provide highways over the inclosures for the use of the public, there must of necessity be a qualification of the exercise of the power of mining; and it cannot be that the mine owner is entitled so to work as to take away the natural support of the roads that lie above the mines and cause them to sink, not only to the danger of the public, but absolutely to the total destruction of the highways themselves. The provisions of the Act of Parliament for setting out the highways are such as at once to repeal and to put an end to any power whatsoever which might otherwise be directly or indirectly conferred upon the lord of the manor, inconsistent with the creating, maintaining, and keeping in proper repair for the use of the public those highways which the commissioners are not only empowered, but expressly commanded, to make. It appears to me, therefore, that any act whatsoever done by the owner of the mines in the working of the mines, the effect of which is to interfere with the existence of or to prejudicially affect the highways or the user of them by the public, is, whatever may be the language of the reservation in favour of the mine owner, an unlawful act, and that such reservation must be held to be subject to the paramount right of the public to have these highways and roads preserved and maintained in a fit and proper condition for the free use of all the Queen's subjects. With regard to the authorities which have been cited on behalf of the defendants we may, I think, concede the full effect of them to the defendants, but unfortunately they are not, when carefully looked at, applicable to the facts and circumstances of the present case. In the case which was more particularly and very properly pressed upon our attention by the learned counsel for the defendants—I mean that of the *Duke of Buccleuch v. Wakefield*, in the House of Lords (*ubi sup.*)—there were no doubt powers reserved to the mine owner in respect of the lands to be inclosed, and which might afterwards be and were sold under the Act; but the decision in that case had nothing whatever to do with any highway, nor was there anything there to interfere with the express provisions of the Act of Parliament. The question in that case was solely with regard to the power of the mine owner to enter for mining purposes upon lands which had been purchased under the Act, and had been afterwards sold to various purchasers, and in substance to dispossess such purchasers of their lands upon paying the full value of the land so entered upon; and this the House of Lords held that the Duke of Buccleuch had a right to do. For all damage, injury, or loss sustained by the purchasers, through the exercise of the powers in question in that case, they were entitled, under the Act, to receive full compensation, and there was therefore nothing there that was repugnant to common sense, or one's ordinary sense of justice. It was in fact only notifying to the purchasers that they purchased their lands with the reservation of this power to the lord of

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the manor, and subject therefore to the possibility of his exercising it, and in substance taking possession of the purchased lands, compensating and paying the purchasers for the same. Such is the effect of that case; but to apply that to the present case, and to allow mines to be worked in such a way as would necessarily put an end to the existence of a public highway, or to suppose that power was conferred on the mine owner to commit an indictable nuisance, by causing a public highway to sink below its original level, without his being bound to make compensation, or offering any remedy or redress to the ratepayers, and above all to the public, would clearly be to put a construction upon this award contrary to the principles of justice and good sense. The injury done, be it more or less, is such as to compel the plaintiffs, upon whom is cast by law the duty of keeping these roads in a fit state for the public use, to repair them, and they are consequently entitled to call upon the defendants to repay them the costs of such repairs. Under these circumstances and for the reasons I have given, the judgment of the court must be in favour of the plaintiffs.

CLEASBY, B.—I am of the same opinion. In the case which has been referred to by my Lord, there was a reservation and power with regard to the whole of the minerals regardless of the surface, and there was a power to take and use land in such a way as might be necessary for the purpose. But the question before us is different from any that has been considered, and its decision rests, I think, on entirely different considerations. We have in the present case an enactment set out in paragraph 3, that the commissioners shall "assign, set out, and appoint certain public highways and roads." Then it appears by paragraph 10 that the commissioners did by their award, in accordance with the provisions of the Act of Parliament, set out the roads in question. As soon as that was done it had the unquestionable effect of an enactment, and the public had the right of user of the roads as public roads, and to pass over them from place to place without obstruction or interference. That right of free passage from place to place is one of the most important and essential rights of the public, and one than which none has been, or is, more carefully preserved and guarded. Anything therefore which interferes with that right, or with the free use of the highway, is unquestionably a public nuisance. How, when an Act of Parliament directs a public road to be made, can that Act be read as legalising such acts as create a public nuisance? It appears from paragraph 13 of the case that the roads "have sunk below their original level, and become, until repaired, dangerous to travel over." That is equivalent to a public nuisance. The question, therefore, distinctly arises, whether the same Act which created and appointed the roads also conferred the right to create a public nuisance upon them; and precisely the same question would arise with respect to another important matter, provided for by the same section of the Act which has been referred to, whereby the commissioners are also empowered to set out common wells and watering places, the water in which is thereby appropriated to the use of the inhabitants of the neighbourhood. It would be a monstrous thing if it were possible that the defendants, or those exercising the rights reserved,

could take away from the public the supply of water which the Act of Parliament intended them to have. But I think it is better to confine myself to the question before us, and that is the question of the roads. I would almost say that it is impossible to adopt any construction of words that should result in the conclusion that the same Act of Parliament that created a public highway legalised a public nuisance upon it, because every reservation of right, however worded, must, I should say, be read as subject to the public right, and as if such limitations were expressed. This appears to me to be sufficient for the conclusion at which we have arrived. I may say, with reference to the words in paragraph 5, "All mines, minerals, and quarries, of what nature or kind soever, lying and being within or under the said moors or commons intended to be divided and allotted as aforesaid," that I am by no means satisfied that the mines under the roads are not excluded by them; but upon the main point of the case I am clearly of opinion that there is nothing in the Act relied on by the defendants which entitles them to exercise their rights of mining in such a way as to interrupt or interfere with the full and free user of these highways by the public, and that consequently our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Bogerson and Ford*, agents for *J. Booth*, Durham.

Solicitors for the defendants, *Torr, Janeways, Torr, and Gribble*, agents for *Hodge and Harle*, Newcastle-upon-Tyne.

Friday, May 3, 1878.

(Before KELLY, C.B. and POLLOCK, B.)

BARNES (app.) v. CHIPP (resp.) (a)

APPEAL FROM INFERIOR COURT.

Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), sects. 6, 12, 14, 15, 20 and 21—Summary conviction for offence under sect. 6—Condition precedent to, under sect. 14—Analysis by public analyst—What notification by purchaser to seller is requisite.

The purchaser of any article of food must, as a condition precedent to proceedings and summary conviction under the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), notify to the seller of the article, in the express words of sect. 14 of the Act, his intention to have the same analysed "by the public analyst"; and his merely telling the seller that "he had purchased the article for the purpose of analysis" is not a sufficient compliance with the requirement of that section to sustain a summary conviction under sect. 20 for an offence under sect. 6.

APPEAL against a conviction by justices under the 20 & 21 Vict. c. 43.

At a petty sessions in and for the city of Gloucester, on the 4th Jan. 1878, an information was preferred by Edward Chipp (the now respondent) against Thomas Barnes (the now appellant), under sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), charging for that on the 25th Sept. 1877, at Barton St. Mary, in the city of Gloucester, the appellant did sell, to the prejudice of one Richard Bowen, the purchaser, certain food—to wit, one half-pint of gin—which was not of

(a) Reported by H. LLOYD, Esq., Barrister-at-Law.

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the nature, substance, and quality demanded by the said Richard Bowen; and, upon the hearing thereof, the appellant was convicted before the justices of the said offence, and adjudged by them to pay a penalty of 10s. and costs. And the appellant, being dissatisfied with such determination, the said justices, in compliance with his application in that behalf, under sect. 2 of the 20 & 21 Vict. c. 43, stated and signed the following

CASE.

Upon the hearing of the information it was proved on the part of the respondent, and found as a fact, that on the day stated in the information the said Richard Bowen, who is a police constable stationed and residing at Gloucester, but not appointed by the local authority, went by the direction of the respondent, who is inspector of weights and measures for the city of Gloucester, to the house of the appellant, the Bell Inn, in Barton-street, in the said city, and asked the barmaid to supply him with half a pint of gin, which was supplied to him in a measure, and for which he paid her tenpence; that he then told her that he was a police constable, that he had purchased the gin for the purpose of analysis (but did not add "by the public analyst"), and that if she liked he would divide it (but did not add "into three parts") and give her a portion; but that she said she did not require it; that he then put it into a bottle, which was labelled 16, corked it, and sealed it with the county seal in the presence of the barmaid, and showed it to her, and asked her to make any mark she liked for the purpose of identification, which she declined to do; and that he then took the bottle to the police station, and handed it to the respondent in the same state. That the respondent, on the 9th day of Oct. 1877, took the bottle in the same state and handed it to Mr. John Horsley, the analyst appointed for the city of Gloucester, who does not reside within two miles of the residence of the said Richard Bowen, the purchaser, but resides at Cheltenham, nine miles from Gloucester. That on the said 9th day of Oct. 1877 the said John Horsley analysed a portion (about one-fourth) of the contents of the said bottle, and that it contained seventy-four parts of water and twenty-six parts of spirit, and was fifty under proof, and was diluted. That the said John Horsley drew the cork and with the same cork corked up the remainder of the contents of the said bottle (but did not then seal it), and locked it up in a cupboard in his laboratory, to which no one but himself had access; and that he gave his certificate of the result of the analysis to the respondent on the 21st day of Dec. 1877. That the said John Horsley sealed the said bottle on the 7th day of Jan. 1878, and not before, and delivered it back to the respondent on that day; and that he never divided the contents of the bottle into two parts other than by taking out a portion and analysing it.

No evidence was given as to the proper ingredients to be used in the manufacture of gin, nor as to the proper or usual strength at which gin ought to be sold; but it was found as a fact that the gin sold to Richard Bowen was not of the quality demanded by him.

It was contended before the justices on the part of the appellant that the proceeding must fail on each or upon all of the following several grounds:

First, that under the 13th section of the Act the person procuring a sample of food for the purpose of being analysed must be a medical officer of health, an inspector of nuisances, an inspector of weights and measures, an inspector of markets, or a police constable appointed by the local authority, and that Richard Bowen, the purchaser, was none of those. Secondly, that the 14th section of the Act had not been complied with, as Richard Bowen did not notify to the seller his intention to have the gin analysed by "the public analyst," and did not offer to divide it into three parts. Thirdly, that the 15th section of the Act had not been complied with, as the analyst did not divide the gin into two parts, and did not seal or fasten up one of those parts and cause it to be delivered to the purchaser, either upon the sale of the sample or after he supplied his certificate to the purchaser. Fourthly, that the purchaser did not himself take the gin to the analyst, nor send it by post in the manner provided by the 16th section of the Act.

The justices, however, being of opinion, first, that under the 12th section of the Act any person may purchase an article of food and submit it for analysis, and also that an officer, inspector, or constable is, under the 13th section of the Act, entitled to procure a sample either himself or by deputy; secondly, that the 14th section of the Act had been sufficiently complied with by the purchaser stating that he had purchased the gin for the purpose of analysis, and offering to divide it, although he did not mention the public analyst, or offer to divide the gin into three parts; thirdly, that it was immaterial whether the 14th and 15th sections of the Act were strictly complied with or not, compliance with these sections not being a condition precedent to a prosecution under the 20th section, which only requires that the analyst, having analysed the article, should have given his certificate of the result, from which it appears that an offence has been committed; and fourthly, that it was not requisite that the article purchased should either be handed to the analyst by the purchaser himself, or forwarded to him by post under the 16th section of the Act, gave their determination against the appellant in the manner before stated.

The questions of law arising on the above statement for the opinion of this court, are: First, whether, in proceedings for a penalty under the 6th section of the Act, the person purchasing the article must be an officer, inspector, or constable, mentioned in the 13th section, or whether he may be one acting under the direction of such officer, inspector, or constable, or any other person. Secondly, whether, on the facts herein stated, the 14th section was sufficiently complied with. Thirdly, whether, on the facts herein stated, the 15th section was sufficiently complied with. Fourthly, whether it is requisite, looking at the 12th section, that, before a person can be convicted, both the 14th and 15th sections, or one of them, must have been strictly complied with. Fifthly, whether it is requisite that the article purchased should either be taken by the purchaser personally to the public analyst or forwarded by post to such analyst under the 16th section of the Act.

The following are the sections of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) referred to and discussed in the argument as material:

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Sect. 6 imposes a penalty not exceeding 20l. on any person who "shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser."

Sect. 12 enacts that any purchaser of an article of food, &c., in any place being a district, &c., where there is any analyst appointed under the Act, or any Act thereby repealed, shall be entitled, on payment to such analyst of a sum not exceeding ten shillings and sixpence, or, if there be no such analyst then acting for such place, to the analyst of another place of such sum as may be agreed upon between such person and the analyst, to have such article analysed by such analyst, and to receive from him a certificate of the result of his analysis.

Sect. 13:

Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable under the direction and at the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of this Act, may procure any sample of food or drugs, and, if he suspects the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analysed by the analyst of the district or place for which he acts, or, if there be no such analyst then acting for such place, to the analyst of another place: and such analyst shall, upon receiving payment as is provided in the last section, with all convenient speed analyse the same, and give a certificate to such officer, wherein he shall specify the result of the analysis.

Sect. 14:

The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated, and each part to be marked and sealed, or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison, and submit the third part, if he deems it right to have the article analysed, to the analyst.

Sect. 15:

If the seller or his agent do not accept the offer of the purchaser to divide the article purchased in his presence, the analyst receiving the article for analysis shall divide the same into two parts, and shall seal or fasten up one of those parts, and shall cause it to be delivered, either upon receipt of the article or when he supplies his certificate, to the purchaser, who shall retain the same for production in case proceedings shall afterwards be taken in the matter.

Sect. 16 provides that, if the analyst do not reside within two miles of the residence of the person requiring the analysis, the article may be forwarded to the analyst through the post-office as a registered letter, &c.

Sect. 18 prescribes the form of the certificate.

Sect. 20:

When the analyst, having analysed any article, shall have given his certificate, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for recovering the penalty, &c., before justices, &c., in a summary manner.

Sect. 21:

At the hearing of the information the certificate shall be sufficient evidence of the facts therein stated, unless the defendant requires the analyst to be called as a witness, and the parts of the articles retained by the purchaser shall be produced; and the defendant may, if he think fit, tender himself and his wife as witnesses on his own behalf.

Bosanquet, for the appellant, did not intend to rely on the first and last objections with respect to the person who, under the 13th section, was entitled to procure a sample, and as to the mode of transmitting the article to the analyst under the 16th section, and would therefore not trouble the court with any arguments upon those points. The remaining objections resolved themselves into two, namely, that sects. 14 and 15 of the Act were not complied with in the present case, and so, therefore, such compliance, being a condition precedent to taking proceedings for an offence against sect. 6, this conviction cannot stand. The offence charged against the appellant here is created by sect. 6 [reads it]. Sect. 13 provides that certain public officers, named, may procure samples and submit them to analysis, and I am not going to contend that nobody else may do so as well. By sects. 14 and 15 the mode in which the sample when purchased is to be dealt with by the purchaser and the analyst respectively is prescribed. Then comes sect. 20, providing for proceedings being taken against offenders, which says, "when the analyst, having analysed any article, shall have given his certificate, &c., proceedings may be taken against the seller." Clearly, therefore, the analysis and certificate are by that section made conditions precedent to the taking proceedings; and sect. 14, which enacts that the purchaser, buying an article which he intends to be analysed, shall, after completion of the purchase, "forthwith notify to the seller his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts," &c., makes these formalities conditions precedent to procuring an analysis. Neither of them however were observed by the purchaser in the present instance. It may be, if the facts be as stated, that an offence under sect. 6 was committed, but the necessary conditions precedent to proceedings were not performed. [He was here stopped by the Court, who called on]

Jelf, for the respondent, *contra*, in support of the conviction.—This, though in one sense a penal statute, is in its general scope and intention a remedial one, and should therefore receive a construction favourable to the object and intention which the Legislature had in view in passing it, namely, the protection of the public from having noxious, adulterated, and diluted goods sold to them in lieu of genuine articles. If therefore the spirit of the Act has been fairly and reasonably complied with on the part of the appellant in the present case, the court will be slow to upset the conviction upon a merely technical objection. The offence created by sect. 6 is selling "to the prejudice of the purchaser." The next section of importance is sect. 12 [reads it]. That steers clear of the objection raised on the other side. Any person in the community may go into a shop, and if he gets an article which he thinks is adulterated, may go to the analyst and obtain his certificate. The 20th section, on which the appellant relies so strongly, must be read together with sect. 12. Any person therefore, so prejudiced in his purchase, may go before the justices and make a complaint, and institute proceedings against the seller under sect. 20 without reference to sect. 14. Then comes the question of proof, and by sect. 21 the production of the certificate is made sufficient evidence unless the defendant requires the analyst to be examined.

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In like manner as any ordinary purchaser may have an article analysed, so the police officer may procure a sample, and if he be "prejudiced" or damaged by receiving an adulterated article, he may go, as was done here, to the public analyst. The seller is in no wise damaged or prejudiced so long as he is warned that the article is to be analysed, nor can the information that it is to be done in one way or another at all affect or alter his mind in selling the article complained of. If sects. 14 and 15 are held to be, as is contended by the appellant but as the respondent contends erroneously, conditions precedent, then it is submitted that in *spirit* they have been complied with. The formalities thereby prescribed are all for purposes of proof, and are not conditions precedent to the right of any purchaser to take proceedings.

KELLY, C.B.—I do not think that there is a particle of doubt that our judgment in this case should be in favour of the appellant. There are a great variety of provisions in this Act of Parliament for the purpose of securing, as far as possible, the genuine and unadulterated character of articles of food that are sold to their customers by the various tradesmen and shopkeepers throughout the country; but, at the same time, there are introduced into the Act also certain prescribed formalities and conditions in favour of the tradesmen, the full and due performance and observance of which the latter are entitled to claim as a safeguard and protection to themselves against hasty, inconsiderate, and unfounded charges. Doubtless some of the sections of the Act, taken by themselves, would seem to show that an offence against the Act has been committed in the present instance; but, looking at the Act as a whole, and taking section after section, when we come to the 14th section we find it enacted, in the clearest and most distinct and direct terms, that "the person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller, or his agent selling the article, his intention to have the same analysed by the public analyst." We are asked by the learned counsel for the respondent, in effect, to cut the words "by the public analyst" out of the section altogether; but that we cannot do, the terms of the section being imperative. It is, in my opinion, most important for the interests and safety of the tradesman that the directions in this section should be strictly complied with, and that he should be told that it is "the public analyst" to whom the purchaser intends to submit the purchased article. It is he, "the public analyst," who is appointed by the Act to analyse suspected articles, and it is he whose certificate is made a condition precedent to a prosecution, and the production of which is to be taken as *prima facie* proof of the offence at the hearing of the information "before the justices." It may possibly be that the tradesman may have already had the article analysed by some analytical chemist of his own choice; and, unless he is informed that the article is going to be submitted for analysis to "the public analyst," he may be well satisfied with the analysis he has had made for himself, and may rest upon it; whereas, if he were aware that the "public analyst" was going to be consulted, he might have a doubt as to the accuracy of his own analysis, and be anxious to

have another and more duly authorised one made. In my judgment, both in common sense and justice, and on the express words of the Act of Parliament, the appellant is entitled to succeed on this objection to the conviction; and it is therefore unnecessary to consider the other objections relied on by him.

POLLOCK, B.—I am of the same opinion.

Judgment for the appellant, quashing the conviction.

Solicitor for the appellant, *Edward Sweeting*, agent for *O. J. Chesshyre*, Cheltenham.

Solicitor for the respondent, *J. M. Weightman*, agent for *P. Cooke*, Gloucester.

May 7 and 18, 1878.

(Before KELLY, C.B., and POLLOCK, B.)

ROOK (app.) v. HOPLY (resp.)(a)

APPEAL FROM INFERIOR COURT.

Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 6, 25—Adulteration—Nature, substance, and quality of article—Written warranty.

An invoice, containing a description of the article sold, furnished by A. to B., does not constitute a "written warranty," within the terms of the 25th section of the Food and Drugs Act 1875, so as to discharge B., who sells to C., from a prosecution under sect. 6 of the said Act.

THIS was a case stated for the opinion of the court by the stipendiary magistrate of Manchester, under 20 & 21 Vict. c. 43.

On the 20th Sept. 1876, an information was preferred by Rook (the appellant) against Hopley (the respondent), for "that he, the said John Hopley, on the 2nd July 1876, did sell, to the prejudice of Andrew Thomas Rook, the purchaser thereof, a certain article of food, to wit, lard, which was not of the nature, substance, and quality of the article demanded by him contrary to the form," &c.

The magistrate dismissed the summons on grounds which will appear from the following paragraphs of the stated case:

Par. 5. The 38 & 39 Vict. c. 63, s. 6, enacts that:

No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds: provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say:

(1) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof.

(4) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation.

Par. 6. By sect. 25 it is enacted that:

If the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be

(a) Reported by A. M. TABLETON, Esq., Barrister-at-Law

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liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence.

Par. 7 sets out the circumstances of purchase by appellant from respondent.

Par. 8. Sets out copy certificate of the public analyst, who stated that he was of opinion that the article submitted to him was a sample of adulterated lard, and that it contained 15 per cent. of water.

Par. 8A. The magistrate found as a fact that the lard was adulterated.

Par. 10. The respondent proved that he had purchased on the 20th June 1876, of William Walker, four tins of lard, and at the time of the purchase received a document of which the following is a copy :

Bought by Mr. J. Hopley of Wm. Walker,
4 tins lard, No. 1, 28lb. each, 1wt. (K) at 55s.
2l. 15s. 0d.

Par. 11. The respondent proved the identity of the substance sold to the appellant with that purchased of Walker, and in the same condition.

Par. 12. The respondent bought the article as lard.

Par. 12A. There was no explanation given of "No. 1" in the invoice. No suggestion was made by the appellant or by the respondent that the word and figure "No. 1," or anything else in the said document imported any addition or qualification to the word "lard."

Par. 13. It was contended on the part of the respondent that the said document was a sufficient written warranty within the 25th section of the Act, and that he ought accordingly to be discharged from the prosecution.

Par. 14. It was contended on the part of the appellant that the said document did not constitute a sufficient warranty.

Par. 15, 16. The magistrate, upon the facts proved, held in favour of the respondent.

J. Brown, Q.C. (Sutton with him) for the appellant. — Four conditions are necessary to exonerate the intermediate vendor, and though three of such conditions may have been complied with in this case, the essential condition of a written warranty, to satisfy the terms of the statute, is here wanting. Any seller who was possessed of such an invoice would thus escape scot free. The Legislature intended that a seller under such circumstances should be held liable, unless he was provided with an express written warranty; and this does not meet the requirements of the Act:

Benjamin on Sale, p. 442;
Josling v. Kingsford, 13 C. B., N. S. 447; 32 L. J.
C. P. 94;
2 *Smith's Lead. Cas.* p. 3.

[He was stopped by the Court.]

Ambrose, Q.C., for the respondent, argued that the document was not an invoice, but a bought-note, and contained a written warranty. It was a contract to supply the article demanded; and at all events a guarantee to that effect was implied. It is not necessary to use the word "warrant," whether such a contract is verbal or in writing. [KELLY, C.B.—That is conceded. POLLOCK, B.—The intermediate purchaser is exempt, if he can prove that he bought with a "written warranty." Is this bought-note, if such it can be called, a "written warranty?"] A sale by description is a sale by warranty. We bought it as "lard." The analyst did not find in accordance with the words

of the statute; he calls the article "lard," and the magistrate finds as a fact that it is "adulterated lard," but to sell this latter is no offence within the statute. But even if you convict me on this head, I come within the 25th section. The document is not an invoice, which refers to a past sale, and records a debt, but is a contract: (*Allan v. Lake*, 18 Q. B. 560.) The 25th section was enacted for the protection of honest traders. It cannot have been intended that a separate written warranty should be demanded of the wholesale dealer to exempt the seller. Between the retail dealer and the wholesale dealer, as evidenced by this bought-note, there is undoubtedly a contract of warranty. He cited

Bermanger v. White, 10 C. B. 857;
Wieller v. Schilke, 17 C. B. 619;
Bowes v. Shand, L. Rep. 2 H. of L. App. 455;
Randall v. Hewson, 2 L. Rep. Q. B. 102;
Gardiner v. Gray, 4 Camp. 144;
Barr v. Gibson, 3 M. & W. 399;
Chantler v. Hopkins, 4 M. & W. 404;
Jones v. Just, L. Rep. 3 Q. B. 204.

Brown, Q.C. was not called on to reply.

KELLY, C.B.—The appellant is entitled to our judgment. I arrive at this conclusion with much reluctance, inasmuch as on the facts proved it is a very hard case, but with that I have nothing to do. The question is simple, and really one that appeals to our common sense; the respondent purchased the article in question as lard, and sold it as such; it was found as a fact that it was lard adulterated with 15 per cent. of water. The question then follows, whether in the face of this fact, the case comes within the provisions of the statute, the article not being that which he sold it for. Is "adulterated lard" "lard," i.e. of the nature, substance, and quality of the article demanded, in the eye of the law? As to whether the document referred to, be it an invoice or a bought-note, imports a warranty, I do not give any decision; it is not a warranty within the meaning of the Act under consideration. The article demanded and paid for was lard; lard, in one sense, mixed lard, was furnished. Regarding the certificate of the analyst, the finding of the magistrate, and the terms of the preamble of the Act, I am of opinion that this case comes within it. It was the intention of the Legislature to prevent the sale of adulterated articles of food, and this article is expressly found to be adulterated. The respondent acted *bona fide* and with an honest intention, but I think, under the circumstances, the appellant is entitled to our judgment.

POLLOCK, B.—I agree with my Lord that the appellant is entitled to our judgment. I base my decision on the construction of the Act of Parliament on which the jurisdiction of the magistrate depended. The provisions of the Act introduced for the first time new and most stringent provisions for the protection of honest traders. Let us consider the requirements of sect. 6, under which it is alleged the respondent becomes liable to a penalty. There are certain specified exceptions, within which the defendant must bring himself, so as to exempt him from the penalty incurred under this section, but with this question we have nothing to do here. The article sold must be to the prejudice of the purchaser; that it was so here, though not set out in the case, clearly appears from the certificate of the analyst. Was the article of the nature, substance, and quality

CR. CAS. RES.]

REG. v. YOUNG.

[CR. CAS. RES.]

demand by the purchaser? Now the article demanded was not lard mixed with water, and that this article was so mixed is proved by the analyst's certificate, which states that the article was adulterated with 15 per cent. of water. The article, therefore, was not of the quality demanded, and was sold to the prejudice of the purchaser. Mr. Ambrose has argued that the respondent bought the lard, not only as being the same in nature, substance, and quality as that demanded, but also with a written warranty to that effect. To assert that this document was a written warranty within the meaning of sect. 25, is an insult to a man's understanding. The Legislature intended that there should accompany the sale an express written warranty; and a mere description of the article is insufficient.

Case remitted to magistrate with costs.

Solicitor for the appellant, *B. F. Austin*, for *W. H. Talbot*, Manchester.

Solicitors for the respondent, *Le Riche and Son*, for *Cobbett, Wheeler, and Cobbett*, Manchester.

CROWN CASES RESERVED.

Saturday, May 18, 1878.

(Before Lord COLERIDGE, C. J., MELLOR and LUSH, JJ. CLEASBY, B., and LOPES, J.)

REG. v. YOUNG. (a)

Rape—Married woman asleep—Belief that the prisoner was her husband.

While a married woman was asleep in bed with her husband, the prisoner got into the bed and proceeded to have connection with her, she being then asleep. When she awoke, she at first thought he was her husband, but on hearing him speak, and seeing her husband at her side, she flung the prisoner off, and called out to her husband, when the prisoner ran away.

Held the prisoner was guilty of the crime of rape.

Case stated for the opinion of this Court by Huddleston, B.

The prisoner, John Young, was indicted for a rape upon Johanna Hurley.

The evidence proved that the prosecutrix, a married woman, being partially under the influence of drink on the 2nd Feb. 1878, went to bed in her lodgings in the Seven Dials with her youngest child about nine o'clock; her husband with another child came home about midnight.

About four o'clock in the morning, when all four were asleep, the prisoner entered the room, the door not having been locked, got into bed, in which were the prosecutrix, her husband, and the two children, and proceeded to have connection with the prosecutrix, "she being at the time asleep. When she awoke" (b) at first the prosecutrix thought that it was her husband, but on hearing the prisoner speak she looked round, and seeing her husband by her side, she immediately flung the prisoner off her, and called out to her husband.

The prisoner ran away, but before he could make his escape he was secured by a police-

constable. None of the parties had ever seen the prisoner before.

In answer to questions put by me the jury found that the prosecutrix did not consent before, after, or at the time of the prisoner's having connection with her, that it was against her will, and that the conduct of the prosecutrix did not lead the prisoner to the belief that she did consent.

I put the last question to the jury in consequence of what fell from Denman, J., in *Reg. v. Flattery* (2 Q. B. Div. 410-414, 13 Cox C. C. 388).

Upon these findings I directed a verdict of guilty, but reserved the question as to whether the conviction was right, the Court of Criminal Appeal in *Reg. v. Flattery* having expressed a desire that the case of *Reg. v. Barrow* (L. Rep. 1 C. C. R. 156; 28 L. J. M. C. 20, 11 Cox C. C. 191), should be reconsidered.

See Reg. v. Clarke, Den. C. C. 397; 24 L. J. Rep. M. C. 25, 6 Cox C. C. 412;

Reg. v. Jackson, E. & R. 487.

J. W. HUDDLESTON.

No counsel appeared to argue for the prisoner.

Lilley for the prosecution.—The conviction was right. In *Reg. v. Camplin* (1 Den. C. C. 89; 1 Cox C. C. 220), where the prisoner made the prosecutrix, a girl aged thirteen, drunk, and whilst she was insensible violated her person, it was held that a rape was committed without the consent and against the will of the prosecutrix, although the jury found that the liquor was given to her for the purpose of exciting her and then having sexual intercourse with her, and not for the purpose of rendering her insensible. [CLEASBY, B.—In that case the girl was insensible, and incapable of consenting. This case, as stated, says, "The prosecutrix at first thought it was her husband," and leads to an impression that she at first consented. In *Reg. v. Clarke* (6 Cox, 412 C. C.; 24 L. J. 25 M. C.) it was held that if a married woman consents, under the belief that the man is her husband, the man cannot be convicted of rape.] [MELLOR, J.—The jury found that the prosecutrix did not consent before, after, or at the time of the prisoner's having connection with her, that it was against her will, and that the conduct of the prosecutrix did not lead the prisoner to the belief that she did consent. LUSH, J.—I will go and speak to Baron Huddleston as to this (a).] In *Reg. v. Mayers* (12 Cox C. C. 311) Lush, J., held that if a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist.

On the return of Lush, J.,

Lord COLERIDGE, C. J., said:—We are all of opinion that the addition made by the learned Baron to the statement of this case puts an end to any doubt as to the case, under the circumstances, being clearly one of rape.

The rest of the Court concurred.

Conviction affirmed.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) The words between the inverted commas were added by Huddleston, B., on being consulted by the court during the argument, to clear up an ambiguity that had been suggested on the case as previously stated.

[CT. OF APP.]

Ex parte ARROWSMITH; *Re* LEVESON.

[CT. OF APP.]

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Thursday, Feb. 28, 1878.

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

Ex parte ARROWSMITH; *Re* LEVESON. (a)*Ecclesiastical livings—Mortgage of pew rents—*
13 Eliz. c. 20.

A mortgage by a vicar of the pew rents of a district church, paid to the churchwardens upon trust to pay thereout the expenses of the church, and hand over the surplus to the vicar:

Held, to be void as a charging of a benefice within the meaning of the 13 Eliz. c. 20.

THIS was an appeal from a decision of Mr Registrar Spring-Rice, sitting as Chief Judge in Bankruptcy.

The Rev. C. A. Leveson was the vicar of the district church of St. George, Campden Hill, which was established for parts of two parishes by an Order in Council of the 18th May 1865, under the 1 & 2 Will. 4, c. 38, the 8 & 9 Vict. c. 70, and other Church Building Acts.

The site of the church had originally been conveyed to the Ecclesiastical Commissioners, whose interest was, under the 8 & 9 Vict. c. 70, s. 13, vested in Mr. Leveson, on his presentation by the patron. The freehold was afterwards vested in trustees for the benefit of Mrs. Leveson.

The pew rents, the scale of which was fixed by Act of Parliament, were paid to trustees upon trust to pay thereout the expenses of the church, and to hand over the surplus to the vicar.

On the 19th Oct. 1876 Mr. Leveson assigned the pew rents of the chapel to trustees on behalf of E. M. Arrowsmith, by way of mortgage, to secure the repayment of a loan of 4800*l.* made to him by the latter.

On the 25th Oct. 1876 Arrowsmith entered up judgment against Mr. Leveson for the 4800*l.*

On the 8th Oct. 1877 Mr. Leveson filed a petition for the liquidation of his affairs by arrangement. Resolutions were duly passed and confirmed in favour of a liquidation, and appointing a trustee.

On the 15th Nov. 1877 the trustee in the liquidation obtained from the Bishop of London, under the 83rd section of the Bankruptcy Act 1869, a writ of sequestration of "all and singular the fruits, tithes, or other profits, rights and emoluments whatsoever to the said vicarage or benefice of St. George's Campden Hill, and to the aforesaid C. H. Leveson, the vicar or incumbent thereof, being or in anywise appertaining," for the benefit of him, the trustee.

On the 14th Jan. Mr Registrar Spring-Rice, sitting as Chief Judge, decided that the mortgage of the pew rents was void as against the trustee in the liquidation, and granted an injunction restraining Arrowsmith and the trustees of the mortgage deed from proceeding under the judgment or commencing or prosecuting any proceedings against the trustee in the liquidation or the sequestration.

From this decision Arrowsmith and his trustees appealed.

The question turned upon the construction of the 13 Eliz. c. 20, which is entitled "An Act touching leases of benefices and other ecclesiastical livings with cure," and the 1st section of which, in order that the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses, enacts (*inter alia*) that no lease after the 15th May then next to be made of any benefice or ecclesiastical promotion with cure shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year, &c., and "that all chargings of such benefices with cure hereafter with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this Act, shall be utterly void."

This Act has been at various times partly repealed, and the repealing statutes have been subsequently also partly repealed; but the provision with regard to "chargings of benefices" remains law.

Dr. Stephens, Q.C. Dr. Tristram (with them *E. O. Willis*) for the appellants.—The Act of 13 Eliz. c. 20, was one of a number of statutes passed to prohibit a then very common evil, that of the alienation of ecclesiastical property by bishops, beneficed clergy, &c. The 1 Eliz. c. 10, s. 5, the 13 Eliz. c. 10, the Act under which this case is said to come, and the 14 Eliz. c. 11, were all passed for that purpose. This is a prohibitory statute; and, as Lord Cranworth said in *Philpott v. President and Governors of St. George's Hospital* (6 H. of L. Cas. 349), "prohibitory statutes prevent you from doing something which formerly it was lawful for you to do. And whenever you can find anything done that is substantially that which is prohibited, I think it is perfectly open to the court to say that that is void, not because it comes within the spirit of the statute, or tends to effect the object which the statute meant to prohibit, but because by reason of the true construction of the statute it is the thing, or one of the things actually prohibited." And in the same case Lord Brougham (at p. 363) says: "Because the Legislature has confined itself to one specific mode of accomplishing its purpose, of carrying into effect the intention with which it made the enactment, we are therefore to add enactments which the Legislature never made, provisions beyond what the Legislature has made, for the purpose of completing that which it left incomplete, for the purpose of supplying what it left defective. I am not at all prepared to adopt any such general principle of construction." Yet that is the principle which the registrar has applied to the construction of this statute of the 13 Eliz. c. 20. We do not dispute that a charge of, or even an agreement to charge, a living is void under the Act, for that was held in *Shaw v. Pritchard* (10 B. and C. 241). But how can this old Act be held to have contemplated pew rents, which were unknown to the law till the 58 Geo. 3, c. 45? How can an Act passed in 1571 apply to what was unknown till 1818? There is no personal right to a pew, except in certain special cases of prescriptive right:

(a) Reported by H. PEAT, Esq., Barrister-at-Law.

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Fuller v. Lane, 2 Add. 425;
Hawkins v. Compeigne, 3 Phil. 16;
Wyllie v. Mott, 1 Hogg. 29;
Stephens' Laws relating to the Clergy, pp. 902, *et seq.*

The vicar has no such interest in the pew rents as can bring them within the Act. He has no property in the pews, and cannot sue for arrears of pew rents. Then this is a penal statute, and on that account it should be construed strictly. It is true that this statute does not impose any penalty upon the granting of a charge; but that is done by the 18 Eliz. c. 11, s. 7. Pew rents are not part of a benefice; moreover, this is not a benefice at all, but an endowed perpetual curacy. The 13 Eliz. c. 20, takes away a common law right, and it should not be construed in such a way as to extend its operation. They also cited

M'William v. Adams, 1 Macq. 137;
Stephenson v. Higginson, 3 H. of L. Cas. 638;
Movys v. Leake, 8 T. R. 411.

Dr. Deane, Q.C. and *Robson*, for the respondent, were not called upon.

JAMES, L.J.—We need not trouble you, Dr. Deane. I have no doubt upon this case at all. The words of the Act of Parliament are too plain to admit of any controversy. The mischief of the Act was “that the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses.” In order to prevent that it was enacted that all chargings of benefices or ecclesiastical promotion, with cure, or any part thereof hereafter with any pension or with any profit out of the same to be yielded or taken hereafter to be made other than rents to be received upon leases hereafter to be made according to the meaning of this Act, shall be utterly void. Now this is, in my opinion, what we may call a consolidated chapel rent; it is a living appointed for ecclesiastical ministers. By reason of the increase of population a new church has been created, and a new endowment of that church has been provided for by means of the letting of pews, which letting of pews is put under public officers by the Act of Parliament to the intent that such persons shall receive the rents and profits from them, and, after paying the necessary charges incident to the collection of the same to give the surplus to the vicar, that is, to the ecclesiastical minister to whom that living is appointed. Therefore it appears to me to be quite clear that this is a case within the statute. It is said that this property is of a different kind to that which was contemplated by the statute. Certainly, beyond all question it is a living adapted to the ecclesiastical minister. The word “living” there is the beneficial interest given to the minister; it is a beneficial interest given to a man for his maintenance. If that be so, it is said that he has not the legal estate because the legal right to receive the pew rents is in the churchwardens, and that all he had got was a beneficial interest arising from the surplus. That beneficial interest was as much an interest in law as any interest known to the courts of equity formerly, and now to all the courts of this country as an interest in a legal estate. It was an equitable interest of exactly the same character as if it had been rents received from glebe lands, from tithes or any other property which might be more commonly known at the time the statute was passed.

Then, it is said that it is deriving in some degree a profit from the personal exertions of the gentleman, and therefore is not within the statute. It may be that the personal exertions of the gentleman are the means by which the thing is rendered valuable. Real estate is rendered more valuable in this country because something is annexed to it, as, for instance, a public-house is more valuable by reason of a licence being attached to it because more profit would arise from it. In this particular case I cannot see any reason for saying that the right given by the churchwardens to certain persons to use certain seats at certain times for the purpose of hearing a particular individual is not a right to have a certain use and occupation of a certain portion of the pews. Then the sums received from those seats which are called rents are sums arising as profits out of that freehold estate by the use to which it is so put. I am of opinion that this case is not only within the plain mischief, but within the plain words, of the Act of Parliament, and that therefore the decision of the court below must be affirmed.

BAGGALLAY, L.J.—I am of the same opinion. It is unnecessary to consider the various Acts of Parliament subsequent to that of the 13 Eliz., by which the statute was repealed, set up again, and again repealed, except to mention that there was a further repeal by the Statute Law Revision Act of 1874, which repealed, amongst others, the first section of the statute 2 Vict. c. 106. The practical result of all these repeals is that the last portion of the first section of the statute 13 Eliz., namely, that which prohibits charging of benefices, remains in full force, though the earlier part has been repealed. What is really the effect of that provision in the first section of the 13 Eliz.? It prohibits “all chargings of such benefices.” Now, that must clearly be the charging of such benefices as have been before mentioned; and there you have the interpretation put upon the word “benefices”; they are “benefices, or ecclesiastical promotion with cure.” Then you have prohibited “all chargings of benefices with any pension, or with any profit out of the same.” It may be quite true that pew rents were unknown before the time to which Dr. Stephens has referred. It is true that under the Act of Parliament vicarages, or whatever they are called, are not referred to; but I have no doubt that in this case the pew rents of this particular church have become a portion of the benefice or ecclesiastical promotion within the meaning of the statute of Elizabeth, and that therefore this is a charge upon that contemplated by the Act of Parliament.

THESIGER, L.J.—I am of the same opinion. It is said that pew rents do not come within the statute of Elizabeth, because there is no permanent or durable interest in them, and they have been likened in argument to the moneys received by an officer on half-pay. This argument is founded, as it appears to me, upon a confusion between the rents themselves and the thing out of which those rents are derived. The rents, like any other rents, may be greater or less, or may cease altogether, and are dependent, no doubt, in some measure upon the exertions of a particular clergyman. But at the same time the power of obtaining them is derived from the benefice, which in itself is permanent and durable. That being so, when the pew rents in fact exist, they are a

profit derived from that benefice, and come within the meaning of the statute, where the words are "any profits out of" such benefice.

Appeal accordingly dismissed with costs.

Solicitor for the appellant, *W. J. Foster.*

Solicitors for the respondent, *Gadsden and Treherne.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Monday, March 4, 1878.

(Before, *JESSEL, M.R.*)

CHILTON v. CORPORATION OF LONDON. (a)

Profit à prendre—Right of lopwood—Crown grant to inhabitants of a parish—Action by one inhabitant—Motions on admissions in pleadings—Rules of Court 1875, Order XL, r. 11.

An action to enforce rights granted by the Crown to the inhabitants of a parish, whereby such inhabitants were created a corporation, is not maintainable by an individual inhabitant, but only by the inhabitants as a corporation.

Willingale v. Maitland (L. Rep. 3 Eq. 103) discussed.

THIS was a motion for judgment on admissions in the pleadings under Order XL, r. 11.

The material paragraphs in the statement of claim were as follows :

Par. 2. The plaintiff is the lessee for a term of ninety-nine years, commencing in the year 1868, of a certain hotel called the Robin Hood Hotel, in which the plaintiff has for some years past resided, and now resides, with a cottage and certain lands held therewith, situate in the parish of Loughton, in the county of Essex, and is also the lessee for a term of ninety-nine years, commencing in the year 1868, of another cottage and lands held therewith, adjoining the said hotel and situate in the same parish. The said hereditaments comprised in the said leases respectively are situate within the ambit of the manor of Loughton, and within the precinct of Epping Forest, and formed part of the waste of the said forest, and were inclosed from the said waste by the lord of the said manor, with the consent of the homage at the manorial court, at some time since the 21st Aug. 1857, and the said hotel, cottages, and other buildings upon the lands so inclosed were erected at some time before the 21st Aug. 1871. At the time when the said inclosure was made, such inclosures were generally believed to be lawful; but such belief was mistaken, and the hereditaments so inclosed still remain in law subject to the rights of common formerly exercised thereon.

Par. 4. There is vested in the inhabitants of the said parish of Loughton, within the ambit of the said manor of Loughton (of whom the plaintiff is one) the right from the hour of twelve o'clock at night on the 11th Nov. in every year until the same hour on the 23rd April in the succeeding year to cut or lop, under the name of lopwood, the boughs and branches of the trees growing upon the waste lands of the said forest within the ambit of the said manor, "except upon certain specified lands, "in such a way as not to destroy or unnecessarily injure the said trees, for the proper use and consumption of such inhabitants as fuel within the said manor and parish of Loughton (which said right is hereinafter called "the right of lopwood")."

The statement of claim then alleged that the defendant had recently purchased about 3000 acres of the forest waste, situate within the limits of, amongst other manors, the manor of Loughton, to hold the same as open spaces for ever, subject to such rights of common and rights of lopwood, cutting and carrying away wood, as the said lands

were subject to at the time of the purchase; and that in the course of making a pond upon part of the forest waste in the parish of Loughton so purchased by them, the defendants by their workmen and agents had lately cut down and carried away all the trees (upwards of forty in number) growing upon a part of the said waste, about two acres in extent, where the plaintiff and the other inhabitants of the said parish of Loughton were entitled to use their said right of lopwood, and had thereby disturbed and materially injured the said right of lopwood. The plaintiff claimed an injunction to restrain the defendants, their servants, agents, and workmen "from digging up, cutting down, destroying, or injuring any of the trees growing on the waste of the said forest lying within the ambit of the said manor of Loughton, so as to interfere with the said right of lopwood to which the plaintiff is entitled as *afresaid*."

The defendants, by their statement of defence, admitted the allegations in the second paragraph of the statement of claim, except that they did not know the precise extent of the plaintiff's interest in the premises therein mentioned; and they also admitted the statements in the fourth paragraph of the statement of claim, "but with the qualification that the right of lopwood therein mentioned is limited to the cutting of such of the boughs and branches of the trees subject to the said right as are above the height of seven feet from the ground; and that certain trees, locally called 'spears,' growing upon the waste lands of the said forest within the ambit of the said manor, are not subject to the said right of lopping; and, except that the corporation do not admit that the said John Chilton, as the occupier of a house built upon land which forms part of the waste of the said forest, or, otherwise, is an inhabitant of the said parish entitled to exercise the said right." They also admitted making the pond, and that in doing so a few trees, (but, as they believed, much less than forty in number) were cut down and carried away, and that such trees were growing upon a part of the waste where the inhabitants of the said parish of Loughton were entitled to use their said right of lopwood; but they denied "that the said John Chilton is an inhabitant entitled to use the said right; and they deny that they have thereby disturbed and materially, or in fact, injured the right of lopwood belonging to the said inhabitants; and they do not admit that the said trees were trees which were subject to the said right of lopwood."

Elton, for the plaintiff, asked for an injunction in the terms of the claim upon the admissions in the statement of defence, and referred to

Willingale v. Maitland, L. Rep. 3 Eq. 103.

Chitty, Q.C. and *W. R. Fisher*, for the defendants, were heard only upon the question of costs.

JESSEL, M.R.—I think you must have your costs, Mr. Chitty. A plaintiff who comes on admissions made by a defendant must have a clear case; but I can see all sorts of difficulties about the plaintiff's case, some of them so serious that I think he had better consider whether he should proceed any further with it. In the first place, the right alleged is one which I do not understand has any existence in law. It is thus stated in the fourth paragraph of the statement of claim: "There is vested in the inhabitants of the said parish of

(a) Reported by *G. WELBY KING, Esq., Barrister-at-Law.*

Loughton, within the ambit of the said manor of Loughton (of which the plaintiff is one), the right from the hour of twelve o'clock at night on the 11th Nov. in every year until the same hour on the 23rd April in the succeeding year, to cut or lop, under the name of 'lopwood,' the boughs and branches of the trees growing upon the waste lands of the said forest within the ambit of the said manor, 'except upon certain parts which are named,' in such a way as not to destroy or unnecessarily injure the said trees for the proper use and consumption of such inhabitants as fuel within the said manor and parish of Loughton (which said right is hereinafter called the 'right of lopwood')."

It has been admitted in argument, and could not be denied, that, except in a certain case of *Willingale v. Maitland* (*sup.*), to which I am about to call further attention, no such right as this is known to the law. It cannot exist by custom, and it cannot exist by grant, or so-called prescription, except by Crown grant; and therefore it is a right which cannot be supported; and if the right by itself is one which cannot be supported in law, it cannot entitle the plaintiff to judgment merely because the defendant does not deny the right. The court is bound to give judgment according to law. But then it is said that, although the right is not known to the common law, it may be created by Act of Parliament; and the judge is bound to assume, when not disputed by the pleadings, that it has been so created. The answer to that is, simply, that the judge is theoretically bound to take judicial notice of all Acts of Parliament; he is bound theoretically to know the contents of them, and to be aware that there is no such Act of Parliament. I say "theoretically," for practically the judge requires attention to be called to the particular statute and to those clauses and sections of it that bear upon the matter in hand. But he is bound to take judicial notice of all Acts of Parliament; and even on demurrer, which is the strictest form of pleading, any Act of Parliament can be taken notice of by the judge without its being pleaded on either side. I am not at liberty therefore to assume or presume that there is a public Act of Parliament conferring the right. It was then said that if there is not a public Act of Parliament, the right can exist by Crown grant, and for that proposition the case of *Willingale v. Maitland* was cited. Now as far as I am aware (and probably no one has had more to do with these cases, or has looked into more authorities upon them than myself) there is no other case to be found at all like this; and the learned counsel who has argued the case on the part of the plaintiff, and who is not only the author of a valuable work upon the subject, but has had considerable experience in these cases, and probably knows as much about the authorities as any man living, has not been able to find any authority or case bearing upon the subject, except this case of *Willingale v. Maitland*. Therefore I think I may, without presumption, say that no such case exists. Being therefore compelled to see what *Willingale v. Maitland* decided—without attempting for a moment to say that I can or that I should wish to overrule it, it being decided by my predecessor in 1866—I must see what it did decide. Now what it decided was this, that a Crown grant to the inhabitants of a parish to take certain profits *à prendre* out of a royal manor was valid, and that the effect of the grant was to incorporate

the inhabitants for the purpose of enabling them to exercise the rights. That is all *Willingale v. Maitland* decided. In the first place the case was decided on demurrer, and the bill alleged this: "That Her Majesty Queen Elizabeth, being then lady of the manor of Loughton, by her royal charter granted to the inhabitants of the parish, that the labouring or poor people inhabiting the said parish, and having families, might at all times, commencing from the hour of twelve at night on the 11th day of November in every year, cut or lop the boughs and branches above the height of seven feet from the ground on the trees growing upon the waste lands of the said manor and parish (except on certain specified portions thereof)". Now I find this stated: "That the inhabitants had, since the charter, continually exercised the right so granted." That is all fiction, because if it had been a Crown grant, it would have been found among the patent or close rolls, which are perfect from the time of Queen Elizabeth. However, it was not to be found; so, in order to get rid of the difficulty, the pleader chose to invent this fiction: "The said charter, which was formerly among the records of a forest court called the Verderer's Court, has, together with such records, been long since lost or improperly disposed of; but there were divers documents and entries in the court rolls and other records relating to the manor, referring to or containing evidence of the charter, and the right thereby granted." That being so, the Judge dealing with the demurrer was bound to take those statements as true; though, of course, he and everybody else in court knew that they were fictitious. Therefore he was dealing with a case in which an actual Crown grant by Queen Elizabeth, the owner of the royal manor of Loughton, was pleaded. Then, it being admitted that the right could not exist by custom, or by grant, or prescription in the inhabitants as individuals, the counsel for the plaintiffs argued thus: A grant by the Crown to the inhabitants of a place is valid, because the Crown having the power of creating a corporation, the inhabitants are by the grant incorporated for the purposes of the grant. That was the argument for the plaintiffs. Then there were certain old cases cited, which went very far to support that proposition. Now that argument was adopted by the court. Lord Romilly says: "A passage has been cited from Sheppard's Touchstone to the effect that a grant cannot be made to the inhabitants of a parish as such, for, although, they may be all capable of taking individually as grantees, yet they cannot take under that general designation; but that passage applies solely to grants by private individuals. Several authorities were cited by Mr. Joshua Williams"—he was the leading counsel for the plaintiffs—"to establish the proposition which I apprehend to be indisputable, that a grant by the Crown to a class of persons is good. The distinction between a grant by a private individual and a grant by the Crown is this, that as the Crown has the power to create corporations, so, if it is necessary for the purpose of establishing the validity of a grant, the grantees will be treated as a corporation *quoad* the grant, which is not the case with a grant by a private individual, because a private individual has no power of creating a corporation. The result therefore is that, according to that decision, and according to some ancient

decisions, a grant by the Crown to the inhabitants of a parish for the purpose of taking a *profit d prendre* from land belonging to the Crown, would be a valid creation of a corporation of the inhabitants of the parish. That being so, does it go any further? I admit that the court in that case did not take the objection that, if the inhabitants of the parish were a corporation, the corporation must sue. The objection does not seem to have been taken, though that is undoubted law. An individual corporator cannot sue a third person for injuring the property of the corporation. It seems that it did not occur to anyone to take that point. In the present case, if the plaintiff takes anything at all, he takes it under the doctrine of *Willingale v. Maitland*, so that he is a member of a corporation to which certain rights were granted *quod* corporation. Whether such a corporation should sue under a corporate name, or whether, they not having a corporate name, the action should be by some on behalf of all, as being the corporation, is not for me now to decide. All I can say is that the corporation must sue, and that an individual corporator cannot. Therefore, in that way, I think the present plaintiff cannot get judgment; that is, he cannot bind all the inhabitants of the parish, for it would be deciding the extent of the right in their absence, which I think cannot be done. That appears to dispose of the main point argued on the part of the plaintiff. But I cannot help seeing that there are two other difficulties, and very singular ones—although here I must say there is more temptation to the plaintiff to come into court, for I do not find the points so distinctly raised on the pleadings as I think they might have been. The second objection is this, that, although the plaintiff is an inhabitant of the parish in a sense, he is not an inhabitant of the parish in the sense of being a member of this corporation. What the defendants say in their statement of defence is: "We do not admit that the plaintiff, as the occupier of a house built upon land which forms part of the waste of the forest, or otherwise, is an inhabitant of the said parish entitled to exercise the said right." That means this: the house and land of the plaintiff were on part of the waste of the forest; the land had been inclosed by the lord of the manor, with the consent of the homage, since August 1851, and the buildings had been erected before August 1871. Then the plaintiff says: "At the time when the said inclosure was made, such inclosures were generally believed to be lawful; but such belief was mistaken, and the hereditaments so inclosed still remain in law subject to the rights of common formerly exercised thereon." Now, if that is so, if the house itself is built upon land subject to rights of common, what the defendants mean to allege, although they do not put it as plainly as might be, is this: that, inasmuch as the land upon which the plaintiff's house is erected is land itself subject to the right of common, the house is improperly and illegally erected; and that the inhabitant of a house illegally erected, and erected against the custom, is not an inhabitant within the meaning of the custom. That is perfectly intelligible, and I think raises an objection which appears to me at present a valid objection, although I do not wish finally to dispose of such a point as that. At present it seems to me that a grant to the inhabitants of a parish means the inhabitants of

houses within the parish, and must be restricted to houses lawfully erected, and does not apply to houses which are illegally erected, and which may be levelled at any moment as having been erected in defiance of the law which regulates the rights of common; and that consequently the inhabitants of such houses do not get the benefit of the grant. That, at all events, appears to me now to be a valid objection. Then there is a third objection to these pleadings, to which I do not see the answer. The plaintiff alleges a custom as to lopping the trees growing upon the waste lands, but the defendants do not admit that custom in its entirety. They admit the custom except as to certain trees, locally called "spears," as to which they say the custom does not exist. I do not see the definition of "spears" anywhere. Then the plaintiff alleges that the defendants carried away all the trees, upwards of forty in number, growing upon part of the waste, about two acres in extent, thereby injuring his right of lopwood. The defendants say they have cut down and carried away a few trees, but, as they believe, much less than forty in number; and that such trees were growing upon a part of the waste where the inhabitants of the said parish of Loughton are entitled to use their said right of lopwood. But they deny that "the said John Ohilton is an inhabitant entitled to use the said right; and they deny that they have thereby disturbed, and materially or in fact injured, the right of lopwood belonging to the said inhabitants; and they do not admit that the said trees were trees which were subject to the said right of lopwood." Now, of course, if they admitted that the custom was as to all trees, this allegation would have been inconsistent; but, inasmuch as they have only admitted the custom as to trees other than spears, and as they say the trees cut down are not within the custom, it is an implied allegation that those trees are spears, and is therefore quite consistent with their admission of the custom or right, or whatever it may be called, which the plaintiff claims. I should say that upon that ground also it is impossible to give judgment against the defendants upon these pleadings. The motion will therefore be dismissed with costs.

Solicitors: *C. J. Rawlings; Horne and Hunter.*

May 21 and 22, 1878.

(Before BACON, V.C.)

SCHOOL BOARD FOR LONDON v. FAULCONER. (a)

Transfer to a school board of a local school, and of an annuity payable to the school so long as it was not materially altered—Elementary Education Act 1870, sect. 23—Right of the school board to the annuity.

By a charity scheme settled by the Court of Chancery, it was directed that a sum of 90l. a year should be paid to the treasurer for the time being of a school association in aid of a certain school for the education of the children of the poor of every religious denomination, and that if at any time the school should not fall substantially within this description, or should become materially altered in discipline, number of children, or other circumstances, the trustees of the charity should appropriate the 90l. a year for educational purposes among other schools of

(a) Reported by H. A. BOVELL, Esq., Barrister-at-Law.

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a similar character. The school and the endowment were subsequently transferred to a school board under the 23rd section of the Elementary Education Act 1870. The trustees of the charity refused to pay the 90l. a year to the board, on the ground that the endowment was not one which could be transferred to the school board under the said section, and that the school had, by the transfer, become materially altered in circumstances.

Held, that the board was entitled to the 90l. a year, as the endowment was transferable under the said section, and the school had not become materially altered.

THIS was an action by the London School Board against the trustees of the St. Mary Newington Surrey Copyhold Charity Estates. It was brought to decide the question whether the School Board were entitled to a yearly sum of 90l., which, under the provisions of a charity scheme, had formerly been paid to the managers of a school in Flint Street, Walworth, and which the managers and trustees of the school had, under the Elementary Education Act (33 & 34 Vict. c. 75), sect. 23 (a), transferred to the School Board along with the school and school-house.

The following are the material facts:—In the year 1852 the Court of Chancery approved of a scheme, providing for the appropriation of the increased revenues of certain portions of the St. Mary Newington Surrey Copyhold Charity Estates. This scheme contained (*inter alia*) the following provisions.

Clause 4:

That the sum of 90l. a year be paid to the treasurer for the time being of the St. Mary Newington School Association, for the education of the children of the poor of every religious denomination, to be appropriated by the committee for the time being of such association, in aid of the charges and expenses attendant upon carrying on of the school in Flint-street, Walworth, or of any other school that may be established in its stead; provided no sum shall be paid to any school which shall become the property of any exclusive denomination or sect, or exclude by reason of its regulations the children of any class or denomination of persons.

Clause 10:

That if the said school shall not at any time hereafter or from time to time fall substantially within the description of school, or within the terms of the grant, or if such school shall become materially altered in discipline, number of children, or other circumstance, then the application of the 90l. a year should in the discretion of the trustees (of the charity) be in the appropriation of such trustees for educational purposes amongst other schools of a similar character in the said parish, subject to the same conditions or provisions as contained in the said 4th clause.

The 90l. a year was, after the approval of the above-mentioned scheme, duly paid to the managers of the Flint Street school. On the 2nd Sept. 1873 the trustees and managers of the Flint Street school agreed with the London School

Board to assign to them the school and school-house and the endowment of 90l. a year; and the Board agreed, in consideration of the assignment of the endowment, to give the then schoolmaster a pension during his life, and on his decease to make his wife an allowance. After this agreement the school was carried on by the School Board, and on the 4th June 1875 the assignment was duly made. The school was still undenominational, and apparently the only changes in the condition of the school of any importance were that there was a Government inspector, that girls were admitted, and that the connection of the school with its former governing body was severed. The trustees of the charity, however, refused to pay the 90l. a year to the School Board, and hence the present action was brought.

In their statement of defence the trustees insisted that the school had become materially altered in circumstances by being transferred to the School Board; that the endowment was not one which could be transferred to the Board; and that if the 90l. a year were paid to the School Board, the only effect would be the diminution of the rates, and the poor inhabitants of St. Mary, Newington, for whose benefit the charity estates were originally given, would obtain no advantages from the 90l. a year which they would not otherwise obtain.

It appeared from the evidence that the School Board had not decided how to apply the 90l. a year; but they contemplated keeping it as a special fund to provide scholarships and prizes for the pupils in the school.

Hemming, Q.C. and Bomer for the plaintiffs.—The school has not, under the provisions of the scheme, forfeited this endowment. As required by clause 4, it is still undenominational, and does not exclude the children of any class. Nor is it "materially altered in discipline, number of children, or other circumstance," for those words can only refer to alterations for the worse. The transfer of this endowment will not affect the rates, for the School Board are only bound to supplement the existing means of education; and this endowment, whether paid to the School Board or to the governing body of a school, forms part of those means. The 23rd section of the Education Act contemplates endowments being transferred when the Board take on them the burden of existing schools. The 90l. a year must be paid either to this school or to a similar school within the same parish. The defence that the 90l. a year, if paid to the Board, will not give the poor of the parish any special benefit, cannot be considered now, as it would take us behind the scheme.

Sir H. Jackson, Q.C. and Maidlow for the defendants.—This annuity was not the alienable property of the managers of the Flint Street School. They could not have assigned it to any other school in the same parish, nor can they assign it along with their own school. The 23rd section of the Education Act says that no property which is not vested in the managers of the transferred school, or in a trustee for them or the school, can be transferred to a school board. This endowment was not vested in the managers or in a trustee for them, nor are the funds from which it is derived held *simpliciter* in trust for the school. They are funds administered by the trustees at their discretion, that discretion being

(a) "An arrangement" (with a school board under this section) "may provide for the transfer or application of any endowment belonging to the school. . . . When an arrangement is made under this section, the managers (of the school) may, whether the legal interest in the endowment is vested in them, or in some person as trustee for them or the school, convey to the school board all such interest in the endowment as is vested in them, or in such trustee. . . . Nothing in this section shall authorise the managers to transfer any property which is not vested in them, or a trustee for them, or held in trust for the school."

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limited and guided by the court. The principle which prevents the application of charity funds in relief of the poor rates will apply in the case of education rates. The changes in the school are within the words, "discipline, number of children, or other circumstance." The proposed application of the 90*l.* a year to the payment of a pension or the giving of scholarships and prizes is inconsistent with the scheme, which says it is to be expended "in aid of the charges and expenses of the school."

No reply was called for.

BACON, V.C.—The scheme is the law upon the subject. I cannot go behind the scheme; I cannot doubt that the scheme was right in itself, or hesitate to say that all its provisions must by the law be recognised and carried into effect. The scheme is plainly this: [His Lordship, having read the clauses of the scheme which are set out above, continued:] The trustees' duty is to pay the 90*l.* a year for the maintenance of the Walworth School, or any other school which shall be established in its stead, provided the provisions of the scheme are complied with. There is a certain discretion vested in the trustees. The obligation may not in all cases be upon them to pay that 90*l.* a year; for, if the school shall be materially altered, or if any other circumstances should render it expedient—I am giving the largest construction to those words, "or other circumstance"—then the trustees in their discretion may apply that 90*l.* a year for other similar educational purposes, and for no other purpose, no other purpose being suggested. Then comes the Elementary School Act, the provisions of which were referred to, which are very clear and distinct, and which apply directly to this case. It is found by the managers of the school that it would be expedient that the Walworth School should be transferred to the management of the Government board, the Elementary School Board, and accordingly the requisitions of the 23rd section of the Act are duly and punctually complied with. The conveyance is made, and the managers, as far as they have any legal power to do so, assign and transfer the 90*l.* a year for the purposes of that school. Then the Act of Parliament, the clauses of which have been read, contains this provision: [His Lordship read the clause of the 23rd section of the Act beginning, "When an arrangement is made," and then continued:] No words could be suggested more clearly and explicitly, or more directly covering this particular case before me, for the 90*l.* a year is vested in the trustees in trust for the school, payable by them to the managers of the school, and the managers have power to transfer that interest, that 90*l.* a year which they are bound to receive, to the School Board. The Act of Parliament is literally in every respect complied with. Sir Charles Reed, having been asked some questions in the box yesterday, said that it was the intention of the School Board to keep the 90*l.* as a distinct fund, but (among other suggestions which were made) to apply it in giving prizes or encouragement to the pupils in the school; and Mr. Maidlow has argued thereupon that that is a clear proof, which the court ought to adopt, that it is the intention of the School Board to misapply this fund, to make the school one for middle-class education, where in point of fact it is meant for elementary education. I cannot attend to that

argument in the slightest degree. If the 90*l.* a year had been paid, without any School Board Act existing at all, to the managers of the school, who can doubt that it would be within their power and discretion, in carrying on this school, to apply the 90*l.* a year, or such part of it, as they thought fit, to any lawful proper purpose connected with the management of the school, it being always an elementary school; for that fact has been plainly proved, and this school, as in all other respects so also for public purposes of education, is exactly the same as that school which existed before the Elementary Education Act was passed. I cannot find any reason why the plain words of this Act of Parliament should not be carried into effect, why that 90*l.* a year, which is to be paid to the Walworth School for the purposes of education, should not be paid to the persons upon whom the task of conducting that general education is now imposed, instead of the individuals who formed the managing board. There is no reason in the world to doubt that the matter has been carried out in the manner prescribed by the general statute, the policy and expediency of which it is not for anybody to question, and being satisfied, as I am, by the law, and by the force of the Act of Parliament especially, that the managers who have the right to have the 90*l.* a year, are now the School Board, I cannot hesitate to make a declaration to that effect, and to order the payment of the 90*l.* a year by these trustees to those persons who by law are entitled to receive them.

Solicitors, Gedge, Kirby, and Millett; John Clutton.

QUEEN'S BENCH DIVISION.

Feb. 21 and May 13, 1878.

(Before COCKBURN, C.J. and MANISTY, J.)

STALLARD AND OTHERS (apps.) v. MARKS (resp.) (a)

Excise licence—Wine and spirits—Orders taken at unlicensed premises—Bond fide traveller—6 Geo. 4, c. 81, s. 10; 30 & 31 Vict. c. 90, s. 17.

The appellants carried on business under proper licences as wine and spirit merchants at Worcester, and were also duly licensed with another partner to deal in beer at Cheltenham. A person who was formerly the appellants' traveller rented in his own name the rooms which were entered at Cheltenham by the appellants as their premises for storing and dealing in beer, and he was resouped by the appellants for the rent. The appellants' name and description, as wine and spirit merchants at Worcester, appeared upon the window blinds and inside the rooms; and orders were received there for wines and spirits, which were transmitted to and carried out by the appellants at Worcester. No wines nor spirits were ever kept upon the Cheltenham premises, and the appellants had no licence to deal in wines or spirits there.

The appellants were convicted under 6 Geo. 4, c. 81, s. 10, of retailing spirits at Cheltenham without a licence, and under 30 & 31 Vict. c. 90, s. 17, of selling wine without a licence at the same place.

Held, upon a case stated, that this was not the case of a bond fide traveller taking orders for goods which his employer is duly licensed to deal in or sell, within the proviso to the 17th section of the

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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latter Act; and that the appellants were rightly convicted.

THIS was a case stated by three of Her Majesty's justices of the peace for the Cheltenham division of the county of Gloucester, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the High Court of Justice on a question of law which arose before them as hereinafter stated:—

1. At a petty sessions held at Cheltenham on the 15th March 1877, an information which had been laid by William Henry Marks one of Her Majesty's officers of excise (hereinafter called the respondent), against Josiah Stallard, William Stallard, and Josiah Valentine Stallard (hereinafter called the appellants), setting forth that the appellants then and there being persons retailing the goods and commodities, to wit, spirits, thereinafter mentioned, for the retailing of which goods and commodities a licence was then and there required by the statute in that case made and provided, and being retailers of spirits (but not being retailers of spirits in Ireland), between the 1st and 5th Jan. last, at Cheltenham aforesaid, did retail certain spirits, to wit, one gallon of whisky, without taking out such licence as in that behalf was and is required by the statute in that case made and provided; and further that the appellants, after the passing of a certain Act of Parliament in the year 1860 intituled "An Act for granting to Her Majesty certain duties on wine licences and refreshment houses, and for regulating the licensing of refreshment houses and the granting of wine licences," between the 1st and 5th Jan. last at Cheltenham aforesaid, did sell certain wines by retail, to wit, three quarts of sherry and three quarts of port, without having a proper licence in force authorising them in that behalf, contrary to the form of the said Act, was heard and determined by the justices, and upon such hearing the said justices convicted the appellants in the mitigated penalties of 12l. 10s. for retailing the spirits, and 5l. for retailing the wines without having taken out the requisite licences. And the appellants, being dissatisfied with this determination, as being erroneous in point of law, applied to the said justices within three days to state a case for the opinion of the High Court of Justice, and the justices granted their application.

2. Upon the hearing of the information the following facts were either proved or admitted by both parties.

3. The appellants have been in business as wine and spirit merchants for a great number of years, and at the times alleged in the information held at Worcester all the licences the law required for dealing in and retailing spirits and wines, but did not hold at Cheltenham licences to retail spirits or wines; though they, with their copartner in the beer trade, Richard Stallard, held a licence for dealing in beer at Cheltenham, and kept a stock of beer there.

4. In accordance with directions of the supervisor of Excise of the Cheltenham district (Gerald Fitzgibbon), an officer of the Inland Revenue, on the 2nd Jan. last, visited an office No. 54A, in Winchcomb-street, Cheltenham, and observed upon the premises a board set up with these words printed upon it: "Josiah Stallard and Sons, Distillers, Wine Merchants and Brewers, Worcester, Established 1808, Wine Merchants to the Queen." Upon the window blind were printed also these

words: "Established 1808, Stallard and Sons, Distillers, Wine Merchants and Brewers, Worcester." Mr. Fitzgibbon ordered of Mr. Dredge (whom he saw in the office, and whom he described in his examination as clerk or traveller) one gallon of whisky, three bottles of port, and three bottles of sherry, for which he paid him 33s., and took his receipt. Mr. Dredge stated that the goods would be supplied from Worcester, and having taken Mr. Fitzgibbon's name and address sent the order in due course to the appellants' place of business at Worcester.

5. In a day or two afterwards a jar containing the gallon of whisky and a case containing the three bottles of port and three bottles of sherry, were sent by railway from Worcester to Mr. Fitzgibbon's address in Cheltenham, and on the day the goods were forwarded from Worcester an invoice made out in the appellants' names was also sent him by post from Worcester.

6. Mr. Dredge stated in his evidence that he resided at Cotswold-terrace, in Cheltenham, and was a traveller in the employ of the appellants, and worked the Cheltenham district, and that his sole employment was to receive orders for the appellants to be executed at Worcester; that at first he used to drive about for orders, and has never given up doing so, but in September last year, for convenience, he took in his own name, as yearly tenant, two rooms, being the office before adverted to, No. 54A, in Winchcomb-street, and the beer store adjoining, for which he has since paid the rent, and the receipts are made out in his name, but he is reimbursed in the shape of expenses; that no stock of wine or spirits has at any time been kept upon the premises, but the appellants, with their copartner in the beer trade, Richard Stallard, hold an excise lice for storing or keeping beer there.

7. On the 16th of last Nov. the appellants and the said Richard Stallard, in the Excise official paper they signed, making entry of these premises for the purpose of storing and keeping beer for dealing, described themselves as of No. 54A, Winchcomb-street, Cheltenham, and being dealers in beer; and the said premises so entered by the appellants and the said Richard Stallard for storing beer there, were the same premises in which the said order for wines and spirits was taken, and were held under one and the same agreement at one gross rent for the whole, which rent was paid by Mr. Dredge, and repaid to him as expenses.

8. The appellants contended that the premises, 54A, in Winchcomb-street, were rented by Mr. Dredge on his own account as a convenient place to take orders, and were not used for retailing spirits or wines, and that no spirits or wines ever were stored or kept in them, and that, although he is reconped the rent and any other payments he may make, the reimbursement is in the nature of expenses which he is entitled to receive in addition to his commission, and does not make the premises the appellants'; that Mr. Dredge was the *bonâ fide* traveller of the appellants in the Cheltenham district, as he carried on his business as such in these stationary premises, as well as by calling at places to obtain orders; that the transaction with Mr. Dredge was an order for the spirits and wines, which he did not execute, but sent to Worcester to be executed there by the appellants, and that the goods were sent direct from Wor-

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cester to the purchaser; that the appellants do not carry on their spirits or wine businesses in any other place than Worcester, and have not retailed any spirits or wines in Cheltenham.

9. The respondent contended that the premises, No. 54A, Winchoomb-street, were premises occupied and used by the appellants for retailing wines and spirits, that the sale of the whisky, and sherry and port wines there by Mr. Dredge to Mr. Fitzgibbon was perfect and complete, and amounted in law to a retailing of these spirits and wines by the appellants.

The question for the opinion of this court was whether, upon the facts above stated, the justice were right in convicting the appellants.

Feb. 21.—*Forbes* argued for the appellants, and *C. Bowen* for the respondent.

The arguments and the enactments relating thereto sufficiently appear in the considered judgment of the court.

Our. adv. vult.

May 13.—*MANISTY, J.* delivered the judgment of *COCKBURN, C.J.* and himself.—This was an appeal against a conviction of the appellants for retailing spirits in Cheltenham without having a retail dealer's excise licence. The appellants carried on business as wine and spirit merchants in Worcester, and held all the licences the law required for dealing and retailing spirits and wines there; but they did not hold a licence to retail spirits at Cheltenham, though they with their copartner in the beer trade (*Richard Stallard*) held a licence for dealing in beer at Cheltenham, and kept a stock of beer there. The justices convicted the appellants for retailing spirits in Cheltenham without having taken out the proper excise licence, and the question is, whether upon the facts proved before them they were right in so doing. The case was argued before the Lord Chief Justice and myself on the 21st Feb. last, and we took time to look into the Acts of Parliament to which our attention was called; and having done so, we are of opinion that the conviction was right. By sect. 2 of 6 Geo. 4, c. 81, every retailer of spirits in England is required to take out an excise licence. By sect. 10 of that Act it is enacted that "no one licence taken out under or by authority of this Act by any person or persons except auctioneers and maltsters shall authorise or empower such person or persons to exercise or carry on the trade or business mentioned in such licence in more than one separate and distinct set of premises, such premises being all adjoining or contiguous to each other, and situate in one place and held together for the same trade or business, and of which he, she, or they shall have made lawful entry to exercise or carry on therein his, her, or their trade or business as aforesaid at the time of granting such licence, but that a separate and distinct licence shall be taken out by all and every such person or persons as aforesaid, except as aforesaid to exercise or carry on his, her, or their trade or business as aforesaid, at or in any other or different premises than as before mentioned." By the 17th section of the 30 & 31 Vict. c. 90, it is enacted: "If any person shall solicit, take, or receive any order for spirits, wine, or other article, for the dealing in, retailing, or selling whereof an excise licence is by law required, without having in force a proper excise licence authorising him so to do, he shall forfeit the penalty imposed by law

upon a person dealing in, retailing, or selling such article without having an excise licence in force authorising him so to do; and in any case in which the place of business or residence of the offender shall not be known to the officer of excise who shall exhibit any information for the recovery of such penalty as aforesaid, or if known shall be out of the United Kingdom, it shall be sufficient service of the notice and summons required to be given to a defendant by any law of excise if the same be left at the house or place where the offender shall have solicited, taken, or received any such order as aforesaid, addressed to such offender: provided always, that nothing herein contained shall be deemed to apply to the sale of any spirits or foreign wine, while the same shall be and remain in the warehouse or warehouses in which the same shall have been deposited, lodged, or secured according to the law, before payment of duty upon the importation thereof, where such spirits or foreign wine shall be sold in a quantity not less than 100 gallons at one time; or to impose a penalty upon a *bond fide* traveller taking orders for goods which his employer is duly licensed to deal in or sell." The information in the present case was laid for retailing spirits in Cheltenham without a licence contrary to the provisions of 6 Geo. 4, c. 81, and not for taking an order for spirits contrary to the provisions of 30 & 31 Vict. c. 90, but this latter statute was relied upon on behalf of the appellants, and it was contended that they did not carry on the business of retail dealers in spirits at 54A, Winchoomb-street, Cheltenham, that the transaction in question was simply a taking of an order for spirits by a Mr. Dredge as their *bond fide* traveller in the Cheltenham district; and that the order was executed by the appellants at Worcester. If that contention were well founded, the appellants incurred no penalty, but we think it is not. The facts are stated at length in paragraphs 4, 5, 6, and 7 of the case, but may be shortly stated thus:—Premises known as 54A, Winchoomb-street, Cheltenham, were let to Mr. Dredge, who was a traveller in the employment of the appellants, and took orders for them in a district called the Cheltenham district. These premises were occupied by him for the use of the appellants. They recouped him the rent which he paid to the landlord. They entered the premises as their own for the purpose of storing and keeping of beer (see par. 6 of case); they took out a licence for the purpose of carrying on there the business of dealers in beer; they printed their name and description upon the premises. Mr. Dredge, acting for the appellants, took orders for spirits at 54A, Winchoomb-street, Cheltenham, and transmitted the orders to Worcester, and the appellants executed them by sending the spirits from Worcester. In other words, the appellants by their agent Dredge sold spirits by retail at 54A, Winchoomb-street, Cheltenham. We are of opinion that upon these facts the justices were justified in convicting the appellants. We think that, if a person takes a house or part of a house either in his own name or the name of any other person, and there either personally or by his agent makes sales of spirits by retail, he carries on business there as a retailer of spirits, notwithstanding he keeps no spirits there, and the spirits which he sells there are (as in the present case) kept in and delivered from a store in another town where he has a store and carries on the business

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of a wine and spirit merchant. Judgment must be given for the respondent, and the appeal is dismissed with costs.

Solicitors for appellants, *White and Sons*.

Solicitor for respondent, *Solicitor to the Inland Revenue*.

Wednesday, May 22, 1878.

(Before COCKBURN, C. J. and MELLOR J.)

POWELL (app.) v. KNIGHT (resp.) (a)

Cruelty to animals—Lawfully shooting a dog—Leaving it to die in pain—No offence—12 & 13 Vict. c. 92, s. 2.

The appellant had been convicted by a stipendiary magistrate under sect. 2 of 12 & 13 Vict. c. 92, of ill-treating and torturing, and causing to be cruelly ill-treated and tortured, a dog.

The appellant had shot, with a bullet from a pistol, through the eye a neighbour's dog, which was trespassing in his garden, and the magistrate assumed for the purposes of this case that the shooting the dog was lawful. The appellant immediately gave notice of what he had done to the owner of the dog and to a policeman, and dragged the dog into the road. When in the road he found for the first time that the dog was not dead, but was in pain; he however left it in the road, and, although desired to do so by the policeman, refused to cause it to be killed. It died some hours afterwards in great pain, and the defendant knew when he left it that it could not survive its wound, and that death only could put an end to its pain.

Held, upon a case stated, that the appellant had not been guilty of any offence within the Act; and that the conviction was wrong.

This was a case stated by a metropolitan police magistrate, in pursuance of 20 & 21 Vict. c. 43.

At a petty sessions held at the police court, Wandsworth, in the county of Surrey, and within the metropolitan police district, on the 15th March 1878, one Edward J. Powell, the above-named defendant, was charged upon a certain information or complaint made by Edmund Knight, an officer of the Society for the Prevention of Cruelty to Animals, "for that the defendant did ill-treat and torture, and cause to be cruelly ill-treated and tortured, a dog, contrary to the provisions of 12 & 13 Vict. c. 92."

At the hearing of the said information it was proved that the defendant, about nine o'clock in the evening on the day of 1878, found in his garden a large retriever dog, the property of Fitzgerald O'Brien, who lives at No. 58, Garden-road, Clapham, within three doors of the defendant, who lives at No. 64 in the same road, and the defendant then shot the dog with a pistol. The owner of the dog had at the time of the hearing of the information commenced an action against the defendant for the value of the dog. Whether the defendant had or had not a right under the circumstances to shoot the dog was raised, but was not determined, as the magistrate convicted the defendant for conduct subsequent to the shooting hereinafter set forth; and it is to be assumed for the purposes of the case that the shooting the dog was lawful.

The dog was shot by a bullet through the eye, and on being shot fell on the ground at the

defendant's kitchen door, which was some yards distant from the road.

The defendant, after shooting the dog, went immediately to the house of the owner of the dog and told him that he thought he had shot his dog; the defendant and the owner then went to where the dog was, and both thought the dog was dead.

The defendant then sent for a policeman, and on his arrival took the dog by the collar to drag him into the road; the dog appeared to be dead, and the defendant believed that it was dead; but as the defendant was dragging it into the road the dog showed signs of life; after dragging the dog into the road, which he did in the presence of the owner of the dog, the dog gave evident signs of life, and the defendant then became aware that the dog was alive and in pain; the defendant then left the dog in the road, saying to the owner of it, "I do not think it is dead, if you like to look after it." The owner of the dog replied, "You shot it, you must see to it," or words to that effect; the defendant went indoors.

About an hour afterwards, that is, between ten and eleven, another constable found the dog in the road still alive, and went and knocked at the defendant's door and called his attention to the fact that the dog was still alive. The defendant refused to come out, and did not kill the dog or cause it to be killed. The injury to the dog was such that it would sooner or later have caused death, and would, until death ensued from it, cause great pain, and the only mode to stop the pain was to kill the dog; and the defendant knew the extent and nature of the injury when he left the dog in the road.

The dog remained lying in the road until about three o'clock in the morning, when it was found in the same place in the road by another policeman in great agony, shown by its howling and bodily movements, and the policeman then killed it. The howling had then been going on for some time in the road nearly opposite the defendant's house.

It was contended on behalf of the defendant, that as the magistrate assumed for the purpose of this case that the original shooting of the dog was lawful, the not killing the dog afterwards, or seeing that it was killed, was merely an act of omission, and was not an offence within the statute.

The magistrate thought that, as the wound from which the dog suffered was caused by the defendant, the torture caused by that wound, when it was allowed to continue, continued as an act of the defendant, and was evidence of an offence within the statute; and if there was evidence, he thought the offence had been committed.

He accordingly convicted the defendant, and fined him 5*l.* and 2*s.* costs.

The question for the opinion of the court is whether the conviction was legal.

If the court should be of opinion in the affirmative, the conviction was to stand; if in the negative, the conviction was to be quashed.

Grantham, Q.C. (with him *Boddam*) appeared for the appellant, but in the course of his argument was stopped by the Court.

Tennant (with him *Morton Smith*) argued for the respondent.—This is not the case of a mere omission to slaughter an animal known to be in great pain and incurable, like *Everitt v. Davies* (26 W. R.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

332); there a mare with a swollen hoof was allowed by the owner to remain alive in a field, although he was told that the animal was incurable, and in pain. Kelly, C.B.; whilst holding that proceeding of itself to be no offence, said: "I think, however, under all the circumstances of the case, that the real question which the magistrates ought to have considered is this, whether the owner, by turning the mare into a field where she could only feed by moving about and suffering intense torture, did not cause and procure her to be tortured within the meaning of the Act." An exactly similar question of fact has here been determined by the magistrate against the appellant, and it may be accurately said, upon these facts, that he caused or procured this dog to be tortured.

COCKBURN, C.J.—I think that to justify a conviction under this statute the torture of the animal must have been caused intentionally. Here it is to be taken upon the magistrate's finding that the dog was shot justifiably. The defendant thought he had killed the dog, and dragged it into the road merely for the purpose of removing the dead body off his premises. It was when the dog was in the road the defendant found that it was not dead; any man of common humanity, and not made of the hardest materials, would then have immediately put an end to the animal. Passively it was inhuman cruelty to do otherwise; but passive cruelty of that kind is not, in my opinion, an offence provided for by the statute. There was no intentional infliction of pain after firing the shot which is to be taken as lawful. However much we may desire to punish such an act, as the statute does not provide for it, we cannot assume the functions of the Legislature. I do not see why such an act of passive cruelty should not be made an offence punishable in the same way as active torture, but that can be done only by the Legislature.

MELLOR, J.—The shooting not being unlawful, the act of torture is not in this case anything done by the defendant. The words of the 2nd section touch only a person who actually tortures an animal or causes or procures it to be tortured. The appellant's only act which in any way caused the torture in this case is expressly found to have been legal.

Judgment for appellant.

Solicitors for the appellant, *Freeman and Bothamley*.

Solicitor for respondent, *A. Leslie*.

Friday, May 24, 1878.

(Before COCKBURN, C.J. and MELLOR, J.)

NUTTER v. ACCRINGTON LOCAL BOARD. (a)

Local board—Power to raise level of turnpike road

—Liability for compensation by arbitration—Maintenance of footway only—11 & 12 Vict. c. 63, ss. 68, 144—21 & 22 Vict. c. 98, s. 41.

The defendants, by agreement with the trustees of a turnpike road which they were liable to repair, resolved to take upon themselves the maintenance and repairs of the footway only of this road; the defendants afterwards raised the level of this footway and thereby caused damage to the plaintiff, whose house and land were adjacent.

The plaintiff took proceedings to obtain compensation for this damage under sect. 144 of the

Public Health Act 1848, and was awarded a substantial amount and costs.

Held, in an action upon the award, that sect. 41 of the Local Government Act 1858 does not empower a local board to take upon themselves the repair or alteration of a longitudinal section of a turnpike road; and that no damage done by a local board in repairing a turnpike road under that section can be compensated by arbitration under the Public Health Act 1848.

THE following case was stated by an arbitrator for the opinion of the court in an action upon an award:—

1. The plaintiff was in Sept. 1864, and is now, the owner of a house and land in the town of Accrington, adjacent to a certain road called the Whalley-road.

2. The defendants became in 1857 the local board of health, and are the urban sanitary authority for the town and district of Accrington under the provisions of the Public Health Act 1848 and the other Acts therewith incorporated.

3. The house and land of the plaintiff, and that part of the Whalley-road adjacent thereto, are within the district of the said local board.

4. By Act of Parliament of the twenty-ninth year of George III. a turnpike trust was established which included the Whalley-road, part of which was within and some part without the district of the Accrington Local Board; and such trust expired in 1874, up to which time toll-gates were maintained, and tolls taken at various parts of the road.

5. There has always, for fifty years at least, been a footway immediately adjacent to the plaintiff's premises, and previous to the establishment of the local board the turnpike trustees had maintained, and from time to time repaired, the footway and the carriage way, both within and without the local board district, with the exception of the pavement within the local board district. The carriage way adjacent to plaintiff's property had not been paved at the time the footway was raised as hereinafter set forth.

6. After the establishment of a local board, and previous to the year 1871, by agreement between the local board and the turnpike trustees, the local board sometimes provided curbstones for the footpath of such part of the Whalley-road as was within their district, and the trustees put them in; and the trustees did everything that was done for the maintenance and repair of the carriage way.

7. In the year 1864 the trustees communicated to the defendants their intention of erecting a toll-bar in another turnpike road in the township of Accrington subject to the same trust; and afterwards in Feb. 1865 the defendants, in order to induce the trustees not to erect such toll-bar, passed the following resolution, which was in due course communicated to the trustees and accepted by them:

Resolved that the proposal made to a deputation from this board by the trustees of the turnpike road at their meeting of Sept. 15th last to the following effect, "That the local board should take upon themselves the future repair of such parts of the turnpike road within their district as are already or may be hereafter pitched with stone, and all such parts of the footpath as are already or may hereafter be flagged at least a yard in width, and that other parts of the road and footpaths shall continue to be repaired by the trust," be accepted by this board.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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8. That part of the footpath immediately adjoining the plaintiff's land was flagged more than a yard in width previous to 1864.

9. Previous to 1871 a further agreement had been entered into between the local board and the trustees, whereby, among other things, the trustees undertook to raise the level of the carriage way at a part of the road immediately opposite the house and land of the plaintiff; and the defendants on their part undertook to raise the footpath to a corresponding height.

10. In or about the month of May 1871, in execution of the last-mentioned agreement, the trustees raised the level of the carriage way opposite to the plaintiff's house and land; and the defendants raised the footpath to a corresponding height.

11. The plaintiff sustained damage within the meaning of sect. 144 of the Public Health Act 1848, by the raising of the footway by the defendants, and such damage was the necessary and direct result of the raising of the footpath, and not of any negligence of the defendants in the execution of the work.

12. In Oct. 1874 proceedings against the defendants were commenced by the plaintiff to obtain compensation under the provisions of the Public Health Act 1848, and, after all due preliminaries required by the Act were performed, were carried on *ex parte* by the plaintiff, and on the 19th Jan. 1875 an award was published whereby the defendants were ordered to pay to plaintiff 112*l.* compensation for the damage she had sustained, and a further sum of 111*l.* 5*s.* 8*d.* taxed costs.

13. The said award was in all respects a good and valid award, provided that the damage sustained by the plaintiff was a proper subject for arbitration and compensation within the meaning of the Public Health Act 1848, and the other Acts therewith incorporated.

14. Neither of the sums of 112*l.* and 111*l.* 5*s.* 8*d.* have been paid by the defendants to the plaintiff.

15. That part of the Whalley-road which is adjacent to plaintiff's house and land was at the time the footpath was raised as herein mentioned, and is, "a street," unless the court find (1) that: was a turnpike road; and (2) rule as a matter of law that a turnpike road is excepted from the definition of street within the true intent and meaning of the Public Health Act 1848 and other Acts incorporated therewith.

The questions for the opinion of the court are: (1) Whether the claim of the plaintiff was a claim within the true intent and meaning of the Public Health Act 1848, and other Acts incorporated therewith. And (2) whether the arbitrator had authority to make such award, and whether the said award is good and binding upon the defendants.

The court to direct for whom judgment is to be entered with the costs of the cause and special case, unless upon application made on the hearing for good cause shown the court shall otherwise order.

Forbes argued for the plaintiff.—By sect. 41 of the Local Government Act 1858 (21 & 22 Vict. c. 98), "It shall be lawful for any local board, by agreement with the trustees of any turnpike road, or with any corporation or person liable to repair any street or road or any part thereof, . . . to take upon themselves the maintenance, repair, and cleansing, or watering of any such street, or any part thereof . . . or of any part of the said roads within their district, . . . on such terms as the local board and the trustees or corporation or person or surveyor aforesaid may agree upon between themselves." By sect. 4, "This Act shall be construed together with and be deemed to form part of the Public Health Act 1848, . . . and the provisions of each of the said Acts shall, so far as may be consistent with the provisions of this Act, respectively, be applicable to all matters and things arising under the other Act." And by sect. 144 of the said Public Health Act 1848 (11 & 12 Vict. c. 63) it is enacted that "full compensation shall be made out of the general or special district rates to be levied under this Act to all persons sustaining any damage by reason of the exercise of any of the powers of this Act; and in case of dispute as to amount the same shall be settled by arbitration in the manner provided by this Act." The defendants, under the 41st section of the Act of 1858, took upon themselves the maintenance and repair of part of this road; and in raising the level of the footway, which may be included in the repair which they undertook, the defendants caused damage to the plaintiff by reason of the exercise of the powers of an Act which is to form part of the Act of 1848. Express power is given to local boards, by sect. 68 of the Act of 1848, to cause the soil of any street, being or which at any time becomes a highway to be raised, lowered, or altered as they may think fit; whether houses form a street or not was decided by *Reg. v. Fullford* (33 L. J. 122, M. C.), to be a question of fact, and the arbitrator has here found that this part of Whalley-road is a street.

Crompton for the defendants.—The plaintiff's proper remedy for this damage would have been by action, to which the defendants might have pleaded any justification which they could have derived from the authority of the turnpike trustees which was transferred to them:

Mill v. Hawker, L. Rep. 10 Ex. 92.

There is no provision by which damage can be recovered by arbitration for this injury. Sect. 68 of the Act of 1848 does not apply to longitudinal sections of a street, nor does it apply to turnpikes. And sect. 41 of the Act of 1858, which applies to turnpikes, gives no power to raise the level of any part of them. If it had been intended to give a board the same powers with respect to turnpikes as they had with respect to streets by sect. 68 of the Act of 1848, it would have been easy to state as much in sect. 41 of the Act of 1858. The case of *Southampton and Itchin Bridge Company v. Local Board of Southampton* (8 H. & B. 801) is an authority that an action is the proper remedy for a wrong which is not the subject of compensation under sect. 144 of the Public Health Act 1848.

Forbes in reply.

(Cockburn, C.J.)—I consider this a shabby defence, but our judgment can only be for the defendants. I seriously doubt whether the 41st section of the Act of 1858 has any application to repairs of a longitudinal section of a road; without that, the defendants had no power to make the agreement contained in their resolution of Feb. 1865. A local board may by that section take upon themselves the maintenance or repair of any

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street or road or any part thereof; but the words themselves and the subsequent provisions concerning mortgages of the tolls contain nothing pointing to a division of a length of road for the purposes of repair, so that the responsibility for a transverse section should be on more than one body. I base my judgment, however, chiefly on the other ground of objection by the defendants, viz., that this is not damage under sect. 144 of the Act of 1848, by reason of the exercise of any of the powers of that Act. The part of the Act which deals with the management of streets begins at the 68th section, which enacts "That all present and future streets being, or which at any time become highways within any district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, shall vest and be under the management and control of the said local board of health. And the said local board of health shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered and repaired, as and when occasion may require. And they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and place and keep in repair fences and posts for the safety of foot passengers." This section refers only to streets which are highways, and not at all to turnpike roads; there is no section of that Act which treats at all of such roads. By the Act of 1858, however, for the first time a board may agree with turnpike trustees to repair or maintain turnpike roads; the powers and liabilities which the board may undertake are only those of the trustees who transfer them; and even if the words "maintenance and repair" include alteration of level, there is no provision for compensation by arbitration for any damage caused by the board in dealing with such turnpikes. The only remedy which the plaintiff could have had against the turnpike trustees for the damage he has suffered, before the defendants undertook the repair of this road, must have been, if any remedy existed, by action. It is not necessary to decide whether there was such a remedy; clearly there was none by arbitration, nor can there be any by that means against the defendants now. I much regret that the plaintiff has been put to this useless expense, but I think he cannot possibly recover the compensation to which he is thus found to be entitled.

MELLOR, J.—I am of the same opinion on both points, but my view of the first objection is much stronger than that of my Lord. It might be convenient to divide a road transversely into parts for the purposes of repair, but I cannot think that the 41st section of the Act of 1858 was ever intended to distribute longitudinal sections of a road between different repairing bodies. Such a proceeding would introduce a double jurisdiction in the same area, and could not have been contemplated by the Legislature. I think, therefore, that it was not in the power of the defendants to make the agreement contained in their resolution, and any damage resulting to the plaintiff in carrying it out was not by reason of the exercise of any of the powers of either of the Acts of 1848 or 1858.

Judgment for defendants.

Solicitors for the plaintiff, *Ridale, Oraddock, and Ridale*, for *Robinson and Sons*, Blackburn.

Solicitors for defendants, *Johnson and Weatherall*.

Saturday, June 1, 1878.

(Before COCKBURN, C.J. and MELLOR, J.)

ROBINSON (app.) v. STEVENITT (resp.) (a)

Highway—Liability of surveyor—Conviction for neglecting to repair—Evidence without view—5 & 6 Will. 4, c. 50, ss. 20 & 94.

By sect. 20 of the Highway Act 1835, if a surveyor shall neglect his duty in anything required of him by that Act, for which no particular penalty is imposed, he shall forfeit for every such offence any sum not exceeding 5l.

By sect. 94, if any highway is out of repair, justices may order a view, and if satisfied thereof upon the view, may convict the surveyor who is liable for the repair in any penalty not exceeding 5l., and shall make an order appointing a time for the necessary repair.

Justices convicted the appellant, a surveyor, under sect. 20, upon evidence in the ordinary way, of neglecting his duty by neglecting to repair a footpath for which he was liable.

Held, upon a case stated, that the justices could convict for non-repair only upon adopting the course provided by sect. 94; and that this conviction was therefore bad.

This was a case stated by two of Her Majesty's justices in and for the parts of Kesteven, in the county of Lincoln, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on the questions of law which arose before them as hereinafter stated.

1. On the 10th Dec. 1877 an information was preferred by Thomas Stevenitt (hereinafter called the respondent) against John Robinson (hereinafter called the appellant), under sect. 20 of the Highways Act (5 & 6 Will. 4, c. 50), charging for that he, the said appellant, on the 3rd Dec. 1877, at the parish of Caythorpe, in the said parts and county, then being the surveyor of the highways for the said parish, unlawfully did neglect his duty as such surveyor by then and there neglecting to repair a certain footpath in the town street of Caythorpe, leading from Caythorpe towards Newark, as he was required to do by the Act of the 5 & 6 Will. 4, c. 50, contrary to the same statute. The information came on for hearing before four of Her Majesty's justices of the peace, acting in special sessions in and for the division of Sleaford, in the said parts, on the 17th Dec. 1877, and was adjourned at the request of the appellant's solicitor. At this hearing no question was raised by or on behalf of the appellant as to the jurisdiction of the justices to hear and determine the case under sect. 20 of the Highway Act (5 & 6 Will. 4, c. 50).

2. At the special sessions, holden at the place before mentioned on the 7th Jan. 1878, the said information again came on for hearing before three of Her Majesty's justices of the peace acting in and for the said division.

3. Before the hearing of the case on the last-named day, the appellant's solicitor raised an objection to the jurisdiction of the justices, on the ground that the information ought not to have been preferred under sect. 20 of the Highway Act, and that proceedings ought to have been taken

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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under sect. 94 of the same Act, and could not be taken under any other section than the latter. The justices overruled this objection, and proceeded to hear the case, when it was proved that the footpath in question had been wholly picked up for the purpose of making a new and better path in the month of September last, and was left in a rough state covered with broken stones, and unfit for use as a public footpath, from that time up to 3rd Dec. last, the day named in the information, and therefore they convicted the appellant and fined him 1s. with costs. On the part of the appellant it was contended that he was not able to procure gravel to form the surface of the footpath before the day named in the information; but this was not proved to the satisfaction of the justices, who were of opinion that due diligence had not been used in reinstating the footpath in question.

4. The appellant being dissatisfied with the determination upon the hearing of the said information as being erroneous in point of law, duly applied to the said justices to state and sign a case setting forth the facts and grounds of such determination as aforesaid for the opinion of this court, and duly entered into a recognisance as required by the said statute in that behalf. And the said justices, in compliance with the said application and the provisions of the said statute, stated this case.

5. The questions of law arising on the above statement for the opinion of this court are, whether the justices had jurisdiction to hear and determine the information, and convict the appellant under sect. 20 of the Highway Act (5 & 6 Will. 4, c. 50), or whether they ought to have followed the course prescribed by sect. 94 of the same Act, previously to hearing the case, and before they had jurisdiction to convict the appellant.

6. If the court should be of opinion that the said conviction was legally and properly made, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said conviction is to be quashed, or the court is to make such other order as to the court may seem fit.

Evans argued for the appellant.—No doubt sect. 20 of the Highway Act 1835 (5 & 6 Will. 4, c. 50) provides a penalty for certain offences created by the Act, but it does not give an alternative mode of conviction for non-repair to that which is particularly enacted in sect. 94. By sect. 20 it appears "that if any surveyor or district surveyor, or assistant surveyor, shall neglect his duty in anything required of him by this Act, for which no particular penalty is imposed, he shall forfeit for every such offence any sum not exceeding 5l." This applies to the offence of neglecting to impound cattle under sect. 74; and probably, if the conviction be properly worded, to an offence under sect. 73; although a conviction purporting to be under sects. 20 and 73 was held bad in *Morgan v. Leach* (10 M. & W. 558). By sect. 94, if any highway is out of repair, and information is duly given thereof, a justice may summon the surveyor of the parish chargeable with such repairs to appear before justices at special sessions; "and the said justices shall either appoint some competent person to view the same and report thereon to the justices in special sessions assembled, on a certain day and place to be then and there fixed, at which the said surveyor of the highways or other party as aforesaid shall be directed to attend; or the said justices shall fix a day whereon they

or any two of them shall attend to view the said highway; and if to the justices at such special sessions, on the day and at the place so fixed as aforesaid, it shall appear either on the report of the said person so appointed by them to view, or on the view of such justices, that the said highway is not in a state of thorough and effectual repair, they, the said justices at such last-mentioned special sessions, shall convict the said surveyor or other party liable to the repair of the said highway in any penalty not exceeding five pounds, and shall make an order on the said surveyor or other person, or bodies politic or corporate liable to repair such highway, by which order they shall limit and appoint a time for the repairing of the same." It does not appear upon the case that any view of this footpath was had, and it must be taken that the justices did not convict under this sect. 94.

The respondent did not appear.

COCKBURN, C.J.—I think this conviction cannot stand. Sect. 94 provides a particular course to be adopted before a conviction for non-repair of a highway, which the justices in this case altogether neglected. There is also a particular penalty of 5l. imposed by that section for the offence, and it is required that the justices shall further order a time for repairing the highway. This being so, sect. 20 does not apply to this offence. It enacts that if a surveyor shall neglect his duty in anything required of him by this Act, for which no particular penalty is imposed, he shall forfeit the penalty therein provided. There are offences created by the Act to which that section may apply, but it cannot apply to a surveyor's neglecting to repair a highway.

MELLOR, J.—I am entirely of the same opinion. The conviction must be quashed.

Judgment for the appellant.

Solicitors for appellant, *Sharp and Ullithorne*, for *C. E. Bissell*, Sleaford.

COMMON PLEAS DIVISION.

Friday, Feb. 8 and 22.

(Before GROVE and LINDLEY, JJ.)

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF MONMOUTH (BY THE TOWN COUNCIL) AND THE CHURCHWARDENS AND OVERSEERS AND ASSISTANT OVERSEERS OF THE PARISH OF MONMOUTH.(a)

Bating—Public Health Acts—Local Paving Act—Town and borough of Monmouth—General rate invalid—Implied exemption—58 Geo. 3, c. 81 (local and personal). 35 & 36 Vict. c. 79, 37 & 38 Vict. c. 89, 38 & 39 Vict. c. 55.

By a local Act (58 Geo. 3, c. 81) certain persons therein mentioned were appointed commissioners for the purpose of paving the footways and cleansing, lighting, and watching the streets in the town of Monmouth. By s. 59, "the said commissioners shall and are hereby authorised and required once in every year to rate and assess any sum not exceeding one shilling in the pound upon or in respect of all houses, &c. . . . being within the limits of the said town of Monmouth." By s. 67, "all and every person or persons paying the rates and assessments hereby authorised to be levied within the said town shall be and they and

(a) Reported by A. H. BITTLETON, Esq., Barrister-at-Law.

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every of them is and are hereby exempted and discharged from all charges and expenses of paving, lighting, watching, cleansing, or fencing off any part or parts of the footways and cross paths of the said town and borough." By the Public Health Act 1872 the borough of Monmouth (within which was the town of Monmouth) was created an urban sanitary district, and the mayor, aldermen, and burgesses of the borough acting by the town council the urban sanitary authority for such district. By s. 16, "All expenses incurred or payable by an urban sanitary authority under the Sanitary Acts shall . . . be defrayed . . . in the case of the council of a borough out of the borough fund or borough rate." By the Sanitary Law Amendment Act 1874, all the powers and duties of the commissioners under the said Local Paving Act relating to any objects or purposes of the Sanitary Acts were transferred to the council. By the Public Health Act 1875, s. 144, "Every urban authority shall, within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways." By s. 207, "All expenses incurred or payable by any urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act." The town council, as the urban sanitary authority for the borough of Monmouth, made a general borough rate to meet expenditure, which included the paving, lighting, and cleansing of the town. A ratepayer, who occupied a house within the borough, but outside the town of Monmouth, appealed on the ground that the rate was made in part for raising money towards defraying the expenses of carrying the Monmouth Paving Act into execution.

Held, that the rate was invalid.

CASE.

1. This is a special case, stated by consent under the provisions of 12 & 13 Vict. c. 45, s. 11, in order to have determined the question of the validity of a rate made by the churchwardens and overseers of the parish of Monmouth.

2. The borough of Monmouth is one of the boroughs mentioned in schedule A, 5 & 6 Will. 4, c. 76, and the corporation consist of the mayor, four aldermen, and twelve councillors. The area of the borough includes the whole of the parish of Monmouth and a considerable part of the adjoining parish of Dixon, a plan of the said borough accompanies and forms part of this case.

3. By an Act of Parliament of 58 Geo. 3, c. 81, intitled "An Act for paving the footways and cleansing, lighting, and watching the streets in the town of Monmouth," certain persons therein mentioned were appointed commissioners for the purpose of executing the said Act so far as related to the paving, repairing, cleansing, lighting, and watching the said town. A copy of the said Act accompanies this case.

4. Sect. 28 is as follows :

And in order that the footways of the streets, lanes, and other public passages and places within the said town and borough may be properly paved and repaired, and that the said streets, lanes, and other passages may be lighted, cleaned, and watched, be it further enacted that from and immediately after the passing of this Act the property of and in all the present and future pave-

ments in the streets, lanes, and other public passages and places within the said town, in the footways and of all materials, implements, watch houses, stands, lamp irons, posts, and other things which shall be provided for the purposes of this Act, and all the soil, dung, manure, and dirt which shall arise or be made in any of the said streets, lanes, passages, and places, and of all ashes, cinders, dirt, and rubbish to be taken and carried away from the houses in the said streets, lanes, passages, and places, shall belong to and be the property of and the same are hereby vested in the mayor of the said town of Monmouth for the time being in trust for the said commissioners; and he is hereby authorised to bring or cause to be brought an action, or to prefer any bill of indictment, as the case shall require, against any person or persons whomsoever who shall steal, take, or carry away, detain, spoil, injure, or destroy any of the matters or things herein so mentioned and vested, or any part or parts thereof.

5. Sect. 30 is as follows :

Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to any of the roads, ways, or passages which have been usually paved, amended, or repaired by the trustees acting in the execution of an Act of the fiftieth year of the reign of his present majesty, intitled "An Act for enlarging the term and power of three Acts of his late and present majesty for repairing several roads therein mentioned leading to through and from the town of Monmouth, and for making a new piece of road communicating therewith, nor to any part or parts of the carriage roads and ways only which have been usually repaired by the inhabitants at large of the parish of Monmouth, except or so far as may be necessary for the purposes of this Act, or such part or parts of the said roads as the said commissioners shall contract with the trustees of such roads, or with the surveyors of the highways of the parish of Monmouth for the paving, maintaining, or repairing, which contract or contracts it shall be lawful for the said commissioners to make and enter into.

6. Sect. 31 is as follows :

And be it further enacted that it shall be lawful for the said commissioners, and they are hereby authorised and empowered to new pitch and pave any of the footways of the streets, lanes, highways, public passages, and places in the said town, and from time to time when and so often as they shall think proper, to cause all or any of the present or future pavements or footways in the several streets, lanes, and places in the said town to be taken up, raised, lowered, altered, relaid, pitched, paved, or repaired in such manner as the said commissioners may think proper. And that the footways in the several streets and places where the same can properly be set and left shall be laid with a pavement of flagstone, and also to cause the said several streets, lanes, passages, and places within the said town to be cleansed, and all nuisances and encroachments therein to be removed, and the present drains, sinks, gutters, and watercourses for conveying the water off, and from the said streets, lanes, passages, and places to be amended, repaired, cleaned, scooped, and new ones be made in such manner as the commissioners shall think proper. And if the parties who shall be respectively ordered to remove such nuisances or encroachments shall not remove the same within two days after notice in writing given by the clerk of the said commissioners, they shall respectively forfeit a sum not exceeding the sum of 20s., to be recovered before one of the justices of the peace in like manner as the penalties herein directed to be recovered under this Act. And that if any person or persons shall at any time hereafter, without the consent or approbation of the said commissioners, signed by the clerk, make or cause to be made any alteration in the form of the pavement of any street, lane, public passage, or place by this Act directed to be paved or repaved, such person or persons shall, at his or their responsibility (within five days after notice being given for that purpose by the said clerk), put the pavement which shall have been so altered into the same form and condition as it was on or before making such further alteration, or in such other manner as the said clerk shall direct in writing, and in case of neglect or refusal so to do, then the said commissioners shall and may cause the same to be done, and the expense and charges thereof shall be borne and defrayed by the person or persons so

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neglecting or refusing the same to be recovered (in case of non-payment thereof upon demand) in like manner as any penalty is hereinafter authorised or directed to be recovered.

7. Sect. 59 is as follows :

And for raising money towards answering and defraying the charges and expenses of carrying this Act into execution, be it further enacted that the said commissioners shall, and are hereby authorised and required once in every year, to rate and assess any sum not exceeding one shilling in the pound upon or in respect of all houses, warehouses, shops, cellars, vaults, stables, coach houses, brewhouses, granaries, malthouses, and buildings which are already built or made, or which shall hereafter be built or made, and upon the several gardens, yards, or lands thereto respectively belonging and adjoining, and upon all gardens, orchards, paddocks, closes, tenements, and hereditaments adjoining to or occupied with, or usually considered as appurtenant to such buildings not exceeding a distance of 100 yards from the present turnpike gates, if the paving shall be continued up to the same, and being within the limits of the said town of Monmouth, according to the rate or charge made upon the same hereditaments for the repair of the highways for the parish of Monmouth for the year proceeding, and the first year for which such rates or assessments shall be made, shall commence at, and be computed from, the day or time to be fixed for that purpose by the said commissioners, at a meeting of which one calendar month's notice shall be given, to be fixed on the town hall, and at which one half of the commissioners shall be present; and the moneys so to be rated or assessed shall from time to time be half-yearly paid to the collector or collectors to be appointed as aforesaid, and in order the better to ascertain and make such rates or assessments the surveyors of the highways of the said parish shall, and are hereby required, at all reasonable times, to permit the said commissioners or any of them and their clerk, and also the said collectors, to peruse and inspect the rates, and assessments made for the repair of the said highways for the year then next proceeding, and to take a copy or copies thereof, and every such surveyor refusing to comply therewith shall forfeit and pay any sum not exceeding 5*l.* every time he shall so refuse.

8. Sect. 67 is as follows :

And be it further enacted that all and every person or persons paying the rates and assessments hereby authorised to be levied within the said town, shall be and every one of them is and are hereby exempted and discharged from all charges and expenses of paving, lighting, watching, cleansing, or fencing off any part or parts of the footways and cross paths of the said town and borough.

9. Sect. 78 is as follows :

And whereas a parcel of meadow ground called Chippenham, containing forty-five acres or thereabouts, lies within the said town and borough of Monmouth, the aftermath and grass of which from the time of hay harvest to Candlemas day has been immemorially taken and enjoyed by the inhabitants and occupiers within the said town and borough. And the same has been opened to them on Monday next, after the 4th Sept. yearly by the order and on payment of 1*s.* a head for horses, and 9*d.* a head for horned cattle, and 6*d.* a score for sheep, to the mayor and corporation of the said town, which mode of enjoyment occasions the said field to be overflocked with unreasonable numbers of horses and cattle, by which many accidents happen, and the grass is also trod down and destroyed, so as to make the same of little or no value. Whereas such grass would be of considerable advantage to the inhabitants of the town if a proper and reasonable stock was turned in to eat off the same in a usual course of agriculture. And a sum of money may also be raised, which may be applied to the purposes of this Act if the said grass was disposed of in a proper and judicious manner. Be it further enacted that from and after the passing of this Act, the aftermath and grass to arise and grow yearly in and upon the said field called Chippenham from the time of hay harvest until Candlemas day following, shall be vested in the mayor of the said town and borough, with full power and authority from time to time to sell and dispose of the said grass to such person and persons as he the said mayor shall in his discretion think fit, and to pay the money arising therefrom, as the same shall be received yearly, to the treasurer

to be appointed under this Act, for the lighting of the said town only. Provided always that nothing herein contained shall prevent or in any manner impede the races in Chippenham at such times as may be thought convenient for that purpose, nor to prevent any person or persons from walking in or upon the said field as they have been accustomed to do.

10. From the year 1818 to the commencement of 1877, the said Act has been put in force by the commissioners therein named, and a rate of 1*s.* in the pound assessed on all houses, land, and hereditaments liable thereto.

11. Up to forty years ago or thereabouts, the turnpike gates of the town were respectively the Drybridge Gate, the Cinderhill Gate, the Monk Gate, the Wyebridge Gate, and the Dixon Gate, all which said gates were situate close to the town, and all houses, lands, and hereditaments situate within these gates, and within a distance of 100 yards of the said gates were assessed to the said rate. The position of the said turnpike gates is indicated on the said plan.

12. About forty years ago the said Dixon Gate was removed about a mile from the town of Monmouth, but the area of the houses, lands, and hereditaments rated was not extended.

13. The paving of the footways in the borough of Monmouth has never been extended beyond 100 yards distance from the site of any of the old turnpike gates of the town, and outside these limits there are only a few public lamps.

14. By sections 3 and 4 of the 37 & 38 Vict. c. 89 (The Sanitary Law Amendment Act 1874) all the powers and duties of the commissioners under the said local paving Act relating to any objects or purposes of the Sanitary Acts as defined by 35 & 36 Vict. c. 79 (The Public Health Act 1872) and all property held by the commissioners for such objects or purposes were transferred to the mayor, aldermen, and burgesses of the borough acting by the town council as the urban sanitary authority for the urban sanitary district of the borough, constituted by the said Public Health Act 1872 through the said commissioners as already stated, continued to act in the execution of the said local Act up to the beginning of the present year.

15. By virtue of the Public Health Act 1875 (38 & 39 Vict. c. 55) the borough of Monmouth was continued an urban sanitary district, and the mayor, aldermen, and burgesses acting by the council are the urban sanitary authority.

16. The sect. 144 of the Public Health Act 1875 is as follows :

Every urban authority shall, within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have exercise and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are or may be inconsistent with the provisions of this Act. Every urban authority shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which by the Highway Act 1835, or any Act amending the same, are vested in and given to the inhabitants in vestry assembled of any parish within their district. All ministerial acts required by an Act of Parliament to be done by or to the surveyors of highways may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint.

17. Sect. 207 of the said Public Health Act is as follows :

All expenses incurred or payable by any urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the

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district fund and general district rate, leviable by them under this Act, subject to the following exceptions, viz.:

That if in any district the expenses incurred by an urban authority being the council of a borough in the execution of the sanitary Acts were, at the time of the passing of this Act, payable out of the borough fund or borough rate, then the expenses incurred by that authority in the execution of the Act shall be charged on and defrayed out of the borough fund or borough rate, and

That if in any district the expenses incurred by an urban authority (being improvement commissioners) in the execution of the sanitary Acts were, at the time of the passing of this Act, payable out of any rate in the nature of a general district rate, leviable by them as such commissioners throughout the whole of their district, then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of such rate for the purposes of this section. The council of the borough of Folkestone shall be deemed to be improvement commissioners, and that where, at the time of the passing of this Act, the expenses incurred by an urban authority in the execution of certain purposes of the sanitary Acts were payable out of the borough fund and borough rate, and the expenses incurred by such authority in the execution of the other purposes of the said Acts were payable out of a rate or rates leviable by that authority throughout the whole of their district for paving, sewerage, or other sanitary purposes, then the expenses incurred by that authority in the execution of the same or similar purposes respectively under this Act shall respectively be charged on and defrayed out of the borough fund and borough rate, and out of the rate or rates leviable as aforesaid.

18. Sect. 16 of the Public Health Act 1872 is as follows:

All expenses incurred or payable by an urban sanitary authority under the sanitary Acts shall, if the Local Government Acts or the provisions of those Acts with respect to rating were at or immediately before the passing of those Acts in force throughout the district of such authority or within a local government district wholly within such district be defrayed in manner provided by those Acts; and if the Local Government Acts were not so in force at or immediately before the passing of this Act, be defrayed as follows, that is to say:

In the case of the council of a borough out of the borough fund or borough rates; in the case of improvement commissioners out of any rate in the nature of a general district rate leviable by them as such commissioners throughout the whole of their district.

Provided that where an urban sanitary authority had before the passing of this Act power to levy within its district a rate or rates for paving, sewerage, or other sanitary purposes, all expenses incurred by such authority in the performance of its duties under the Sanitary Acts shall be defrayed out of such rate or rates, except where at the time of the passing of this Act any such expenses were chargeable upon the borough fund or borough rate, in which case such expenses shall continue so chargeable. And by sect. 8 of the Sanitary Law Amendment Act 1874 it is enacted:

Whereas doubts have arisen as to the meaning of the proviso to the 16th section of the principal Act with reference to the rate therein mentioned as a rate levied within the district, be it therefore declared that such rate shall signify one which is levied throughout the whole of the district. Provided that where any charges to which that section refers have been defrayed out of any rate before the passing of this Act the same if not heretofore questioned in any court of law shall be deemed to have been legally defrayed so far as any objection could arise out of the proviso in this section referred to.

Provided, further, that when any charges directed by the said 16th section of the principal Act to be paid in the case of a council of a borough out of the borough fund or borough rate have been hitherto divided between the landlord and tenant in moieties or otherwise, under the provisions of any local Act in that behalf, the Local Government Board may, upon application by their order, make provisions for the continuance of such division of the charges between parties during the continuance of any contract existing at the passing of the Act.

At the passing of the Public Health Act 1872 the Local Government Acts were not, nor were the provisions thereof with respect to rating, enforced throughout any local government district coincident with or wholly within the borough of Monmouth.

19. Sects. 5, 6, 10, 149, 211, 216, 227, 270, and 340, of the Public Health Act 1875, are also referred to.

20. The estimated expenses of the town council, including paving, lighting, and cleansing the town, for the current year amount to 2529l. 3s., and a rate has been made of 3s. in the pound for the parish of Monmouth. A copy of the said rate is annexed to and forms part of the case. Though the said rate on the face of it appears to be a poor-rate, it is admitted that 2s. of the 3s. rate is for the purposes and expenses hereinafter set forth.

21. The rate, so far as the portion applicable to pay borough rate is concerned, was made in aid of the expenditure of the current year, viz., from the 1st Sept. 1876, to the 31st Aug. 1877.

22. The 3s. rate is made by the overseers as a poor rate, partly for the general purposes to which the poor rate is applicable, and partly to meet the call made upon them by the town council in aid of the general expenditure of the borough. Such general expenditure is shown by the estimate on which the rate was founded, and of which a copy is annexed and forms part of the special case. It comprises the salaries of the corporation officers, the cost of the police force for the entire borough, except turnpike roads and county bridges, expense of paving, cleaning, and lighting the town, the instalment in reduction of debts upon the cattle market and interest, the school board calls for the borough, repairs of corporation property, and some other incidental expenses.

23. The area of the district is 5707 acres, the rateable value of which is 19,165l. 7s. 4d. The whole expenditure, except one item mentioned hereafter in this paragraph, will be made in respect of the area of the whole borough. The expenditure for paving, cleansing, and lighting estimated at 500l., has been or will be confined to the limits of the town of Monmouth as defined by the Monmouth Paving Act, and to a small portion outside that area where a few gas lamps have been erected, the annual cost of lighting and maintaining which is estimated at 3l. 10s. per lamp. The rateable value of the town as defined by the Monmouth Paving Act is 8301l., and the estimated rateable value of the property so lighted outside that limit is about 640l. The annual cost of lighting and maintaining the gas lamps erected outside the limits of the town of Monmouth has been previously to the making of the rate appealed against defrayed by contributions from the occupiers of property adjacent thereto, and has not been included in the paving and lighting rate or in any other rate.

24. The appellant is a ratepayer occupying a farm house and lands more than one hundred yards distant from any of the old turnpike gates of the town, and outside the limits fixed by the Monmouth Paving Act. The said farm house and lands are marked on the annexed plans.

25. The appellant has been charged or rated to the said rate at the sum of 21l. 13s. 9d. in respect of the said farm house and lands, and has appealed to the Court of Quarter Sessions against the said

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rate and the said charge. Notice of appeal, dated Feb. 16, 1877, was given to the urban sanitary authority of the borough of Monmouth, and to the overseers and assistant overseer of the parish of Monmouth. A copy of the notice of appeal is annexed and forms part of the case. It has been agreed that for the purposes of the case no objection shall be taken as to the want of or sufficiency in the notice.

26. The appellant contends that under the above circumstances the said rate is invalid, and that he is not liable to be assessed or rated in respect of the said rate, on the ground that the said rate is made, as the appellant alleges, in part or wholly for raising money towards answering and defraying the charges and expenses of carrying the said Monmouth Paving Act into execution or for similar purposes.

27. The respondents contend that the said rate is valid, inasmuch as it is made, as the respondents allege, in respect of expenses incurred by them as the urban sanitary authority for the district of the borough under the Public Health Act 1875, which expenses are by that Act made chargeable on the borough fund and borough rate; and that the said Local Paving Act does not exempt them from any duties imposed or curtail any powers conferred on them as such urban sanitary authority as aforesaid.

28. Copies of the rate and assessment appealed against are annexed to and form part of this case.

29. The question for the opinion of the court for which this case is stated is, whether the said rate is valid or invalid, and whether the appellant is liable to be rated to the said rate in the manner hereinbefore set forth.

The costs of the appeal and of this case are to follow the judgment of the court.

The court is to have power, in case it should see fit to send back this case, to have any fresh facts found which they may think material, or to have the statement of the present facts amended by a barrister-at-law whom the court shall name.

Bowen and Bradford for the appellant.—The Public Health Act must be read as subject to the local Act. To tax the country for the benefit of the town is unreasonable. By this rate the agricultural part of Monmouth is called upon to pay for paving and lighting, from which it gets no advantage. There is authority in support of the proposition that the Public Health Act does not override local Acts. We say, first, that these expenses are "otherwise provided for," viz., by the local Act; and, secondly, if that is not so, that they are not properly "incurred in the execution of this Act." They cited:

The Commissioners for Improving the Town and Parish of Walton-on-the-Naze v. Walford, 10 L. Rep. Q.B. 180;

Reg. on the Prosecution of the Overseers of Walsall v. The London and North-Western Railway Company, 46 L. J. N. S. 102, Mag. Cas.;

Garnett v. Bradley, 46 L. J. 545, Ex.; L. Rep. 2 Ex. Div. 349; 36 L. T. Rep. N. S. 725.

G. A. E. Fitzgerald for the respondents.—The question turns entirely upon the construction to be placed on the Public Health Act of 1875 and the Monmouth Local Act of 1818. In 1818 there were no general provisions on this subject for the whole country, and this local Act carved out a district from the borough of Monmouth for the purposes of paving, lighting, &c. By the Public

Health Act of 1872 the whole of England was mapped out into urban and rural sanitary districts. The urban sanitary district of Monmouth is co-extensive with the borough of Monmouth. The consolidating Act of 1875 re-affirms these boundaries. The appellant in this case does not claim any exemption from a rate in respect of any particular property. What he complains of is that the urban sanitary authority has not rated the inhabitants of a small district within the limits of their authority, in respect of the paving and lighting of that district, apart from the rest of the inhabitants within the limits of their authority. In the case of *The Walton Commissioners v. Walford* (*ubi sup.*), cited by the other side, the area of the local Act was co-extensive with the sanitary district under the Public Health Act, and the commissioners for carrying out the local Act were the authority under the Public Health Act. The rate, therefore, was one imposed by the Public Health Act itself. By sect. 43 of the Public Health Act 1872 it was enacted that "Any limit imposed on or in respect of any rate by any local Act of Parliament shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes." The area under the local Act is clearly absorbed in the area of the sanitary district under the Public Health Act. [GROVE, J.—In the *Walton* case (*ubi sup.*) it was held that "limit" in that section meant pecuniary, not territorial limit.] [LINDLEY, J., referred to sect. 67 of the local Act (set out in special case).] That section does not exempt the appellant because he resides outside the old district. [GROVE, J.—The townspeople are liable to pay town rates; the borough inhabitants outside the town are liable to pay borough rates. Then the Public Health Act makes one district. If the borough becomes liable to pay town rates, surely the town becomes liable to pay borough rates? Yes. [Then, you say sect. 67 is repealed? No; because the exemption is only to those persons who pay rates under the local Act, and they will now pay rates under the Public Health Act and not under the local Act. The whole policy and scope of the Public Health Act is to consolidate the conflicting districts for rating purposes. Sect. 10 of the Public Health Act 1875 shows the relation of the local Acts to the general Act. The latter part of that section says; "Where any local Act, other than an Act for the conservancy of any river, is in force within the district of an urban authority, conferring on any commissioners, trustees, or other persons powers for purposes the same as or similar to those of this Act (but not for their own pecuniary benefit), all the powers, rights, duties, capacities, liabilities, and obligations of such commissioners, trustees, or other persons, in relation to such purposes, shall be transferred and attach to the said urban authority." The local Acts and the general Act are therefore to be construed together; and it is submitted that they are to be so construed as to carry out the intention of the general Act. Where there are provisions under the Public Health Act and under the local Act for carrying out the same object it is submitted that it is optional with the sanitary authorities to proceed under the Public Health Act or under the local Act. Sect. 340 of the Public Health Act 1875 supports this contention. That section says that, "Where, within the district of a local

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authority, any local Act is in force providing for purposes the same as or similar to the purposes of this Act, proceedings may be instituted, at the discretion of the authority or person instituting the same, either under the local Act or this Act or under both, subject to these qualifications: (1) That no person shall be punished for the same offence both under a local Act and this Act; and (2) That the local authority shall not, by reason of any local Act in force within their district, be exempted from the performance of any duty or obligation to which they may be subject under this Act." [LINDLEY, J. referred to sect. 341, which is as follows: "All powers given by this Act shall be deemed to be in addition to, and not in derogation of, any other powers conferred by Act of Parliament, law, or custom, and such other powers may be exercised in the same manner as if this Act had not passed; and nothing in this Act shall exempt any person from any penalty to which he would have been subject if this Act had not passed. Provided that no person who has been adjudged to pay any penalty in pursuance of this Act shall for the same offence be liable to a penalty under any other Act."] A discretion is therefore given, subject to no injustice being done to the public by a double proceeding. As to the words "not otherwise provided for" in sect. 207 of the Public Health Act 1875 (set out in the special case), how can the purposes of this Act of 1872 be provided for by an Act of 1818? The proviso in sect. 16 of the Public Health Act 1872, is interpreted by sect. 8 of the Sanitary Law Amendment Act 1874. Both these sections are set out in par. 18, p. 7, of the special case. It cannot be contended that paving and lighting are not principal purposes of the Public Health Act. [GROVE, J.—The question is whether the urban sanitary authority can exercise the powers which the commissioners had under the local Act otherwise than the commissioners exercised them. No doubt they can exercise them; but are they not limited as to the manner of doing so?] The commissioners under the local Act, who were the town council, had simply a power of paving footways. [LINDLEY, J.—The rate in question could not then have been raised at all under the local Act?] Not at all. The expenses under the Public Health Act of whatever kind are payable out of the borough fund. [GROVE, J.—The appellant's contention must be that the exemption in the local Act exempts by implication persons outside the turnpike gates from contributing to the district within those gates, as it does expressly persons inside the turnpike gates from contributing to the district outside.] We have no power to limit our rate to a smaller district than that of the Public Health Act. We must rate the whole district. And even if we have the power, putting it at the lowest we have an option, and it would not be right to exercise that power, the intention of the Act being that we should rate the larger district. The result of the appellant's contention would be that while a special rate was passed for paving the footways, another rate would have to be passed for the other paving and lighting purposes, from which persons paying the special rate would be exempt. In the case of *Bramston v. The Mayor, Aldermen, and Burgesses of Colchester* (25 L. J. N. S. 73, M. C.) Lord Campbell, C.J., in giving judgment, says, "Mr. Bovill

has very forcibly argued that the general words of the 5 & 6 Vict. c. 98, cannot be taken as repealing the special enactments of the local Act; that must depend upon whether it appears to have been the intention of the legislature to repeal the local Act, and it appears to me that such was the intention of the legislature. We must look to the Acts themselves, and doing so it must, I think, be considered that the legislature intended to sweep away the private and local practice that had existed, though sanctioned by Acts of Parliament, and to have one uniform mode," &c. Uniformity was one great object of the Public Health Act. [GROVE, J.—Those observations would apply as much to the case cited against you, *Garnett v. Bradley* (*ubi sup.*), as to the present case.] He also cited

Maxwell on the Interpretation of Statutes, pp. 145-147.

Bradford in reply.—By the Public Health Act 1872 the whole of the borough of Monmouth was constituted an urban sanitary district, and the town council were made the urban sanitary authority therein. Taking sect. 7 of that Act and sect. 3 of the Sanitary Law Amendment Act 1874 together, it will be seen that all the powers, rights, duties, capacities, liabilities, and obligations of the commissioners under the Local Act, so far as those powers, &c., related to purposes of the Sanitary Acts, were transferred to the town council as the urban sanitary authority; and the Public Health Act 1875 (which now represents the Sanitary Acts) contains an enactment to the same effect.

GROVE, J.—The question to be determined upon the special case before us is, whether an inhabitant of the urban sanitary district of the borough of Monmouth is liable to contribute to a rate made by the sanitary authority of the district under the Public Health Act 1875, which rate is alleged in part to be made for the purpose of raising money towards defraying the expenses of carrying a Local Paving Act into execution. The answer to this question really depends upon whether the Public Health Act 1875 does in effect repeal the Local Act 58 Geo. 3, c. 81. The Local Act was passed for the purposes of paving the footways and cleansing, lighting, and watching the streets in the town of Monmouth, purposes clearly within the scope of the Public Health Act. I am far from saying that the case is free from difficulty; and I was much impressed by the very able argument of Mr. Fitzgerald. But on the whole I think we must come to the conclusion that the rate as to which our opinion is asked was invalid. The Local Act comprised an area inclosed by the turnpike gates of the town of Monmouth, not exceeding a distance of one hundred yards from such gates, and being within the limits of the town of Monmouth. This district is practically the town of Monmouth. The town of Monmouth forms part of the borough of Monmouth, and the urban sanitary district under the Public Health Act is co-extensive with the borough. We have been furnished with a plan showing the precise limits of these areas. Now by the Local Act certain persons therein mentioned were appointed commissioners for the purpose of executing the Act. The Public Health Act of 1875 certainly does not in terms repeal this Local Act; and I am of opinion that it does not repeal it by implication. The question whether a general Act repeals previous special

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Acts has been lately considered in the case of *Garnett v. Bradley* (*ubi sup.*), which was a question as to the meaning of the provision that "costs shall follow the event" in a trial by jury under the Judicature Act. In that case it was argued, and two courts adopted the argument, that, there being special exceptions in the Act, "follow the event" must mean "follow the event at the trial" in all cases not specially excepted; but a majority of the Court of Appeal thought the words must be taken to mean follow the legal event, so as not to repeal all the previous legislation on the subject of costs; so that there must be something imperative in a subsequent statute in order to repeal a previous particular one. But, in the present case, not only is there nothing imperative, and nothing that cannot be consistently construed with the words of the previous Act; but sect. 340 of the Public Health Act is as follows: [Reads it, *vide sup.*] This section, to my mind, shows clearly that the Act was not intended to repeal previous local Acts, because there is an express power to proceed under the local Act where there is one, which would not have been given if it was intended that they should all be repealed. I am, therefore, of opinion that this is a strong argument in favour of the appellant. But then it is further argued that the new Act goes beyond the previous one by imposing new burthens with corresponding privileges. That argument would have had great weight with me but for sect. 67 of the local Act. How can we hold that the Public Health Act enlarges the burthens of the ratepayers in the town of Monmouth, reasonably reading sect. 67 of the local Act, which is as follows: [Reads it, *vide sup.*] Now, here is a distinct exemption for all persons paying rates within the district under the local Act from all expenses of paving, lighting, &c., the footways of the borough. It is admitted that that is so, but then it is said that that exemption may remain in force notwithstanding the Public Health Act 1875. It is said that a person living beyond the town, but within the borough, is not exempted from paying a rate for town purposes; but there is this difficulty: If a rate is made under the local Act he is, in fact, exempted, the only persons rateable under that Act being persons living within the town; he, not living within the town, is not rated. Mr. Fitzgerald could not argue that the exemption in the local Act in respect of persons paying rates under that Act from contributing to the borough expenses for the same purposes, did not still exist, in the face of the two cases that have been referred to—*The Walton Commissioners v. Walford* (L. Rep. 10 Q. B. 180) and *Reg. on pros. of Overseers of Walsall v. London and North-Western Railway Company* (46 L. J. 102, Mag. Cas.). In those cases it was contended that exemptions conferred by local Acts were repealed by the Public Health Act; but it was held that, looking to the wording of the Public Health Act, that could not be so; so that it could not be contended that the section in this local Act giving the exemption had been repealed. That leads me to suppose that when I find the position of the appellant in this case to be the exact correlative of the position of those persons upon whom an express exemption is conferred by the Act, there must be an implied exemption still in force in this case. It cannot be

that the inhabitants of the borough who live within the town are not liable to pay this rate, and that the inhabitants who live without the town are liable. Both must be liable or both exempt. The persons who live within the town are clearly exempt; therefore, so is the appellant and those who live outside it. The sanitary authority has the powers the commissioners under the Local Act had. They may still enforce that Act so far as it does not conflict with the Public Health Act. It has been suggested that great inconveniences will arise from the operation of a double system of rating in one borough. On the other hand, Mr. Bowen suggests that it is very hard that the country should be rated for the benefit of the town. No doubt there will be hardships and inconveniences in whichever way we decided this question. The remedy must be by Act of Parliament. We cannot take into consideration any balance of hardship, and construe the Act of Parliament according to that interpretation which we think will occasion the least inconvenience. I suppose it is an impossibility completely to reconcile a series of Acts in a perfectly satisfactory manner. But this local Act remains in existence, it is unrepealed, and it is not so inconsistent with the Public Health Act as to prevent the authority under that Act from imposing the same rate as before instead of imposing new burthens upon persons who are exempted from them by their local Act. The two cases cited, and particularly the case of the overseers of Walsall, seem to me to be a strong authority for our deciding as we do, if not absolutely binding. I have already said that I think that which the appellant claims here is in the nature of an exemption under the local Act, having regard to sect. 67 of that Act.

LINDLEY, J.—I am of the same opinion. I arrive at that opinion with considerable reluctance, as I cannot help thinking that a uniform system would be better, as Mr. Fitzgerald has said. However, what we have to do is to see whether the Public Health Act does repeal the local Act. Now the Public Health Act not only does not purport to repeal the local Act, but it contains clauses which show clearly that it was not intended to repeal that Act. Now sub-ss. 340, 341 are as follows: [Reads them.] Then sect. 303 says: "The Local Government Board may, on the application of the local authority of any district, by provisional order, wholly or partially repeal, alter, or amend any local Act, other than an Act for the conservancy of rivers, which is in force in any area comprising the whole or part of any such district, and not conferring powers or privileges on any persons or person for their or his own pecuniary benefit, which relates to the same subject-matters as this Act. Any such provisional order may provide for the extension of the provisions of the local Act referred to therein beyond the district or districts within the limits of such Act, or for the exclusion of the whole or a portion of any such district from the application of such Act; and may provide what local authority shall have jurisdiction for the purposes of this Act in any area which is by such order included in or excluded from such district." Nothing can be clearer than that the Legislature did not intend by the Public Health Act to interfere with the local Acts. It did give power to the Local Government Board to deal with them by provisional order; but that was only where they did not

confer powers or privileges on any persons or person for their or his own pecuniary benefit. Therefore, so far as intention goes, the intention was clearly not to repeal these Acts. I attach great importance to that, because it meets the forcible argument as to the benefits of a uniform system by the fact that a uniform system was not intended to be established. It appears to me that this local Act is one that the commissioners are bound to set in force. It is not optional at all. "For raising money towards defraying the expenses of this Act, the said commissioners shall rate," &c.; "All persons paying such rates shall be exempted," &c. The word "shall" is used throughout. Therefore I cannot accede to the argument that it is optional with the commissioners to make a rate under this local Act or under the Public Health Act. The local Act was a compulsory Act. What, then, is the effect of the general Act upon the local Act? The appellant did not live within the town of Monmouth, and therefore was not liable to be rated under the local Act at all. Those who do live within the town of Monmouth and within the limits described on the plan are liable to be so rated. Then comes the Public Health Act 1872, which says, "All expenses incurred or payable by an urban sanitary authority under the Sanitary Acts shall. . . . if the Local Government Acts were not in force at or immediately before the passing of this Act, be defrayed as follows, that is to say:—In the case of the council of a borough, out of the borough fund or rate; in the case of improvement commissioners, out of any rate in the nature of a general district rate leviable by them as such commissioners throughout the whole of their districts" (s. 16). Now if the case stopped there, I should say that the rate in question was perfectly consistent with both the Public Health Acts and the local Act. But then the case does not stop there, because there is s. 67 of the local Act. Mr. Fitzgerald has argued that no rate being imposed under the local Act there is no exemption under s. 67. But that is rather begging the question, whether there ought not to be a rate made under the local Act. The appellant, however, not residing within the town, would not be rated under the local Act, and could not, therefore, claim to be directly exempted from this rate by sec. 67. But would it be right for us to hold that the commissioners are entitled to say, "We will not make a rate for town purposes under the local Act, as we might do, which you living outside the town would not be called upon to pay; but we will make a general rate for the borough under the Public Health Acts, so as to deprive you of the practical exemption from contributing to town purposes which the local Act conferred on you." It appears to me that that is just what they cannot do. The rate that they have made appears to me to be inconsistent with s. 67 of the local Act. I do not know that a great deal of assistance in answering the question submitted to us can be derived from cases; the difficulty here is not in the principle but in the application of it to the particular case. *The Overseers of Walsall v. The London and North-Western Railway Company* (ubi sup.) is, however, strongly in favour of the view we have arrived at. This is an indirect attempt, no doubt, to repeal s. 67 of the local Act.

Judgment for the appellant.

Fitzgerald asked for leave to appeal.

GROVE, J. doubted whether they had power to give leave. It was stated that the question was pending in the Court of Appeal in the case of *The Overseers of Walsall v. The London and North-Western Railway Company* (ubi sup.)

The question as to leave to appeal was reserved till the decision of the Court of Appeal had been given in the Walsall case.

[Judgment was given in the Court of Appeal in the case of *The Overseers of Walsall v. The London and North-Western Railway Company*, on May 18, when Cockburn, C.J. and Brett, L.J. were of opinion that the court had no jurisdiction to hear the appeal; Bramwell and Cotton, L.J.J. were of a contrary opinion. The court being equally divided the appeal was dismissed.]

Solicitors for the appellant, *Wedlake and Letts*, agents for *Bickerton, Homer and Deakin*.

Solicitor for the respondents, *B. J. Child*, agent for *T. J. A. Williams*.

Friday, June 7, 1878.

(Before GROVE and LINDLEY, JJ.)

SMITH v. WEST DERBY LOCAL BOARD. (a)

Local board of health—Sewer authority—Liability for nonfeasance or misfeasance—Notice of action.

In 1874 a local board of health, who were both the highway authority and the sewer authority of the district, engaged a contractor to lay down a sewer in a road, the contractor to be responsible for any damage that might arise "from the execution of the works," and to maintain the road in repair for three months after the completion of the contract. The works were completed, and after the stipulated three months the local board assumed the control and repair of the road. Eight or nine months afterwards the plaintiff's horse sank into a hole twelve inches deep in the road above the sewer and was injured. The County Court judge found that the subsidence was due to the faulty filling up of the trench.

Held, that the local board were liable in their joint capacity as highway and sewer authority.

Seemingly, they were liable as the sewer authority. The notice of action required by statute claimed for damage caused "by the undermentioned matters and things done or omitted by you, your labourers, servants, or others. . . . For that you . . . negligently, carelessly, and improperly did leave a certain road or highway in an insufficient and improper state of repair."

Held, that this was a sufficient notice of action, though the wrong complained of was a misfeasance and not a nonfeasance merely.

APPEAL from the County Court of Lancashire. The following case was stated:—

This is an action for damages sustained by the plaintiffs by reason of the defendants having (as the plaintiffs allege) negligently, carelessly, and improperly left a portion of a certain road or highway, which they were bound to maintain and repair, in an insufficient and improper state, whereby the plaintiff's horse sustained severe injuries.

The notice of action and the particulars of demand (annexed to the summons) are respectively as follows:

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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SMITH v. WEST DERBY LOCAL BOARD.

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NOTICE OF ACTION.

To the local board of health in the parish or district of West Derby, in the county of Lancaster. Take notice that we, James Smith and John James, trading as James Smith and Company, of No. 9, Lord-street, Liverpool, wine merchants, and Thomas Goffey, attorney for the said James Smith and Company, and on their behalf, will on the expiration of one month from this date enter a plaint against you the said local board of health of West Derby, in the County Court of Lancashire holden at Liverpool, for the injury and damage caused to us by the undermentioned matters and things done or omitted by you and your labourers, servants, and others, acting under your orders and directions, at and upon a certain road or highway called Moss-road, in the parish of West Derby, to wit, for that you the said local board of health did, by yourselves, your labourers, servants and others, on or about the 13th May last, negligently, carelessly, and improperly leave a certain portion of the said road or highway in an insufficient and improper state of repair, whereby a horse belonging to us, the said James Smith and Company, while being lawfully driven upon and along the said road or highway, sank into the said road or highway and was thrown therein, and by reason of the said negligent, careless, or improper conduct was thrown down and severely injured, and permanently diminished in value, to the great injury and damage of us the said James Smith and Company. Further take notice, that Thomas Goffey, of 15, Lord-street, Liverpool, in the county of Lancaster, is the name of our attorney in the cause of action aforesaid. Dated this 11th Oct. 1875.—JAMES SMITH and Co.

PARTICULARS OF DEMAND.

The plaintiffs claim 15l. for damages, which they have sustained by reason of the defendants, by themselves, their labourers, servants, and others, on or about the 13th May last, having negligently, carelessly, and improperly left a portion of the road or highway, which they were bound to maintain and repair, in an insufficient and improper state, whereby the plaintiffs' horse, being then lawfully driven upon and along the said road or highway, sustained severe injuries, and the plaintiffs lost the use of the said horse for a considerable time, and the profit which otherwise would have accrued from the same, and were put to considerable expense in veterinary surgeon's fees and otherwise.

The facts as proved may be shortly stated thus: By contract, dated the 9th March 1874, the defendants engaged a contractor to lay down in the road in question (which it is admitted was and is a road vested in the defendants) a sewer. The sewer was to be a pipe sewer, and the depth of the trench at the place where the accident occurred was to be about 10 feet. The contractor was to excavate, to lay the sewer, and to fill up the trench. All this under the directions and to the satisfaction of the defendants' engineer. The work was to be completed in three months, that is to say, before the 9th June 1874. The contractor was to be responsible for any damage to persons or property that might arise "from the execution of the works," and was to maintain the works and also such parts of the roadway as had been disturbed, in good order and repair for three months after completion.

The work during its progress—the excavation, the laying of the sewer, the filling up, and the restoration of the road—was carefully and daily inspected by the defendants' engineer, or by their surveyor of roads and sewers, and everything was done to their satisfaction.

The work was completed in May 1874, and the traffic was then turned on. Some little subsidence took place here and there from time to time, but this was attended to either by the contractor or (at his expense) by the defendants.

After the lapse of about three months, that is to say, just before the work was to be taken off the

contractor's hands, the metalling of the trench was completed by levelling the rock and putting on the macadam. This was done either by the contractor or by the defendants at his expense; and it was done under the inspection of the defendants' surveyor of roads and sewers, and to his satisfaction. The traffic was then turned on again.

On the expiration of the three months or soon after, that is to say, in August or September 1874, the work (which still continued in a satisfactory state) was transferred to the defendants.

The defendants' surveyor continued to inspect or to pass over the road up to the time of the accident, and it was given in evidence that there was nothing a few hours previously to the accident to indicate that there was any defect whatever at the spot in question, that no intimation was received of anything of the kind, and that, so far as the surveyor was aware, no accident had taken place there or near there, either previously to the accident in question or since. There was on that road a considerable amount of traffic.

Since the transfer just mentioned the road was up to the time of the accident repaired in patches here and there from time to time, such repairs being effected by the laying on of a little macadam, but this was all.

In other respects the roadway was not disturbed in any way.

This then was the state of affairs when the accident took place, that is to say, on the 13th May 1875. It happened thus: The plaintiffs' horse (drawing a spring cart) was going along the road in question (Moss-lane) when its fore feet suddenly sank through a coating or crust of macadam into a cavity, and the horse stumbled forward and was injured.

On examining the cavity it was found to be about 12in. or 15in. deep.

How the subsidence was caused is not known. Neither the engineer nor the surveyor could at all account for it. The engineer stated that possibly it might have been caused by the floods which had occurred about the time of the accident; that such floods would affect more or less any foundation of rock and earth that had once been disturbed, and this even after the lapse of a considerable time. Both the engineer and surveyor were asked whether it could have been caused by any leakage in the sewer, and both (they having made careful examination with a view of ascertaining whether that was the cause) gave decided evidence that it could not; that the sewer was in perfect condition at the time of the accident, and had been so ever since.

At the hearing the plaintiffs' counsel contended that the defendants were liable, either as the highway authority or as the sewer authority, the act complained of amounting to more than a mere nonfeasance. On the other hand, the defendants' counsel contended that the defendants could not be liable under the circumstances as the sewer authority, that they had been guilty of no negligence, that the act complained of was at most a mere nonfeasance only; that if the defendants were liable at all it was as the highway authority, and that the act being, if anything, merely a nonfeasance and not a misfeasance, the defendants were not liable as the highway authority to an action; and their counsel relied upon the case of *Gibson v. The Mayor &c. of Preston* (and the cases

there cited) and *White v. The Hindley Local Board*. See the argument *infra*.

Judgment was delivered by the County Court judge on the 27th Jan. 1876 in favour of the plaintiffs, the judge expressing his opinion that the subsidence of the road which caused the action was caused by the faulty filling up of the trench, and that the defendants, if not liable as the sewer authority, which he was inclined to think they were, were at any rate liable in their joint capacity of highway and sewer authority. The damage was assessed at 10l.

The defendants gave notice of appeal, alleging the following grounds:

1. That they had not as the sewer authority been guilty of any negligence in the excavation of the trench, the laying of the sewer, the filling up and restoration of the road, and the maintaining of that part of the road until the work was, according to the contract, taken off the contractor's hands—a period of eight or nine months before the accident took place.

2. That whatever liability accrued by reason of the excavation of the sewer work attached, according to the contract, to the contractor and not to the defendant.

3. That, assuming that any liability attached to the defendants as the sewer authority, such liability ceased at latest when the liability of the contractor ceased, that is to say, when the works were so transferred to the defendants, such transfer being made to them as the highway authority.

4. That on such transfer (if not before) the trench (then filled up) became a part of the road undistinguishable in its character from any other part, and could no longer be regarded as in any way connected with the sewer, or as vested in the defendants as the sewer authority, or as something for the maintenance of which they were liable as such authority.

5. That even assuming that the defendants were liable as the sewer authority, judgment ought not to be given against them in this action, inasmuch as the plaintiffs are confined, by their notice of action and their particulars of demand, to damages arising through non-repair of the highway.

6. That the defendants are not liable as the highway authority, there having been no negligence on their part as such, and no action being maintainable against them as such for simple non-repair.

7. That they are not guilty of negligence in any other capacity, and are not liable on any other ground.

The questions for the opinion of the court are:

1. Are the defendants liable in this action as the sewer authority?

2. Are they liable in this action as the highway authority?

3. Are they liable on any other ground?

The court may draw inferences of fact.

Baylis, Q.C. for the local board, the appellants. — The defendants are not liable as the sewer authority, the damage having resulted from the work done by the contractor. Where a contractor is employed to do an act not likely in itself to lead to injurious consequences, his employers are not liable for the result. Nor are they liable as the highway authority. Highway authorities, though they may be indicted, are not liable to an action for non-repair, being a nonfeasance only:

White v. Local Board of Hindley, 34 L. T. Rep. N. S. 400; L. Rep. 10 Q. B. 219.

In *Pendlebury v. Greenhalgh* (33 L. T. Rep. 372; L. Rep. 1 Q. B. Div. 36), putting a heap of stones on the road and leaving it there was held a misfeasance, but leaving it by itself would be a nonfeasance. Secondly, the notice of action is insufficient. The notice is given in accordance with the Public Health Act 1848 (11 & 12 Vict. c. 63), sect. 139, and is only a notice of a claim for nonfeasance. It must be construed strictly, and cannot now be amended. Lastly, the finding of the County Court judge was not warranted by the evidence. He also cited

Parsons v. St. Mattheu, Bethnal Green, 17 L. T. Rep. N. S. 211; L. Rep. 3 O. P. 56;

Gibson v. Mayor of Preston, 22 L. T. Rep. N. S. 298; L. Rep. 5 Q. B. 218;

Bovver v. Peat, 85 L. T. Rep. N. S. 321; L. Rep. 1 Q. B. Div. 329;

Gray v. Pullen, 5 B. & S. 970.

Cave, Q.C. for the respondent, was desired to confine himself to the point as to the notice of action. He cited, as to this,

Jones v. Bird, 5 B. & Ald. 887, and

Jones v. Nichols, 13 M. & W. 361.

GROVE, J.—I think the County Court judge was right, and the question submitted to us must be answered in that way. The first question is, whether the defendants are liable as the highway authority, or as the sewer authority. I am of opinion that they are at all events liable as the highway and sewer authority jointly, and if it is necessary to answer the question more specifically, I should say that they are liable as the sewer authority. The sewer itself was not the cause of the mischief, but it was essential to make a trench for the purpose of the sewer, and the defendants were bound to do it in a proper and sufficient manner. It is not necessary, however, to say that they were liable as the sewer authority alone. Here the two authorities are vested in them, giving them complete dominion both over the sewers and the highways. They are, therefore, the persons on whom the obligation of repairing both the sewer and the highway was imposed by statute, and may be regarded in these two capacities together. In my opinion, therefore, they are liable as the sewer authority; but, at all events, they must be liable in their joint capacity. The second question, whether they are liable in any other capacity, it is not necessary to answer. The third question argued was as to the notice. I have some doubt whether the question of the notice was really before the court on this special case, but on that point I am of opinion, at all events, that the notice was sufficient. The test which I suggested to Mr. Baylis is the test applied by Abbott, C.J. Such a notice is not to be construed in the same way as a plea. The rule of construction, indeed, may sometimes be more strict, but the object is different. The object of pleading is to convey to the other side a specific legal claim, which he may answer in a proper legal form; and therefore certain requirements have been made necessary by a long course of decisions, in order that issue may be properly joined. The object of notice of action, on the other hand, is to enable the party on whom it is served to examine the claim, and see if there are any grounds for the matter complained of, which to his mind the notice fairly comprehends; and if so,

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to give him the opportunity of tendering amends if he thinks he is wrong. It must be sufficiently clear and explicit to bring to his mind what is the cause of complaint; and if so, that is a sufficient notice of action. In *Jones v. Nichols* (*ubi sup.*) Pollock, C.B. says: "I am disposed to think that this notice would be sufficient, even if construed with the strictness of a plea," showing that in his opinion it was not to be so construed. In *Jones v. Bird* (*ubi sup.*) it is said by Abbott, C.J. that a notice ought not to be construed with great strictness, its object being merely to inform the defendants substantially of the ground of the complaint, but not of the mode or manner in which the injury has been sustained. Both these cases show that a notice is not to be construed by the same rules as a pleading. Now, is this notice sufficient? It is said that a person might read this notice as a mere notice of action for non-repair. That I understand to mean the allowing a road to become in a bad state by the ordinary effect of time and weather, and similar causes; and therefore it is said that non-repair would not include any act, and would not draw the attention to any misfeasance at all. I think the notice, if reasonably read by a mind willing to understand it, is this, that the local board of health did by themselves, their labourers, or servants, negligently, carelessly, and improperly leave a certain portion of the highway in an insufficient and improper state of repair. That imports that labourers or servants had been employed in reference to the matter. Leaving in an insufficient state of repair means plainly that they did attempt to repair, but left it insufficiently repaired. Then it goes on, "whereby a horse belonging to the plaintiff, while upon the said road or highway, sank into the said road or highway, and was thrown." That tends to show some local cause or matter, not general wear and tear, but something like a hole or soft place in the road. I think that sufficiently brings the matter to the minds of the parties sued, if they desire to understand it. The cases support this view, showing that a notice is sufficient if it substantially indicates the cause of complaint. No case has been cited by the counsel for the appellants where the words are as clear and explicit as these, and have yet been held insufficient. The only remaining point relied on was that there was no reasonable evidence of negligence—negligence upon which a judge, acting as a jury, might proceed. We cannot go into a question of evidence, which is for the judge alone; but I think there were facts in evidence from which negligence might reasonably be inferred. There is enough to show that the work was done in an insufficient way, so that the water might wash away the subsoil and leave a hole—reasonable evidence from which to infer that that took place. I think I should have come to the same conclusion myself.

LINDLEY, J.—I am of the same opinion. I will not say anything as to the point of there being evidence of negligence, because I entirely agree with what has been expressed by my brother Grove; and the contention that the defendants were not liable at all was substantially given up in the argument. What was really attempted was to uphold a very special demurrer to this notice of action. Our attention has been called to the stringent words of the statute requiring notice of action, and it has been said that this notice of

action discloses only a complaint for a mere act of omission. Looking at the words "done and left undone by you," and the expansion of these words which follows, I think that the notice, though capable of being applied to an act of omission, is also capable of being extended to an act of commission. It shows the defendants sufficiently what they have to meet. They had an opportunity of inquiring into the matter; and it therefore appears to me that it would be a mistake to allow a special demurrer like this to such a notice of action. The judgment of the County Court judge must be affirmed. *Judgment affirmed.*

Solicitors for the appellants, *Hedges and Brandreth.*

Solicitors for the respondents, *Brook and Chapman*, for T. Gaffey, Liverpool.

CROWN CASES RESERVED.

Saturday, May 11, 1878.

(Before Lord COLERIDGE, C.J., MELLOR, J., LUSH, J., CLEASBY, B., and GROVE, J.)

REG. v. WELLINGS. (a)

Evidence—Admissibility of deposition—Inability of witness to travel—Pregnancy.

It was proved that a witness who resided fifteen miles from the place of trial was in expectation of her confinement, and on the morning of the trial was unable to move about without considerable difficulty, and was then lying down and had been so for the greater part of the week, but able to get up for a few minutes at intervals, and that she thought her confinement might not take place until the middle of the following week, but might also occur at any hour. No medical evidence was given upon the subject.

The presiding judge having admitted her deposition before the committing magistrate on the ground that she was so ill as to be unable to travel within the meaning of 11 & 12 Vict. c. 42, s. 17, this court upheld his decision.

CASE stated for the opinion of this Court by the Chairman of the Worcestershire Quarter Sessions.

At the Worcestershire adjourned Quarter Sessions, held on the 7th March 1878, the above-named prisoner Thomas Wellings (with one William Mallars, who pleaded guilty) was indicted and tried before me for unlawfully assaulting one Ann Pugh, with intent her feloniously to ravish and carnally know.

On the opening of the case the counsel for the prosecution applied to put in evidence the deposition of Ann Pugh, the principal witness, on the ground that she was so ill as to be unable to travel, being in daily and hourly expectation of her confinement.

In support of his application he called the husband of Ann Pugh, who proved that he resided with his wife fifteen miles distant from the place of trial, and that when he left his wife on that morning she was unable to move about without a considerable difficulty; that she was then lying down and had been so during the greater part of the past week, though able to get up for a few minutes at intervals. In answer to a question from me the husband stated that his wife thought

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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her confinement might not take place until the middle of the following week, but might, she also thought, occur at any hour. No medical evidence was tendered.

The counsel for the prisoner objected that this was not such an illness as was contemplated by the statute 11 & 12 Vict. c. 42, s. 17.

Acting upon what I considered my discretionary power I decided that the illness of Ann Pugh was such as came within the meaning of the statute, and that the foregoing evidence was sufficient to prove such illness, and her deposition was thereupon admitted.

The prisoner Thomas Wellings was found guilty, and was sentenced to be imprisoned and kept to hard labour for eighteen calendar months, and he is now in the Worcester prison in execution of such sentence.

The question upon which I respectfully desire the opinion of the Court is, whether under the circumstances above stated the deposition of Ann Pugh was properly received in evidence.

G. W. HASTINGS, Chairman of the above Court of Quarter Sessions.

Selfe for the prisoner.—The deposition ought not to have been admitted in evidence. The 11 & 12 Vict. c. 42, s. 17, enacts (*inter alia*) that if upon the trial of the accused it shall be proved "that any person whose deposition shall have been so taken is dead or so ill as not to be able to travel, and if it be also proved that such deposition was taken in the presence of the accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, &c., it shall be lawful to read such deposition as evidence in such prosecution." This statutory power ought not to be extended further than it has already been. In this case the deponent was only fifteen miles away, and thought her confinement might not take place for a week. In *Reg. v. Wilton* (1 Fos. & Fin. 309), where Willes, J. admitted the deposition of a woman on the ground that she was ill and unable to attend, she having been, it was stated, delivered of a dead child, the learned judge said: "It must not be supposed that the fact of a woman having been delivered nine days ago constitutes an illness within the meaning of the statute; but we have it in evidence that she was delivered of a dead child, which would tend to produce a morbid state of body, and therefore I am of opinion her deposition may be read." And in *Reg. v. Walker* (1 Fos. & Fin. 534) the same learned judge said: "Illness from confinement is an ordinary state, and not such an illness as is contemplated by the statute. I have considered the question with my brother Crowder. If you find it necessary for your case to put in the deposition, I have made up my mind to reserve the question for the opinion of the judges. . . . I think it should be such an illness as will prevent a person from travelling." In *Reg. v. Huddersfield* (26 L. J. 169, M. C.) it was held that pregnancy was not such "sickness" as would prevent the removability of a pauper. In *Reg. v. Parker and Ashworth* (York Summer Assizes 1862), where it was proposed to put in the deposition of a married woman on the ground that she was pregnant, Mellor, J. said that the matter had been much considered by the Judges, and the general opinion of the bench was that inability to travel arising from pregnancy alone was not such an illness as was contemplated

by the statute. No doubt, in *Reg. v. Stephenson* (9 Cox C. C. 156; 31 L. J. 147, M. C.) it was held that there might be incidents to the state of pregnancy which render a woman too ill to travel, and, as observed by Erle, C.J. in delivering the judgment, it was proved that the woman was daily expecting her confinement, and was *poorly otherwise*, and therefore too ill to travel. The distance in that case was twenty-five miles. In the present case no medical evidence was given, and the evidence was the simple facts stated in the case.

Godson for the prosecution.—The present case is precisely that of *Reg. v. Stephenson*, where it was decided that it is for the presiding judge at the trial to decide in his discretion, whether the evidence that the witness is too ill to travel is sufficient. [He was then stopped by the Court.]

Lord COLERIDGE, C.J.—The question in this case is not whether the witness was ill or not, but whether "she was so ill as not to be able to travel" within the meaning of the statute, and I am of opinion that the conviction should be affirmed, and that the learned chairman at the trial properly admitted her deposition in evidence. We are all of opinion as matter of law that pregnancy may be, not that it must necessarily be, in any particular case, the source of such an illness as to bring a witness within the contemplation of the statute. Whether in the particular case the facts proved bring the witness within the statute it is for the presiding judge to decide. The presiding judge has here decided that this was a case within the Act, and we see no reason for saying that he has exercised his discretion wrongly.

The rest of the Court concurred.

Conviction affirmed.

Saturday, May 18, 1878.

(Before Lord COLERIDGE, C.J., MELLOR, J., LUSH, J., CLEASBY, B., and LOPES, J.)

REG. v. MORRIS ROBERTS. (a)

Perjury—Deputy County Court Judge—Evidence of appointment—9 & 10 Vict. c. 95, s. 111.

An indictment for perjury alleged the offence to have been committed before J. U., then being and sitting as the duly qualified and appointed deputy judge of the County Court of W. Proof was given that the perjury took place in the presence of J. U. at the County Court, and a certified minute, under the seal of the court, of the proceedings, was put in evidence, intitled "Minute of judgments, orders, and other proceedings, at a court holden at, &c., before J. U., deputy judge of the said court."

Held, that there was sufficient proof of J. U. acting as deputy judge, and therefore *prima facie* evidence of his appointment as such.

Held, also, per Lord Coleridge, O.J., that by the County Court Act (9 & 10 Vict. c. 95), s. 111, the minute of the proceedings being made evidence of the proceedings and their regularity, was evidence of the regularity of J. U.'s appointment.

CASE reserved for the opinion of this Court by the Recorder of London.

The prisoner was tried before me on the 10th May inst. upon an indictment for perjury.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The indictment alleged the offence to have been committed before "Joseph Underhill, Esq., then being and sitting as the duly qualified and appointed deputy judge of the County Court of Warwickshire."

A minute of the proceedings of the County Court was put in as evidence on the part of the prosecution, which was intitled as follows :

Minute of judgments, orders, and other proceedings at a court holden at Birmingham, in the county of Warwick, on the 13th Nov. 1877, before Joseph Underhill, Esq., sputy judge of the said court.

A certificate was written on the minute in these words :

We hereby certify that the above is a true copy of an entry in the minute book of judgments, orders, and other proceedings of the County Court of Warwickshire, holden at Birmingham.

Dated this 4th Dec. 1877.

JOHN COLB. } Registrars.
EDWIN PARRY }

The certificate bore the seal of the County Court.

Proof was also given that the alleged perjury took place in the presence of Mr. Underhill, at the County Court.

An objection was taken by the counsel for the prisoner that proof should have been given of the appointment of Mr. Underhill as deputy judge.

I overruled the objection and left the case to the jury, who convicted the prisoner; but upon the application of the prisoner's counsel I have reserved this case for the opinion of the Court for the Consideration of Crown Cases Reserved.

Whether it was necessary that further or any proof of the authority of the presiding judge at the County Court beyond his acting in that capacity, and the production of the minute above mentioned should have been given.

The prisoner remains in gaol awaiting the decision of the court. (Signed) THOMAS CHAMBERS.

Jelf (Archibald with him) for the prisoner.—The conviction was wrong. There was no proof of the material fact that the person before whom the perjury was alleged to have been committed had authority to administer an oath. In other words, there was no sufficient proof of the appointment of the deputy judge. In 1 Hawk. P.C. bk. 1, c. 69, s. 4, it is said, "It seemeth clear that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature without legal authority for their so doing; or before those who are legally authorised to administer some kind of oaths, but not those which happen to be taken before them; or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of manner of force, but are altogether idle." The onus of proving the due appointment of the deputy judge was upon the prosecutor, and the minute produced was not sufficient evidence thereof. The County Court judge has the power of appointing a deputy by the 9 & 10 Vict. c. 95, s. 25, which enacts "that in case of illness or unavoidable absence, the cause whereof shall be entered on the minutes of the court, it shall be lawful for the judge, &c., to appoint some other person, &c." [LUSH, J.—If an appointment had been legally proved in other

respects, would you contend that it was necessary to prove the "cause" thereof?] It would be necessary to prove some fact from which the cause might be presumed. In the present case the prosecution should have shown such an acting as deputy judge as to lead to the reasonable inference that the deputy was properly appointed. [Lord COLERIDGE, C.J.—In *Berryman v. Wiss* (4 T. Rep. 366), Buller, J. said that in the case of all peace officers, justices of the peace, constables, &c., it was sufficient to prove that they acted in those characters without producing their appointments.] All the cases go to show that there must be evidence, not that the person acted *pro hac vice*, but that he had acted in the same capacity on former occasions. [Lord COLERIDGE, C.J.—Would you contend that if perjury were committed before a County Court judge the first time he acted that his appointment should be formally proved? The 11th section of 9 & 10 Vict. c. 95, provides that the minutes, or a copy thereof, bearing the seal of the court, and purporting to be signed and certified as a true copy, shall be admitted in all courts and places as evidence of the proceedings and of the regularity of such proceedings.] The mere fact that a person has once acted in a public capacity is not sufficient proof that he has been regularly appointed. In *Rees v. Verelet* (3 Camp. 433) it appeared that Dr. Parson had acted as surrogate for twenty years, and that was held to be *prima facie* evidence only of his due appointment. [Lord COLERIDGE, C.J.—The once acting in a public capacity is sufficient to make a *prima facie* case that the person so acting is duly appointed: *Wolton v. Gavin* 16 Q. B. 48; 20 L. J. 73 Q. B.; *Reg. v. Essex*, Dears. & B. 369, 7 Cox C.O. 384.] The evidence in the present case is consistent with the fact that the barrister acting as deputy judge had been merely asked to act *eo instante* in the particular case without any written or proper appointment.

Lord COLERIDGE, C.J.—I am of opinion that the conviction should be affirmed. One of the best recognised principles of law, *Omnia presumuntur esse rite et solemniter acta donec probetur in contrarium*, is applicable to public officers acting in discharge of public duties. The mere acting in a public capacity is sufficient *prima facie* proof of the proper appointment; but it is only a *prima facie* presumption, and it is capable of being rebutted, and in the case of *Rees v. Verelet* that presumption was rebutted in fact, and the person who there had acted as surrogate for twenty years was proved to have been improperly appointed. The case of *Rees v. Verelet* is exceedingly like this; there the fact of Dr. Parson having acted as surrogate was held by Lord Ellenborough, C.J., to be sufficient *prima facie* evidence that he was duly appointed, and had competent authority to administer an oath, and for that proposition *Rees v. Verelet* was referred to as good law by Lord Campbell, C.J., in *Wolton v. Gavin*. But it was further shown in *Rees v. Verelet* that Dr. Parson had never been regularly appointed as surrogate, and Lord Ellenborough then held that the evidence that Dr. Parson was not duly appointed a surrogate could not be shut out, however long he might have acted in that capacity, and that the presumption arising from his acting only stood until the contrary was proved. That is an instructive case, as showing the true rule as to the *prima facie* presumption in such cases. It is laid

down in all the text books as a recognised principle that a person acting in the capacity of a public officer is *prima facie* to be taken to be so, and that principle was adopted by Patteson, J. in *Doe dem. Bowley v. Barnes*, in 8 Q. B. 1043. In that case there was a demise by the churchwardens and overseers of some parish property, and the fact that they acted as churchwardens and overseers at the time of the demise was held to be sufficient *prima facie* proof for the purpose of an action of ejectment without proving their appointment. His Lordship then referred to the decision of Tindal, C.J. to the same effect in *Reg. v. Newton* (Car. & Kir. 469), and to *Reg. v. Jones* (2 Camp. 131). This objection, if it were good, would extend very widely, for, suppose perjury committed on the first time of acting in his office before a judge or a recorder, or a County Court judge, or any person who fills a responsible public position, would it lie on the prosecution to show the appointment of such an officer in the strictest possible way? Mr. Jelf has not satisfied me that it would, and no member of the court has any doubt that there is no ground for such a contention. But further the County Court Act (9 & 10 Vict. c. 95), s. 111, provides that a copy of the minutes of the court bearing the seal of the court shall be evidence of the proceedings of the court and of the regularity of such proceedings, and a copy of the minutes bearing the seal of the court was proved which showed that Mr. Underhill was acting as deputy judge of the court. The statute therefore makes this evidence of the regularity of the proceedings before him. The conviction will therefore be affirmed.

The rest of the Court concurred.

Conviction affirmed.

Monday, May 18, 1878.

(Before Lord COLERIDGE C.J., MELLOR, LUSH, and LOPEZ, JJ., and OLESBY B.)

REG. v. GREATHEAD. (a)

False pretences—Indictment—Evidence—Cheque.

By means of a false wage-sheet the prisoner obtained from his master a cheque for the amount stated in the sheet to pay the men's wages. The cheque was informally drawn, and refused payment by the bank. The prisoner returned it to his master, telling him of the cause of its non-payment, and the master tore it up and gave another, which the prisoner cashed, and appropriated the difference between what was really due for wages and what was falsely stated to be due.

On an indictment charging prisoner with obtaining 8s. 6d., the actual sum appropriated by the prisoner, it was objected that the above evidence did not prove the charge, for that he had only obtained a valueless piece of paper.

Held, that the false pretence was a continuing one, and that the second valuable cheque was obtained thereby equally with the first, and that the charge was proved.

CASE stated for the opinion of this Court by the Chairman of the West Riding of Yorkshire Quarter Sessions.

The defendant William Greathead was tried at the adjourned general quarter sessions of the peace

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

for the West Riding of Yorkshire, held at Wakefield, on the 12th April 1878, on an indictment charging him with obtaining certain moneys by false pretences from John Charles Collins, the prosecutor in the indictment mentioned.

The first count in the indictment alleged that the defendant unlawfully obtained on the 12th Jan. from the said John Charles Collins 8s. 6d. in money his property, with intent to defraud.

The second count alleged that the defendant unlawfully obtained on the 2nd Feb. from the said John Charles Collins 1l. in money his property, with intent to defraud.

On the trial it was proved that the prosecutor engaged the defendant as his foreman over workmen employed by the prosecutor, and it was his duty to keep an account of the work done by the several workmen (who were paid by time) and of the wages due to them, and on the Saturday of each week to lay before the prosecutor a wage-sheet, showing the names of the different workmen employed and the number of days each man had worked during the week, and the amounts due to them respectively, upon the production of which wage-sheet, and acting upon such wage-sheet as correct, the prosecutor paid the amount either by cash or by cheque upon his bankers.

On the Saturday of the week ending the 12th Jan. the defendant made out the usual wage-sheet and presented it to the prosecutor, in which sheet a workman of the name of Cookson was represented to have worked five and a half days and to be entitled to the sum of 1l. 3s. 9d., and another workman of the name of Wells was represented to have worked a like number of days and to be entitled to a like amount.

It was proved by the prosecutor that Cookson had worked only four and a half days in that week, and not five and a half days, and was entitled for work done in that week to the sum of 19s. 6d., and not 1l. 3s. 9d., as appeared by the wage sheet, and that Wells had also only worked four and a half days, and was also only entitled to 19s. 6d., and not 1l. 3s. 9d. as appeared by the wage-sheet, and that the total sum appearing by the wage-sheet for the week as 6l. 16s. 6d., included the two sums of 4s. 3d. respectively, being the difference between the before-mentioned two sums of 19s. 6d. and 1l. 3s. 9d., and that therefore the sum of 8s. 6d. was not due as appeared by the said wage-sheet.

The prosecutor, relying on the accuracy of the wage-sheet by the false pretence set out in the first count of the indictment, paid the total amount appearing due on the wage-sheet by a cheque, on his bankers, but on presentation for payment at the bank it was found that there was a material omission in the body of the cheque and the same was sent back to the prosecutor by the defendant and the defendant informed the prosecutor of the fact, whereupon the prosecutor tore up the cheque and gave another cheque to the defendant for the same amount in lieu of the first, which second cheque was presented by the defendant to the bank and duly honoured and cashed and the proceeds paid to the prisoner, who applied the 8s. 6d. to his own use, but properly disposed of the remainder.

There was no evidence of any further pretence at the time the defendant received the last-mentioned cheque. Unless the objection raised on behalf of the prisoner hereinafter set forth was valid there was ample evidence to go to the jury on

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the charge mentioned in the first count of the indictment.

Further evidence was given and facts proved in support of the second count of the indictment charging the defendant with obtaining a further sum by false pretences on the 2nd Feb., and it was not contended on behalf of the defendant that there was no evidence to go to the jury on that count.

At the close of the case for the prosecution it was objected by defendant's counsel that the evidence failed to support the first count of the indictment, on the ground that the whole matter was determined on the handing over the first cheque, and that instead of obtaining the sum of 8s. 6d. by false pretences the defendant had only obtained a piece of paper purporting to be a cheque of the value of 6l. 16s. 6d., which was of no value. And it was further contended that there was no evidence at the time of the defendant receiving the second cheque to show what was passing in the prosecutor's mind, as it might have been given to remedy the first cheque, and sustain the prosecutor's credit.

It was contended on behalf of the prosecution that there was a continuing pretence.

I overruled the objection of the defendant's counsel, but reserved the point and left the case to the jury.

The jury found a general verdict of guilty, and after it was objected that the verdict ought to have been entered upon the counts respectively, I sentenced the prisoner to four months imprisonment with hard labour. I agreed to admit him to bail, but bail was not forthcoming.

The question for the consideration of the Court of Crown Cases Reserved is whether on the above facts the conviction should be quashed.

HENRY LEATHAM, Chairman.

No counsel appeared to argue on either side.

LORD COLERIDGE, C.J.—The circumstances of this case are shortly these: The prisoner presented a false wage-sheet to his master, the prosecutor, and thereby got from him a cheque for the purpose of paying the men's wages as stated in the wage-sheet. He presented the cheque to the bank, and could not get it cashed, as there was a material omission in the body of it. The prisoner returned that cheque to the prosecutor and told him of the omission, and the prosecutor thereupon tore it up and drew another, which he gave to the prisoner. The prisoner cashed the second cheque and appropriated to his own use the difference between the actual amount of the wages and the amount falsely stated in the wage-sheet. Nothing was said by the prosecutor, but he merely substituted the good cheque for the informal one. Now, the good sense of the thing is, that the false pretence upon which the first cheque was given continued in force, and was the acting motive which influenced the prosecutor's mind in giving the second cheque. The conviction will therefore be affirmed.

LUSH, J.—I am of the same opinion. This was merely a substitution of a second cheque for the first, and it was given and obtained on the same false pretence as the first.

The rest of the Court concurred.

Conviction affirmed.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Feb. 5 and May 18, 1878.

(Before COCKBURN, C.J., and BRAMWELL, BRETT, and COTTON, L.JJ.)

REG. ON the prosecution of the LONDON AND NORTH-WESTERN RAILWAY COMPANY (resps.) v. THE OVERSEERS AND MAYOR OF THE BOROUGH OF WALSALL (apps.) (a)

Practice—Appeal against poor-rate—Case stated by sessions—Appeal to the Court of Appeal—Judicature Act 1873, s. 19.

Where a court of quarter sessions made an order on an appeal against a poor rate, subject to a case for the opinion of the Queen's Bench Division,

Held, by Cockburn, C.J. and Brett, L.J., that no appeal lay from the decision of the Queen's Bench Division of the Court of Appeal;

Held, by Bramwell and Cotton, L.JJ., that an appeal lay.

APPEAL by the defendants, the overseers and mayor of the borough of Walsall, against the decision of the Queen's Bench Division, affirming an order of sessions and discharging a rule nisi, which had been obtained by the appellants, calling upon the London and North-Western Railway Company to show cause why the said order of sessions should not be quashed.

A poor-rate having been made on the London and North-Western Railway Company, they appealed against the rate to the court of quarter sessions for the borough of Walsall. The court of quarter sessions made an order in favour of the appellants from the rate (the London and North-Western Railway Company) subject to a special case for the opinion of the Queen's Bench Division. The case having been removed into the High Court of Justice by *certiorari*, the Queen's Bench Division gave judgment affirming the order of sessions, and the overseers and mayor of Walsall appealed.

Feb. 5.—*Herschell, Q.C.*, and *Anstie*, for the appellants.—An appeal lies to this court by the express words of sect. 19 of the Judicature Act 1873, by which the court has jurisdiction to hear and determine appeals from any judgment or order of the High Court of Justice, except in certain cases mentioned in the Act. Sect. 45 does not affect the right of appeal here, for special leave to appeal has been obtained. The way in which the case came before the Queen's Bench Division is practically an appeal; the *certiorari* is mere machinery to bring the case before the court. *R. v. Overseers of Sutton Coldfield* (29 L. T. Rep. N. S. 840; L. Rep. 9 Q. B. 153; 43 L. J. 57, Q. B.) illustrates the course of procedure. The jurisdiction of the Queen's Bench is an ancient jurisdiction, not governed by statute. Formerly the quarter sessions used to consult the judge of assize, but when this practice was found to be inconvenient the proceeding by *certiorari* to bring the case before the Court of Queen's Bench was adopted. The decision of the Queen's Bench

(a) Reported by P. B. HUTTONS, Esq., Barrister-at-Law.

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Division is a "judgment or order" within the meaning of sect. 19 of the Judicature Act 1873, for the divisional court does in form affirm or quash the order of quarter sessions. The order is that the order of the quarter sessions be affirmed. The quarter sessions decide subject to the judgment of the Queen's Bench Division, and the order is brought up that the divisional court may deal with it, and affirm or quash it. Therefore the case is within sect. 19, and possibly also within sect. 45, of the Judicature Act 1873, and there is an appeal; if not there is no way of reviewing orders of quarter sessions. Even if the jurisdiction of the Queen's Bench was originally only consultative, it is no longer so, for they practically deal with the order of quarter sessions. This is not a "criminal cause or matter" within sect. 41 of the Judicature Act 1873. The Crown has no interest, and there is nothing criminal in the proceedings in substance, or even in form. This court has entertained an appeal in a case of *quo warranto*:

Reg. v. Collins, L. Rep. 2 Q. B. Div. 30.

The cases in which the section has been held to apply,

Reg. v. Steel, 35 L. T. Rep. N. S. 534; L. Rep. 2 Q. B. Div. 37; 46 L. J. 1, M. C.;

Reg. v. Fletcher, 35 L. T. Rep. N. S. 538; L. Rep. 2 Q. B. Div. 43; 46 L. J. 4, M. C.,

were proceedings on criminal charges.

Neville (Bosanquet with him) for the respondents.—This is not a "judgment or order" of the Queen's Bench Division within the meaning of sect. 19 of the Judicature Act 1873, but only an opinion: *Reg. v. Ohantrill* (33 L. T. Rep. N. S. 305; L. Rep. 10 Q. B. 587; 44 L. J. 167, M. C.), where the practice is fully explained in the judgment of the court delivered by Field, J. 5 Geo. 2, c. 19, s. 3 clearly contemplates that there should be no appeal, and sect. 20 of the Appellate Jurisdiction Act 1876 (39 & 40 Vict. c. 59) shows that it was not the intention of the Legislature that an appeal should be given by the Judicature Act.

Herschell, Q.C. in reply.

Our. adv. vult.

May 18.—The following judgments were delivered:—

CORROX, L.J.—This is an appeal of the overseers of the poor of Walsall and of the corporation of Walsall against a rule of the Queen's Bench Division, made the 24th Nov. 1877, by which that court discharged a rule *nisi*, obtained by the appellants, calling upon the London and North-Western Railway Company to show cause why an order of sessions therein referred to should not be quashed, and whereby it was ordered that the order of sessions be affirmed. The first question and the only one now to be considered is whether this court has any jurisdiction to entertain the appeal, and, with all respect for the judgment of those who hold the opposite opinion, I am of opinion that it has. This depends on the 19th section of the Judicature Act 1873, taken in connection with the other provisions of that Act, and the amending Acts of 1875 and 1876. In construing the 19th section it must be remembered that under these Acts this court, while it has transferred to it by sect. 18 all the powers of the Court of Exchequer Chamber, has a very much more extensive jurisdiction than was ever possessed by that court. It is authorised to hear appeals from every division of the High Court, and it can and does hear

appeals from orders refusing new trials, when the application for them is based on the ground of the verdict being against the weight of evidence, or of there being no evidence to support the verdict, and it can hear appeals from interlocutory orders made on matters of mere practice. Apparently it was intended by the Legislature to give this court the largest powers of hearing appeals, or rather to give to the suitor the amplest right of appeal. What then is the 19th section? This 19th section in terms gives an appeal from every judgment or order, save as thereafter mentioned, of the High Court, and by the interpretation clause "order" includes "rule." The first point is, what are the exceptions referred to? They appear to be criminal cases, in which there is no appeal save for some error of law apparent upon the record (sect. 47), orders by consent or as to costs (sect. 49), and cases where by Act of Parliament the decision of any court or judge, whose jurisdiction is transferred to the High Court of Justice, is to be final (Act of 1873, sect. 20). This case does not come within any of these exceptions, for it is not suggested that there is anything of a criminal nature in the case, and, although before the Judicature Acts there was no appeal in such cases as the present from the Court of Queen's Bench, it is not suggested that there is any Act of Parliament which makes the decision of the Queen's Bench in such cases final; and the necessity for the 20th section of the Act of 1876 shows what a large power of hearing appeals had, in the opinion of the Legislature, been granted to this court. That which is brought before us for review by the appellant is in form a rule or order of the Queen's Bench Division, discharging a rule *nisi*, and directing that the order of the sessions be affirmed. This, having regard to the interpretation clause, is an order of the Queen's Bench Division within the meaning of the 19th section, and it lies on those who contend that, though the case is not within any of the exceptions mentioned in sect. 19, there is no appeal, to make out their case. How is it shown that it is not within our jurisdiction to entertain the appeal? As I understand, the argument was that, as the case is one as to the amount of rate to be charged on the railway company the decision of the matter is under Act of Parliament given to the quarter sessions, and that they are finally to decide the matter, without appeal from their decision, and that the order of the Queen's Bench is a mere statement of opinion on which the sessions will act, and it is therefore not subject to appeal. I acquiesce in the view that the litigants as to the validity and amount of the rate cannot, as of right, appeal from the decision of the sessions, and cannot insist on the decision of the sessions being in any way reviewed. But in the present case the sessions have stated a case, and the question for us is, not whether there is an appeal from the judgment of the sessions, but whether the opinion of the Queen's Bench Division expressed by the rule appealed from is not open to review. The case of *Reg. v. Ohantrill* (L. Rep. 10 Q. B., p. 587) is an authority that the power of the Queen's Bench to entertain the case, even on the submission of the sessions, depends on the court having power to issue a writ of *certiorari* to bring the case before it. In that case Field, J., delivering the judgment of the court, consisting of himself and Blackburn, J., says,

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"The question whether a case was one of difficulty or not, fit to be reserved for the court, was to be determined by the sessions, and not by the parties. But if they found it one of difficulty, and stated a case for the opinion of the court, then it became necessary that a *certiorari* should issue to bring that case before the court, that being the only mode by which the order could be brought into the court having jurisdiction to quash or confirm it." In that case the justices had convicted, subject to a case for the opinion of the court, but as the Act under which the conviction was made expressly enacted that convictions under it should not be quashed for errors in form, or be removed by *certiorari*, the court held that, even though a case had been stated by the justices, they could not entertain the question. In a case where the Queen's Bench Division has without any submission of the sessions, power to issue, and has issued, a writ of *certiorari*, any order made by the court in a matter not within the exceptions above referred to would be subject to an appeal to this court. In my opinion there is no sufficient reason why an order, which can only be made by this court in cases where it has power to issue a *certiorari*, should not be subject to appeal because the submission of the sessions has enabled the court to issue the writ. But it is argued that if the court should differ from the Court of Queen's Bench this court has no power to compel the sessions to obey any order made on the appeal. It does not appear that the Queen's Bench could enforce obedience to its opinion, if opinion only. All it could do would be to quash or affirm the order of sessions, and if in fact for the purpose of expressing its opinion it makes an order to quash the order of sessions, I see no reason why this court should not do so on appeal, as it has power to make such order as the court appealed from ought to have made. Neither, in my opinion, is it a sufficient argument against the right of appeal that the operative order as regards the rate must be that of the sessions. In many cases on appeal to the House of Lords from the Court of Chancery, it was the practice of the House of Lords to remit the case to the court below with a direction as to the rights of parties, and in cases where it was necessary to enforce an order of the House of Lords, made on appeal from the Court of Chancery, it was the practice for the purpose of enforcing the order of the House of Lords to make it an order of the Court of Chancery. The case then stands thus: In some way not explained a practice now well established has grown up, under which the sessions give their judgment in these cases subject to a case for the opinion of the Queen's Bench. The writ of *certiorari* is then issued for the purpose of bringing the matter before that court, which gives its opinion, not, as was the practice on cases sent by the Court of Chancery for the opinion of common law courts, by the certificate signed by the judges who heard the case argued, but by a rule or order. This rule is within the express terms of the 19th section of the Act of 1873, and in my opinion there is no sufficient reason for saying that it is not under the section subject to appeal. I have not adverted to sect. 45 of the Act of 1873. It has not been shown that in any case there is what can strictly be called an appeal from petty or quarter sessions to the High Court, though it has been suggested that there are

or may be such cases. If there are not, then on the fair construction of that section, it must in my opinion be taken to apply to cases like the present, where, though in form there is no appeal from the sessions, there is in substance a review of their decision. In my opinion the court is, under sect. 19 of the Act of 1873, bound to hear this appeal.

BRAMWELL, L.J.—I am of opinion that an appeal lies in this case. The Lord Chief Justice has favoured me with his judgment, and I agree with nearly, if not all, that he has written. There is no original jurisdiction in the Queen's Bench as to poor law matters. Appeal is the creature of statute. The sessions need not state a case for the opinion of the court. It is a case for its opinion. To my mind these considerations do not solve the question. At the outside they present considerations tending one way only. It is necessary to look at those that tend the other way. I will proceed to state them. The Judicature Act intended as a rule of all but universal application that there should be an appeal from the High Court to the Court of Appeal in every case where the High Court had given a judgment, order, or decision. The one exception is of criminal matters, which were not the subject of error. This exception shows that everything else was intended to be appealable. I think an appeal would lie even without the enactment in sect. 45, though it would to my mind be more doubtful than it is with that section. For it might be said that the opinion or advice asked by the sessions and given was not a judgment or order within sect. 19. I think it would be. I propose, however, to examine the question in connection with that section. We start with this, that proceedings on the Crown side of the division are as a rule the subject of appeal. Then sect. 45 of the original Judicature Act says: "All appeals from petty or quarter sessions," which might have been brought to any court or judge, may be heard before a new court, and the determination thereof shall be final, unless special leave to appeal" is given by such court, &c. This section, therefore, contemplates that there was an "appeal" from quarter sessions to one of the courts whose jurisdiction is transferred, and that from the decision on that appeal there may be a further appeal to the Court of Appeal. Now what appeals were there from quarter sessions? I speak with reserve, because I have no familiarity with the matter. I believe that there is no appeal, strictly so called, nor indeed anything in the nature of an appeal from quarter sessions given by statute to the Queen's Bench; that the jurisdiction of the Queen's Bench was always, and still is, exercised by *certiorari* under powers of the common law—a jurisdiction not limited to quarter sessions, but extending to other cases where orders are made by courts or bodies having judicial powers. On the Queen's Bench being informed that there is invalidity in the proceedings of the inferior court on the face of them, not an error of decision, but a want of authority, or excess, a *certiorari* issues, and on the order being brought up, it is quashed if the objection is sustained; if not sustained, it remains in force, and a *procedendo* issues. This no doubt is not what a lawyer speaking strictly would call an "appeal." But practically it is an appeal; it is so called even by lawyers when speaking gravely of the subject, and undoubtedly it would be a difficulty to make anyone not a lawyer understand why "appeal"

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was not the right word. But assuming it not to be, it is a rule of law and good sense that where you have words used which have no application in their primary or strict sense, you must, if you can, apply them in a secondary or popular sense. And, therefore, if there is nothing that can be strictly called an appeal from quarter sessions, nor anything that can in any way be so called, except proceeding by *certiorari*, which in substance are appeals, the Legislature must be taken to have meant them. Still, I admit that if the enactment is of impossible application it must be disregarded. But is it? Let us examine the matter. I repeat, I speak with reserve. But, as I understand, where an order of quarter sessions is brought up on *certiorari*, and it is proposed to quash it, a rule for that purpose is obtained, and made absolute or discharged. I refer to where there is no case stated, but where a defect on the face of the order is alleged to exist. It must be admitted that there is no difficulty in applying the statute to such a case. Is there where there is no defect on the face of the proceedings unless the special case is referred to? I see none. No doubt the origin of the matter was as the Lord Chief Justice mentions in his judgment. No doubt it was a contrivance to get the opinion of the Queen's Bench. No doubt it was an opinion asked for which the sessions might have disregarded, but has not this *mos pro lege* become *lex*? The procedure is the same as when a defect on the face of the proceedings is relied on, except that a rule *nisi* is taken as granted. Has not the Legislature said if the sessions want the opinion of Queen's Bench they must seek it, subject to that opinion being revised by the Court of Appeal? If they can disregard the opinion of the Queen's Bench, so they can that of the Court of Appeal; if they do not choose to ask it subject to revision, they can still refuse to do so. Is it to be supposed that where a case is granted and stated, and there is also an alleged defect on the face of the proceedings independently of the case stated, the Court of Appeal may examine the latter and not the former matter? Or is it said that appeal lies where there is a defect on the face of the proceedings, but not where a case is stated? On the substance of the matter I cannot see why there should not be an appeal in these cases. They continually involve questions of the utmost importance. As to the expense, with all submission be it said, the Legislature, which has passed a law that has given a power to make the trumpery appeals that are made, was not likely to be deterred by that consideration in these sessions cases, in which thousands are often at stake, especially as there must be leave to appeal. I ought to mention one matter which tells against the appeal possibly, viz., that in some cases the order of sessions is neither quashed nor affirmed, but sent back with a direction or opinion. But if we look at the substance of the matter it is equally a decision, as much as a direction for a new trial, which is no judgment on the case. I am of opinion that even if we cannot consider the question arising on the case stated, we have jurisdiction to hear the appeal, and that our judgment should be that it be dismissed, because the judgment below is right as far as we have power to examine it.

COCKBURN, C.J.—This is an appeal from the

decision of the Queen's Bench Division, affirming the order of the court of quarter sessions for the borough of Walsall, on an appeal against a poor-rate made on the respondents (that is, the appellants from the rate, the London and North-Western Railway Company). The question with which in the present stage of this appeal we are alone concerned is whether this court has any appellate jurisdiction to review a decision of the Queen's Bench Division in the matter of a poor rate. I am of opinion that it has not. It is true that by the 19th section of the original Judicature Act it is enacted that the Court of Appeal shall have jurisdiction and power to hear and determine appeals from any "judgment or order" of the High Court of Justice, or of any judges or judge thereof. The fallacy in the reasoning which seeks to apply this enactment to the decision of the Queen's Bench Division in the matter of a poor rate consists in treating such decision as a "judgment or order" within the meaning of this section. To see this it is, as it seems to me, only necessary to examine in what the jurisdiction of the Queen's Bench Division in the matter of an appeal against a poor rate—if it can be properly called jurisdiction—consists, and how it arises. It is familiar knowledge that in matters relating to the maintenance of the poor, the Court of Queen's Bench has never, from the first establishment of the poor law, had jurisdiction, either as a court of first instance, or as a Court of Appeal, except, as regards the latter, as far as the court of quarter sessions has, of its own free will and mere motion, submitted its judgment to the opinion of the court. And the reason is plain. By the statutes by which provision is made for the maintenance of the poor the jurisdiction over matters connected with it is vested exclusively in justices of peace in petty sessions in the first instance, and in justices in quarter sessions on appeal. Of this the language of the statutes admits of no doubt whatsoever. By the 43 Eliz. c. 2, s. 6, it is enacted: "That if any person or persons shall find themselves grieved with any cess, or tax, or other act done by the said churchwardens and other persons, or by the said justices of peace, that then it shall be lawful for the justices of the peace at their general quarter sessions, or the greater number of them, to take such order therein as to them shall be thought convenient, and the same to conclude and bind all the said parties." By a later Act, the 17 Geo. 2, c. 38, s. 4, it is enacted: "That in case any person or persons shall find him, her, or themselves aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein, or shall have any material objection to such account as aforesaid, or any part thereof, or shall find him, her, or themselves aggrieved by any neglect, act, or thing done or omitted by the churchwardens and overseers of the poor, or by any of His Majesty's justices of the peace, it shall and may be lawful for such person or persons, in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise where

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such parish, township, or place lies; and the justices of the peace there assembled are hereby authorised and required to receive such appeal, and to hear and finally determine the same." In like manner by the Act of 13 & 14 Car. 2, c. 12, by which the law of settlement was established, the appeal given to any persons who think themselves aggrieved by orders of removal is to "the justices at quarter sessions, who are required to do them justice according to the merits of the case." No ulterior appeal is given to any other court. Exclusive jurisdiction being thus given to the justices in petty sessions in the first instance, and to the quarter sessions on appeal, it has been long settled that when once this jurisdiction of the Court of Quarter Sessions on appeal has been exercised, the Court of Queen's Bench has never had, and the Queen's Bench Division of the High Court of Justice, which has taken its place, therefore cannot have any authority whatsoever, except when put in motion by the sessions. If, indeed, the court of quarter sessions refuses to exercise jurisdiction when it has it, the Court of Queen's Bench will by *mandamus* compel that court to hear and determine, in the same manner as it will prevent all other inferior courts from declining jurisdiction where it exists, and so refusing to do justice. But if the jurisdiction has once been exercised, however erroneous the decision, if the order of the quarter sessions be regular on the face of it, so that it appears therefrom that the order of the quarter sessions is within its jurisdiction and competency, the absence of which alone gives occasion to the interference of the Superior Court, the Court of Queen's Bench has from the earliest time declared itself incompetent to interfere, the simple reason being, as has been again and again held, that it has no appellate jurisdiction over the court of quarter sessions in matters which are within the proper jurisdiction of the latter, which an appeal against a poor rate undoubtedly is. Conclusive authority for this position is to be found in the following cases: In *Rea v. Justices of Monmouthshire* (4 B. & C. 844) the sessions on an appeal against an order of removal being equally divided as to the merits of the appeal, but being of opinion that the respondents ought to have proved the forty days' residence, but had not done so, quashed the order. A *mandamus* to compel them to re-hear the case having been applied for, the rule was discharged. Abbott, C.J. says: "I think the rule for a *mandamus* ought to be discharged. It appears that in this case the sessions have given their judgment. This court is not a court of error from that court. It may compel the sessions to proceed to hear and decide the appeal; but when they have so determined it this court cannot compel them to correct their judgment, if it appear to be erroneous. It is unnecessary to say whether the judgment pronounced by the sessions is erroneous, because we are of opinion that if it were so we have no authority to compel them to correct it." In a subsequent case of *Rea v. Justices of Monmouthshire* (8 B. & C. 137) the court of quarter sessions had been equally divided, but the equality had arisen from an interested justice having taken part in the decision. The court being thus divided, an order was entered for adjourning the appeal. A *certiorari* having been applied for to bring up the order for adjournment with a view to quash it as a nullity, inasmuch as the vote of

the interested justice ought not to have had any effect, the rule was discharged. Lord Tenterden says: "It is contended that, though the justices were divided in point of fact, in point of law the vote given by the party interested was a nullity, and that the sessions ought to have quashed the order. The late decisions establish that we cannot assume to ourselves the jurisdiction of a court of error, and review the judgment of the sessions. It is said that the sessions had not jurisdiction to make the adjournment. It is clear they had jurisdiction to make any order concerning the appeal, and, among others, the order that the hearing should be adjourned. Here a judgment has been pronounced by the sessions relating to a matter over which the court had jurisdiction; and, assuming their judgment to be erroneous, I think we have not jurisdiction as a court of error to review it." Even where a judgment had been entered by mistake, owing to miscalculation of the votes, the Court of Queen's Bench refused to interfere. Lord Ellenborough, after pointing out that, on discovery of the mistake, application to correct it should have been made to the court of quarter sessions itself while still sitting, says: "No step of the sort was taken, but judgment was entered; and this court cannot, in order to supply a remedy, exercise a jurisdiction which does not belong to it:" (*Rea v. Justices of Leicestershire*, 1 M. & S. 442.) It has been settled since the cases of *R. v. Oulton* (1 Burrow S. C. 64) and *Reg. v. Preston-on-the-Hill* (1b. 77) that a bill of exceptions does not lie from the judgment of a court of quarter sessions. In the latter case Lord Hardwicke, C.J. says: "This is a case of great consequence, and there may be very great inconveniences on either side. It hath been much wished that a bill of exceptions would lie to the justices at their sessions, because otherwise it may sometimes happen that they may determine in an arbitrary manner, contrary to the resolutions of the courts of law. For if the justices will not state the facts specially, though requested to do so, when the matter is doubtful, this is very blameable conduct in them, and it is to be wished that it might be avoided. On the other hand, there may be very great inconveniences arising from the abuse of bills of exceptions; and this matter for the settlement of the poor, which ought to be rendered cheap and speedy, may by such means be rendered dilatory, expensive, and burdensome." The reporter adds that "after the full hearing of the arguments on both sides the court were unanimous of opinion that a bill of exceptions doth not lie to the quarter sessions." Nevertheless, though it is thus clear, on reference to the statutes and the authorities, that the Court of Queen's Bench has no appellate jurisdiction, properly so called, in these matters, a practice became established, according to which the courts of quarter sessions in cases of difficulty submitted their judgment to the opinion of the Court of Queen's Bench, and either affirmed or quashed the orders appealed against according to its decision. Let us see what is the legal effect of the course thus adopted. The origin of this practice is matter of history. A full account of it is to be found in the learned judgment of Field, J. in the case of *Reg. v. Chantrell* (L. Rep. 10 Q. B. 587.) In remote times the jurisdiction of justices, as given by the commission of the peace, the terms of which are set forth in

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Dalton's Justice of the Peace, was subject to this proviso: "If a case of difficulty upon any of the premises before you, or any two of you, shall happen to arise, then let judgment in no wise be given thereupon before you, or any two of you, unless in the presence of one of our justices of either bench, or of one of our justices appointed to hold the assizes in the county." "This," observes Field, J., "not only empowers but requires the justices, in any case of difficulty, to obtain the opinion of a judge; and, by implication, requires the judge to give his opinion." There is, however, nothing in this provision which makes it obligatory on the justices to adopt the opinion of the judge; still less which enables the judge to pronounce an effective judgment independently of the justices. Accordingly, when called upon to decide an appeal as to the validity of orders made in parish matters, and in so doing to decide difficult questions of law on the construction of ill-drawn statutes, the courts of quarter sessions in cases of difficulty took the course of adjourning their decision till they had sought the advice of the judges of assize on the points or points of law which had arisen. Having obtained it they entered their judgment accordingly. This practice being, however, attended with some inconvenience, as the judges of assize would not, generally speaking, have time to attend to such matters, so as to afford them sufficient consideration, a practice by degrees arose, suggested in all probability in the first instance by the judges of assize themselves, of resorting to the Court of King's Bench for its advice on the law as applicable to the facts—these being stated, as found by the sessions, in the form of a special case. This practice is, however, comparatively of modern origin. As late as the 11th Will. 3, Lord Holt and the Court of King's Bench refused to hear a case which had been reserved for their opinion by a court of quarter sessions, and remitted it to the judge of assize (Anon. 2 Salk. 486). In the time of Lord Hardwicke the modern practice prevailed, but had not entirely superseded the old: (*E. v. Tedford* (Burrow S. C. 57)). The order of sessions as there stated recites that a case had been stated for the judges of assize, but that the judges of assize had not had time to hear and determine it. At a later period all traces of the old practice had disappeared, no doubt owing to the greater convenience of the modern. In the practice which thus became established, two singular anomalies arose. In the first place the justices, though bound in all cases of difficulty to consult judicial authority, constituted themselves the sole judges of the cases in which such difficulty occurred; while, as there was under the statutes no appeal from their decision to the Court of King's Bench, there was no power in the latter court to compel them to state a case for its opinion. It is true that there is inherent in the jurisdiction of the Court of Queen's Bench authority to bring before it by writ of *certiorari*, save where the writ is taken away by statutory enactment or charter, the proceedings of any court of inferior jurisdiction, with a view to quash such proceedings. But this applies only where there is some defect of jurisdiction or informality, or defect apparent on the face of the proceedings. The court cannot—and this must be carefully borne in mind—give itself appellate jurisdiction through the writ of *certiorari* where it otherwise

possesses none. "The writ of *certiorari*," say the Court of Queen's Bench in *E. v. Mosley* (2 Burrow, 1040), "does not go to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds." It would be a mistake to suppose that, because the order of sessions is brought before the court by *certiorari*, the court thereby acquires appellate jurisdiction. That this is so plainly appears from the undoubted fact that a party complaining of a wrongful decision of the sessions in respect of law or fact—so long as the proceedings have been regular and formal—could not on application to the Court of Queen's Bench obtain a writ of *certiorari* to bring up the order of quarter sessions for the purpose of its being considered on the merits. The case is in truth altogether an anomaly. In every other case the writ of *certiorari* is issued at the instance of the party aggrieved, and on a *prima facie* case being shown of some ground why the proceeding in the inferior court should be set aside. Here, without any ground being shown or alleged, and not at the instance of the parties, save as matter of form, but in reality at the instance of the sessions with a view to obtain the opinion of the court, the writ issues solely for the purpose of bringing the proceedings before the court, such being the only means of doing so, there being no power of appeal. The law is correctly stated in Corner's Crown Practice, p. 66, and is fully borne out by the authorities there referred to: "Upon an order of quarter sessions made subject to the opinion of the Court of Queen's Bench on a case stated, and removed by *certiorari*, the court will consider and determine any matter of law arising upon the facts found by the sessions, and stated in the case upon which their opinion may be asked; but if no case be stated for their opinion, the court will not upon *certiorari* inquire further than whether the justices have acted within their jurisdiction, and whether their proceedings are regular on the face of them, although their judgment on the facts of the case may appear to have been erroneous." In the second place, though the justices were directed to have recourse to judicial assistance before pronouncing judgment, they here took, and were allowed to take, the opposite course, namely, of first pronouncing their judgment, and then applying to the court for its opinion. But here, inasmuch as there being no appeal from the judgment of the quarter sessions, or controlling power in the Court of King's Bench, the judgment of the quarter sessions, if once unconditionally pronounced, would have been final and conclusive, in order to avoid this consequence, and at the same time to prevent the necessity of the case being sent back to the sessions when the Court of King's Bench had pronounced its opinion, the practice became established for the court of quarter sessions to pronounce its judgment conditionally, making it subject to the opinion of the Court of King's Bench, according to which the judgment of the sessions was to be affirmed or quashed, as the case might be. In furtherance of this course of proceeding, the order of sessions not being before it, and there being, as I have said, no other way by which the case stated by the sessions could be brought before it, the Court of King's Bench lent the assistance of its process by way of *certiorari* to bring up the order and case, that the court might deal with it. Nothing can be better settled

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than that it is entirely at the discretion of the sessions whether to grant a case, and so to submit their judgment to the opinion of the Court of Queen's Bench, or not. Even though the appeal should be one in which in the proper exercise of their discretion they ought undoubtedly to grant a case, but refuse to do so, there are no means of compelling them to state a case in order that their judgment may be reviewed; still less of compelling them to review it themselves. The decision of Lord Hardwicke and the Court of King's Bench in the cases of *B. v. Oulton* and *B. v. Preston-on-the-Hill*, has never been questioned, and is undoubted law. And the reason is obvious. A poor-rate, like an order of removal, is made under statutory power. As has been shown, the right of appeal given by the statutes to a party aggrieved is to the quarter sessions; and jurisdiction is given to that court to entertain and give judgment on such appeals, either by affirming or quashing the order appealed against; but no ulterior right of appeal is given. The appeal lies to the court of quarter sessions alone. The jurisdiction of the latter is absolute and final, and independent of that of any other court. No other court, not even the highest in the realm, has, under the statutes just referred to, any power to reverse or to interfere with the judgments of a court of quarter sessions when once pronounced. One more observation remains to be made with reference to the jurisdiction of the quarter sessions, but it is a most important one. A court upon which is imposed by Act of Parliament the duty of adjudicating in a particular matter between litigant parties cannot, unless authorised so to do as part of its statutory power, transfer or delegate to another the whole or any portion of its jurisdiction, or give to the decisions of such other court any binding force in law. In this exceptional and anomalous instance a practice—a sort of *mos pro lege*—has grown up of the court of quarter sessions making its judgment depend upon the opinion to be pronounced by the Court of Queen's Bench. But the ultimate judgment must still be considered as that of the sessions, whatever may be the form it assumes. For the right of appeal, which is the creature of the statute, is to the sessions alone; the jurisdiction is given to the quarter sessions alone, without any ulterior appellate power being conferred on the Queen's Bench Division, or being capable of being transferred to it by the court of quarter sessions. If therefore the decision in such a case as the present were to be taken to be in point of law the judgment of the Queen's Bench Division, it would manifestly involve a usurpation of authority in the latter directly in the teeth of the statutes, which have in express terms enacted that the decision of the court of quarter sessions shall be final. What takes place on the hearing in the divisional court is quite consistent with this view. All that is done on the decision of the divisional court being pronounced is, that an entry is made in the master's book that the rule has been made absolute to affirm or quash the order of quarter sessions as the case may be, and a rule is drawn up accordingly, and a copy of it sent to the clerk of the peace for the information of the quarter sessions, and is copied by him into the minute-book of their proceedings. No instance has occurred in which the parties to the original order have failed to act on the decision of the

Court of Queen's Bench, nor does it appear clear what means could be resorted to to compel obedience if necessary, the court not having by the statute either original or appellate jurisdiction over the subject-matter. It thus appearing that in the matter of a poor-rate, or of an order of removal, the ancient Court of Queen's Bench had not, and consequently the present Queen's Bench Division of the High Court has not, any original or any appellate jurisdiction, what then is the jurisdiction which it now exercises in these matters? I answer, consultative only. It directs the court of quarter sessions as to the law applicable to the facts stated in the special case. It supplies the conditions according to which the judgment of the quarter sessions is to stand or fall—that judgment being that the order appealed against shall be affirmed or quashed as the case may be, according to what shall be the opinion of the Queen's Bench Division. The intermediate decision is that of the Queen's Bench Division. The ultimate judgment is that of the court in whom the jurisdiction is alone vested by the statute which creates the appeal, and by which court alone in legal theory it can be exercised. The divisional court has no authority whatever to pronounce any judgment whatsoever, the authority so to do being vested by the statutes in the court of quarter sessions alone; and the judgment is therefore of necessity that of the court to which alone the appellate jurisdiction belongs. Hence arises the form in which the matter is submitted to the court—not in that of a judgment of the quarter sessions, to be affirmed or reversed by a judgment of the Court of Queen's Bench, but in that of a judgment which shall be capable of being moulded into an affirmative or negative one according to the "opinion" which the court shall pronounce to be the right one. And the form is not unimportant; it is that the judgment shall be affirmed or reversed according to—not the judgment or decision, but—the "opinion" of the Queen's Bench Division. Nor could it be otherwise. For, the ultimate appeal being by the express provision of the statute in the court of quarter sessions, and the latter having no statutory authority to delegate any part of its jurisdiction, the Court of Queen's Bench could not possibly have or exercise an appellate jurisdiction which should have *proprio vigore* the force of law. It would be, as has been pointed out, a manifest usurpation on its part to assume it. In cases stated under the 20 & 21 Vict. c. 43 the law is altogether different. There the magistrate is under certain circumstances bound to state a case; and by the 6th section of the Act authority is expressly given to the court, on a case submitted to it by a magistrate, to "reverse, affirm, or amend" the conviction appealed against. Nothing of the kind exists where a case is stated by the quarter sessions for the opinion of the court on an appeal against a poor rate or an order of removal. But although no appellate jurisdiction is given directly or indirectly by the statute to the Court of Queen's Bench, and no authority is given to the court of quarter sessions to delegate its appellate authority to the former, beyond that of submitting to its opinion as to what the judgment of the court of quarter sessions should be, let us for the sake of argument suppose that the sessions can and do delegate their appellate jurisdiction to the Superior Court

by submitting the facts for its judgment as to the law. How can this operate so as to have the effect of involving a further submission to the decision of a third court, which is not the divisional court, because such court may have in general appellate jurisdiction over orders and judgments of the Queen's Bench Division, and thus have the effect of extending the submission without the assent of the court of quarter sessions? To grant or refuse a case is, as we have seen, in the uncontrolled discretion of the quarter sessions. They have given their judgment subject to the opinion of the divisional court on the case which they thought proper to grant. By that opinion their judgment is to stand or fall. But how will it do so if the opinion of the Queen's Bench Division shall be reversed by the decision of this court in the exercise of its appellate jurisdiction, a jurisdiction in respect of this class of cases hitherto unknown and unheard of? How in that event could it be said that the order, which was to be affirmed or quashed (as the case might be), according as the opinion of the Queen's Bench Division might be one way or the other, was rendered valid or invalid in conformity to the opinion of that court, if its decision is reversed? A decision reversed becomes a nullity. The judgment of a Court of Appeal, reversing that of a court appealed from, is not the judgment of the latter court, but of the former. How, then, will the judgment of this court, should it differ from that of the divisional court, satisfy the condition on which the judgment of the quarter sessions—who have plenary and exclusive jurisdiction over the subject-matter, and can make their submission to the Queen's Bench Division subject to such conditions as they think proper, and who have here submitted their judgment to the Queen's Bench Division, and not to any other court, is—by the express terms of the submission, to depend? Can the terms of the submission be thus, without any assent on the part of the court of quarter sessions, enlarged, so as to give authority to this court, which assuredly is not that of the Queen's Bench Division? And this brings me to the consideration of the question on still broader grounds. The primary purpose and intention of the Legislature in creating the present Court of Appeal was, I apprehend, to transfer to it the appellate jurisdiction heretofore vested in the Court of Exchequer Chamber. In doing so, however, it has, it is true, used terms so large as to embrace, according to the decision of this court, judgments and orders in matters of mere procedure, as to which no appeal from the divisional court previously existed. But I cannot think it can have been the intention that the terms used should apply to cases in which there was no inherent jurisdiction in a divisional court, and which were not involved in the advance to some final judgment from which an appeal lay. It cannot have been intended, however general may be the terms of the section, to make, as it were by a side-wind, parochial rates and orders of removal matters which before were not the subjects of appeal, and could not be taken beyond the divisional court, liable to be brought before this court, and consequently to be taken on a further appeal to the House of Lords, with all the expense attending on such an ultimate appeal, thus involving the inconvenience which, as was pointed out by Lord Hardwicke in *Res v. Preston-on-the-*

Hill, would result from rendering "dilatatory, expensive, and burdensome" matters relating to the maintenance of the poor, which, as he observed, "should be cheap and speedy." The spirit of the present legislation is, I think, apparent from the provision introduced into the Act of 1876, by the 20th section of which, lest the general words of the 19th section of the Act of 1873 should have too extensive an operation, it is expressly provided that "where, by Act of Parliament, it is provided that the decision of any court or judge, the jurisdiction of which court or judge is transferred to the High Court of Justice, is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any judge thereof, to the Court of Appeal." It is true that this case is not within the precise terms of this enactment, inasmuch as this decision, from which the right of appeal is here claimed, is not one which is made final by Act of Parliament. But I apprehend that the only reason for not making the terms of the enactment sufficiently comprehensive to include such a case as the present was simply that, as it had never occurred to any one to suppose that there could be an appeal from the decision of the Court of Queen's Bench in such a case, it was not deemed necessary to make the language apply to it in terms. That the case is within the spirit of the enactment cannot, I think, be doubted. Whether, therefore, I look to the nature of the jurisdiction heretofore exercised by the Court of Queen's Bench, or to the object and intention of the recent legislation, I can arrive at no other conclusion than that a decision of the divisional court on an appeal against a rate is not a judgment or order within the 19th section of the Judicature Act of 1873. I am therefore of opinion that this court has not jurisdiction to entertain this appeal.

BRETT, L.J. concurred with Cockburn, C.J., on the ground that the decision of the Queen's Bench Division was not an order or judgment, nor was it a binding decision.

The Court being equally divided, the appeal was dismissed.

Appeal dismissed.

Solicitors for the appellants, *Sharp, Parker, and Co.*

Solicitor for the respondents, *R. F. Roberts.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Saturday, March 16, 1878.

(Before JESSEL, M.R.)

STANDARD BANK OF AFRICA v. STOKES. (a)

Party wall—Tenants in common—Evidence—Presumption of law—Repair of party wall—Common law rights—Metropolitan Buildings Act 1855, ss. 82, 83, 85.

In the absence of evidence of the ownership of a party wall a jury is entitled to find that it belongs to the adjoining owners as tenants in common.

At common law a tenant in common of a party wall was entitled, with or without notice to the other tenant in common and whether the wall required repairs or not, to remove or alter or take bricks from or otherwise interfere with the party wall,

(a) Reported by J. E. THOMSON, Esq., Barrister-at-Law.

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provided that his object in so doing was to substitute a new or better wall or to put the old wall in a better state of repair.

But now the respective rights are regulated entirely by the Metropolitan Buildings Act 1855 and the rights given by that act are in substitution of and not in addition to those formerly existing at common law.

By the 85th section of that Act a tenant in common of a wall is to give notice to the adjoining owner of any works he may intend to carry out. By sub-sect. 3, within fourteen days such adjoining owner is to express his assent to the proposed work, or dissent is to be inferred, and thereupon a difference shall be deemed to have arisen between the building and adjoining owners ;

In case of such difference, by sub-sect. 7 each party is to appoint a surveyor, and the two surveyors are to appoint a third, and such one or three surveyors, or any two of them, are to decide all matters of dispute.

In this case the notice was given but no assent expressed ; each party appointed a surveyor but no third surveyor was appointed, although the plaintiff was cognisant of the defendant's works and intentions.

Held, that a difference had arisen, and that the defendant was not entitled in these circumstances to go on with his work.

MOTION.

The plaintiffs and defendant occupied adjoining premises at Nos. 10 and 11, Clement's-lane, in the city of London. Their respective premises were separated from each other by a party wall. There was no evidence as to the ownership of this party wall, and it became one of the questions in this case whether in the absence of such evidence there would arise a presumption that the plaintiffs and defendant were tenants in common.

On the 26th Sept. 1877 the defendant served on the plaintiffs a written notice of his intention to exercise the rights given to him by the Metropolitan Buildings Act 1855, sect. 85. He proposed to undermine the party wall and to make a sub-basement of concrete and brick. In this letter he appointed a surveyor and referred to the 85th section of this Act, sub-sect. 6 which says :

If either owner does not within fourteen days after the delivery to him of any notice or requisition express his consent thereto, he shall be considered as having dissented therefrom, and thereupon a difference shall be deemed to have arisen between the building owner and the adjoining owner.

No consent was ever expressed by the plaintiffs, although the work went on with their knowledge, and considerable correspondence was carried on between the authorised officers of the bank and the defendant.

The 7th and 8th sub-sects. of the 85th section of the Act prescribe the course to be adopted in case a difference arises between a building and adjoining owner. Those and other sections of the Act applicable to the case are sufficiently set forth in the judgment.

The plaintiffs alleged that the defendant had no right to undermine or underpin the wall, and that considerable risk to the bank was involved in their operations. The defendant alleged that he proceeded with all caution, and that no danger was incurred.

The plaintiffs, however, moved to restrain the

defendant from proceeding with his work. But in the course of this argument, it having been arranged that in conformity with the provisions of the Act a third surveyor should be appointed, there remained only the question whether the defendant was legally justified in the first instance in what he had done.

Davey, Q.C. and Buckley, for the plaintiffs.

Marten, Q.C. and Hull, for the defendant.

JENSEN, M.R.—This matter is now reduced to a question of costs, but it involves, as sometimes a question of costs does, very important points of law, and as according to my practice the costs follow upon the legal right, I think it is absolutely necessary for me to decide upon the legal right, in order to arrive at a decision as to the liability of either party to pay the costs. Now the plaintiff alleges that he is the owner of a house with a party wall. The defendant is the owner of the adjoining house, and there is no dispute about the wall in question being a party wall. The defendant is constructing, or attempting to construct, a sub-basement—that is a floor under the basement—and for that purpose he is excavating the earth from beneath his own basement and also from beneath the wall—and omit for the moment the fact of his going thirty inches on one side of the party wall ; that may have been by accident or not—and he purposes in doing that to do, or has actually done, this : he has cut away the concrete foundation of the wall and intends to fill up the space occupied by the concrete foundation and by the London clay beneath the wall by a solid foundation of brick, making a new wall below the old wall, which itself in its turn will be supported by a new concrete foundation. The plaintiff says that the work may be done safely if executed with great care, but that it is a "risky" work, and one likely to lead to danger. The defendant says that he will be very careful, that he is careful, and that being very careful the work will not be dangerous to any one. Another question arises, whether or not what is proposed to be done is within the provisions of the 33rd section of the Building Act. Now first of all, as to the position of the parties independently of the Building Act, I have no evidence before me at the present moment as to the boundaries of the properties. All I have is, that there has been a common user of the wall, which seems to have been erected by the plaintiff some time back at the common expense of the plaintiff and the defendant, and I have nothing to show how that wall came to be so used and enjoyed. The question is, what does the law presume from that ? I have been referred to an authority which says that in the absence of any evidence beyond what I have mentioned there was sufficient for a jury to find that the wall was held by the two parties as tenants in common, and beyond that the case does not go. The result therefore is that, according to that authority, there is sufficient for me to find, if I think fit, that the wall is held by the plaintiff and defendant as tenants in common. If I do not think fit to decide the question, which probably would be the more correct course to take, then I should remit it for further inquiry to see what the boundaries of the two properties were, which I have no doubt, or very little doubt, could be soon ascertained. But supposing I were driven to the conclusion that the plaintiff and defendant were

tenants in common, what would their rights be? Now, as to that, the very case to which I have been referred enables me to give an answer, and that case is *Oubitt v. Porter*. All the three judges there—and very eminent judges they were—were agreed that you cannot have an action by a tenant in common against another tenant in common merely because he pulls down the wall which belongs to them as tenants in common; if it is a temporary thing, “a temporary removal with a view to improve part of the property on one side at least, and perhaps on both,” there is no authority to show that one tenant in common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy in common, the party removing having at the same time the intention of making a prompt restitution. It was not a destruction. “The object of the party was not that there should be no wall there, but that there should be a wall there as expeditiously as a wall could be made.” I read that from the evidence of Bayley, J. at page 265. Holroyd, J. says this at page 267: “Taking it to be the law that where there is a complete destruction by one tenant in common of that which he has in common with others, so that that other is wholly deprived of the use of it, an action of trespass will lie. I think the act done by the defendant in this case cannot be considered as a destruction of the wall, the removal of the old wall having been effected merely for the purpose of rebuilding another on its site as speedily as possible.” Then Littledale, J. says: “If two persons be tenants in common of land on which there is a wall, and one refuses to repair, and the other pulls down the wall and sells the materials and builds a better wall, it may be said that there has been a total destruction of the original wall, more especially if he sold the materials; still, if he did that for the purpose of getting other materials to make the new wall better than the old one was, and he builds the new one, though there was a destruction of that which was originally the subject-matter of the tenancy in common, an action of trespass will not be maintainable;” and then he says, if it is partial damage, you must have an action on the case. The result, therefore, is this, that what the defendant is doing, namely, the removing of the foundation of the old wall, be it for the purpose of putting in as good a foundation or a better one—for he is doing it, as it is stated, by concrete—it is not a destruction as tenant in common. All that has been done has been done in this case with the *bona fide* intention of supporting the wall, and will not entitle the other tenant in common to maintain an action—of course, still less an injunction. I am not now speaking of a case of danger, which is not, as I understand, this case. That being so, it appears to me that at common law there would have been no right of action as far as the wall is concerned. The next point is taking away the narrow slip of clay which underlies the wall. Whatever might be the case with agricultural land, I do not think it can be pretended that where a stratum of clay is used merely for the purpose of supporting a wall, that the substitution of brick or burnt clay for the unburnt or native clay as a support of the wall can be deemed destruction or destructive waste. It is an improvement, and not a destruction, and I should think, therefore, the removal of a portion

of the clay, intending to substitute brick, will not be destructive waste, nor would it entitle the plaintiff to an injunction. The remaining point is a totally different one. The plaintiff alleges, and the defendant denies, that according to the true construction of the Metropolitan Buildings Act, whatever the rights at common law might have been, such right no longer exists, and that is the view I take myself of the Act. The Act, part 3, begins, “Party structures,” and there is this preliminary in the 82nd section: “In the construction of the following provisions relating to party structures such one of the owners of the premises separated by or adjoining to any party structure as is desirous of executing any work in respect to such party structure shall be called the building owner, and the owner of the other premises shall be called the adjoining owner.” Therefore you start by a definition as regards “any work.” The next has this prefix, “Rights of building and adjoining owners. The building owner shall have the following rights in relation to party structures; that is to say”—does not that mean he is to have no others? Is not that the definition of the rights he is to have, meaning those are all the rights he is to have? In my opinion, that is the meaning of the section. The law of the metropolis now defines the rights of building owners. He is a building owner within the definition of the 82nd section, because he wants to do some work in respect of part of the structure, and being such a building owner he has these rights, which in my opinion are exclusive, and he has no other rights. When we come to look at the sub-sections, I think that is manifest, “a right to make good or repair any party structure that is defective or out of repair.” Now, as he had a right at law as a tenant in common, wherever he was tenant in common, to repair or to improve, this sub-section would have no particular meaning, because, if he has only to give notices under the Building Act when it is defective or out of repair, but that he may do it when it is not defective or out of repair without giving any notice, it would have this extraordinary result—that when the wall wanted nothing doing to it he might amuse himself by pulling out the bricks and putting in new ones or handsomer ones, without giving notice to anybody, at his own will and pleasure; whilst when it was actually out of repair and defective, and wanted something to be done to it very speedily, he could not touch it without giving notice. It is obvious that, to read the Act of Parliament in this way instead of carrying out the specified intentions of the Legislature, is simply to cast ridicule upon them, and I cannot consent to do that. Now then the next is, “a right to pull down and rebuild any party structure that is so far defective and out of repair as to make it necessary or desirable to pull down the same.” Here, again, is a limited right to pull down. But, as I have read the law and statements of these eminent judges, he has a right to pull down when the wall is neither defective nor out of repair, if he only wishes to improve or put up a better or handsomer one, and that without notice. But, according to the statute, he must give notice of such intention when the wall is defective or out of repair. So there would be this curious result: he must give notice when the wall is defective or out of repair, but he may pull down without any notice when it wanted nothing doing to

it, but the tenant in common wished to improve it or beautify it, and therefore wanted to pull it down. Then, without going into others, we have this, No. 6, "A right to raise any structure permitted by this Act to be raised, or any external wall built against such party structure, upon condition of making good all damage occasioned thereby to the adjoining premises, or to the internal finishings and decorations thereof, and of carrying up to the requisite height all flues and chimney stacks belonging to the adjoining owner on or against such party structure or external wall." Now, there are two questions upon that. "The right to raise any party structure" being permitted by this Act to be raised, is it absolutely necessary to limit that to raising it above ground? If the party structure is all above ground, and you put anything upon it, of course the raising must be above ground; but if the party structure were under ground, dividing two basements, and did not reach the surface, clearly then the raising would be underground. Is it necessary to limit the word "raise" to putting something on the wall on the top, and may not you raise or make it longer, or build it up by something on the bottom? I do not think it necessary so to hold, and if it were absolutely impossible to underpin a wall except under this sub-section, my impression is that the sub-section would be wide enough to include it. But I think there is another sub-section that will do, and consequently it is not necessary to insist upon it. Then there is "a right to pull down any party structure that is of insufficient strength for any building intended to be built, and to rebuild the same of sufficient strength for the above purpose, upon condition of making good all damage." Here, I think, we have a section which will do, and which, upon the principle of *omne majus, &c.*, will include the case I have before me. You are going to make a sub-basement; you want, therefore, a wall of sufficient strength for the new building which you intend to be built. For this purpose you may pull down the party structure, which, of course, would be of insufficient strength. It would fall down altogether if you took away its support by making the sub-basement, and you must build it of sufficient strength. If you may pull it down and rebuild it, why may you not do something short of that, and underpin it under that sub-section? It would be a very extraordinary reading of the sub-section to say that, although you have the right of pulling it down altogether and putting it up again, that in rebuilding it you may not do something less; that is to say, support it and put a new wall underneath it. I think that would be a very narrow view of the sub-section. Then there is the right to cut into any party structure, a right to cut away a footing; and then, by the 11th section there is a right "to perform any other necessary works incident to the connection of party structures and premises adjoining thereto." Now, those are very large words. Why should I not read them to include again the case in question? It is a right to perform any necessary works "incident." Incident to what? Why incident to the connection of the party structure. But this is not incident to the connection of the party structure. If you make the sub-basement, and you do not support the wall, it will fall down, and its connection would be terminated in a very summary

manner; and I think therefore there are words here which are quite large enough to include this right, and my interpretation and decision is that they are large enough to include them, and therefore that this right is a right within the Building Act when it becomes necessary, or reasonably necessary, to perform it; that the right is not limited to putting bricks upon the top of the wall; and that you may increase the wall by putting bricks below the wall, so as to enlarge it in that way as much as you may by putting bricks above the wall to enlarge it in the other way. I think it the duty of the court to read these Acts in a reasonable manner, with a view of carrying out the manifest intention of the Legislature—that these party structures should not be interfered with by building owners without due notice to the person or persons other than the building owner interested in the party structure, and without its being referred to the surveyors to decide how the work should be performed. Now that being, in my opinion, within the 83rd section, the rules of the 85th section I think are clear; not that the wording might not have been improved, but it has been said as regards these Acts of Parliament, and truly said, that the wonder is not that you should find imperfections in the wording, but that they should be as well drawn as they are, considering the mode in which they are passed, and the want of final revision. Now, it is quite true that in sub-sect. 7 of the 85th section there is a slight difference in the wording which has given rise to argument; but I think the fair meaning of the section is this: that where there is a dispute or difference, for the words are identical in meaning, you shall not do the work except with the sanction of the other owner who is interested in the wall—or, of two surveyors out of three, one to be nominated by each party, and the two to choose an umpire, or of the umpire; in other words, that the work shall be done according to the direction of the majority of the surveyors or the umpire, and shall not be done in any other manner. Now, the 7th sub-section is this, "in all cases not hereby specially provided for"—this is not specially provided for—"where a difference arises between a building owner and adjoining owner in respect of any matter arising under this Act, unless both parties concur in the appointment of one surveyor"—which they have not done here—"they shall each appoint a surveyor, and the two surveyors so appointed shall select a third surveyor, and such one surveyor or three surveyors, or any two of them, shall settle any matter in dispute between such building and adjoining owner, with power by his or their award to determine the right to do, and the time and manner of doing any work, and generally any other matter arising out of or incidental to such difference?" Now, as they have to determine the right to do and the time and manner of doing the work, it would really be reducing the act to an absurdity to suppose that the building owners had stipulated to proceed with the work until they had so determined. It must mean that they are to determine the time; that is, he is not to do it until the time is determined, and that if he does it before that time he is committing a breach of the Act of Parliament. In the same way, if he is doing something which they do not decide he can do, and if they have made no award, he is not entitled

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REG. v. THE JUSTICES OF MIDDLESEX; *Ex parte* BRADLAUGH.

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to get the award. Then there is a power of appealing, and the appeal may no doubt be delayed for a very considerable time; but, if his right is, as I read it to be, a right merely to do that which the surveyor or the umpire may direct shall be done, he has no right to do anything at all until he obtains such directions. The result, therefore, is that this defendant had no right to proceed with his work until the direction of the surveyor had been obtained, and that the plaintiff is entitled to come here to restrain his so proceeding. The other is this: It appears that the defendant, besides interfering with the earth under the wall, has removed earth to the extent of thirty inches on the plaintiff's side of the wall. Now, as to that, of course there can be costs, and that alone would be quite sufficient ground for the plaintiff coming to this court, which was not the main or the substantial ground, nor was it the ground which occasioned the greater part of the costs; and if I had been against him on the other ground, I certainly should have made him pay the bulk of the costs which were occasioned by the contention in which he failed. Therefore I mention this to show it has not escaped my notice, and that the utmost I could have done for the plaintiff in regard to this small portion of his case, if I had held he had only succeeded in respect of that small portion, would have been to give him some small portion of the costs. The result therefore is that, in my opinion, the plaintiff is right, and the defendant is wrong in law, and that the defendant ought to pay the costs.

Solicitors: *Flux and Co.*; *J. Robinson.*

QUEEN'S BENCH DIVISION.

Thursday, June 6, 1878.

(Before COCKBURN, C.J. and MELLOR, J.)

REG. v. THE JUSTICES OF MIDDLESEX; *Ex parte* BRADLAUGH. (a)

Certiorari—Objection to jurisdiction of metropolitan police magistrate—Obscene books—Order to destroy—2 & 3 Vict. c. 71, s. 49—20 & 21 Vict. c. 83, s. 1.

By 2 & 3 Vict. c. 71, s. 49, no conviction or other proceeding by any metropolitan police magistrate shall be quashed for want of form, or be removed by *certiorari* into the Queen's Bench.

By 20 & 21 Vict. c. 83, s. 1, a metropolitan police magistrate, if satisfied of the good foundation of a complainant's belief that obscene books are kept in a house for the purpose of sale, and if satisfied that such books are of such a character and description that the publication of them would be a misdemeanour and proper to be prosecuted as such, may grant a special warrant to bring these books before him, and summon the occupier of the house to show cause why they should not be destroyed. And if, on appearance, such magistrate is satisfied that such books are of the character stated in the warrant, and have been kept for the purpose aforesaid, he may order them to be destroyed.

A metropolitan police magistrate, in an order to destroy some books under the last-mentioned Act, recited the special warrant and the satisfaction of the magistrate necessary for its issue, but only stated that he himself was satisfied that the said books were obscene.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

Held, upon a rule for certiorari, that the omission on the part of the magistrate making the order to state that he was satisfied that the said books were of such a character and description that the publication of them would be a misdemeanour and proper to be prosecuted as such, was a substantial objection to the order; and that, such objection being to the magistrate's jurisdiction, the order might and must be brought up on certiorari, notwithstanding sect. 49 of 2 & 3 Vict. c. 71.

On the 23rd May a rule *nisi* was obtained by Mr. Charles Bradlaugh in person, calling upon the keepers of the peace and justices in and for the county of Middlesex to show cause why a writ of *certiorari* should not issue directed to them to remove into this court all and singular orders made by them or some of them upon the appeal of the said Charles Bradlaugh against a certain order under the hand and seal of James Vaughan, Esq., one of the magistrates of the police courts of the metropolis, sitting at the Bow-street Police Court, and bearing date on or about the 19th Feb. last, for the destruction of 650 copies of a certain book entitled "The Fruits of Philosophy," and also the said order of the said James Vaughan.

The following is the said order of James Vaughan, Esq.:—

"Whereas on the 18th May 1877, upon complaint duly made on oath before Frederick Flowers, Esq., one of the magistrates of the police courts of the metropolis, sitting at the Police Court, Bow-street, in the county of Middlesex, and within the Metropolitan Police District, by John Green, that he the said John Green had reason to believe and did believe that divers obscene books were kept by Edward Truelove in a certain open and public shop, situate and being No. 256, High Holborn, in the county of Middlesex, and within the said district, for the purposes of sale, and of being otherwise published for the purpose of gain; and he the said John Green did further upon his oath say that on the 14th May in the year aforesaid he did purchase of the said Edward Truelove, at the said open and public shop as aforesaid, one obscene book, entitled 'The Fruits of Philosophy,' which book the said John Green produced to the said magistrate at the time of swearing his information.

"And whereas the said magistrate, being satisfied that the belief of the said John Green was well founded, and that the publication thereof was a misdemeanour, and liable to be prosecuted as such, thereupon issued his special warrant pursuant to the statute 20 & 21 Vict. c. 83, and directed Henry Wood, one of the inspectors of the metropolitan police force, commanding and authorising him to enter in the daytime into the house and shop of the said Edward Truelove, situate and being No. 256, High Holborn, in the county and district aforesaid, and, if necessary, to use force by breaking open doors or otherwise, and to search for and seize all such obscene books as aforesaid found in such house and shop, and to bring all the articles so seized before him or such other of the magistrates of the police courts of the metropolis as should then be sitting at the police court as aforesaid.

"And whereas the said Henry Wood, on the 23rd May 1877, by virtue of the said warrant, duly entered the said house and shop of the said Edward Truelove, and there found and seized

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certain obscene books, to wit, 657 printed books, being copies of the said obscene book entitled 'The Fruits of Philosophy,' kept there for the purpose of sale, and being otherwise published for purposes of gain, and which 657 books were carried before Sir James Taylor Ingham, knight, one of the said magistrates sitting at the said court, and thereupon he, the said magistrate, Sir James Taylor Ingham, knight, on the 24th May in the year aforesaid, duly issued a summons requiring the said Edward Truelove, as such occupier of such house and shop, to appear on Tuesday, the 29th May, in the year aforesaid, at the police court aforesaid, to show cause why the said books so seized as aforesaid should not be destroyed.

"And whereas the said summons hath from time to time, by divers adjournments, with the consent of the said Edward Truelove, been adjourned until this day.

"And whereas upon the hearing of the said summons upon this day Charles Bradlaugh appears before me, the undersigned, one of the magistrates of the police courts of the metropolis sitting at the police court, Bow-street, in the county and district aforesaid, and claims to be the owner of the said books.

"Now I, the said magistrate, having examined the said books, and duly considered the premises, and being satisfied that the said 657 books, being copies of the said obscene book entitled 'Fruits of Philosophy,' so seized as aforesaid, are obscene, do hereby, pursuant to the said statute, order and determine that the said books so seized as aforesaid, and being such copies of the said obscene book entitled 'Fruits of Philosophy' as aforesaid, be destroyed.

"And I do further order and empower the said Henry Wood to destroy the said books at the expiration of seven days after the day of the date hereof, unless the said Charles Bradlaugh shall within such period of seven days give to me notice of appeal in writing to the next general sessions of the peace to be holden in and for the said county of Middlesex against this my order, and shall also within the said period of seven days enter into his recognizance in the sum of 100*l.* and find two sufficient sureties in the sum of 50*l.* each before a justice of the peace for the said county personally to appear and prosecute such appeal, and to abide the order of and pay such costs as shall be awarded by the said court of general sessions of the peace or any adjournment thereof.

"Given under my hand and seal this 19th day of Feb. 1878, at the Bow-street Police Court, in the county and district aforesaid.

(Signed) JAMES VAUGHAN."

It appeared from the affirmation of the said Charles Bradlaugh that he had duly appealed to the court of quarter sessions of the peace for the county of Middlesex sitting at Westminster against the said order; and that on the 13th May the said court of quarter sessions heard the said appeal and confirmed the said order.

The rule was obtained on the ground that the order was deficient in two material findings, viz. (1) that the said books were kept for the purpose of sale, and being otherwise published for purposes of gain; and (2) that the said books were of such a character and description that the publication of them would be a misdemeanour and proper to be prosecuted as such.

It was mentioned that this objection had been taken before the justices in sessions, and the court offered the counsel supporting the order an opportunity of amending if he chose, but he elected to stand or fall by the order as it was drawn.

By 20 & 21 Vict. c. 83, s. 1:

It shall be lawful for any metropolitan police magistrate or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe, and does believe, that any obscene books, papers, writings, prints, pictures, drawings, or other representations are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justices that the belief of the said complainant is well founded, and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanour and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the day-time, and if necessary to use force, by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear and such magistrate or justices shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required, to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given, and such articles shall be in the meantime impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant, or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized.

Bealey, on behalf of the complainant, showed cause against the rule.—In the first place, this court has no jurisdiction to bring up by *certiorari* an order of a metropolitan stipendiary magistrate. By sect. 49 of 2 & 3 Vict. c. 71 (which is an Act for regulating the police courts in the metropolis) it is enacted, "That no information, conviction, or other proceeding before or by any of the said magistrates shall be quashed or set aside, or adjudged void or insufficient for want of form, or be removed by *certiorari* into Her Majesty's Court of Queen's Bench." This is a special privilege granted to metropolitan stipendiary magistrates, and more extensive powers of appeal to quarter sessions than from other justices are created by the same Act. [COCKBURN, C.J.—Does that

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section relate to any other proceedings than those treated by that Act? In any case, the section deals only with matters of form.] This is a mere matter of form which, if objectionable, might have been amended by the quarter sessions under 12 & 13 Vict. c. 45, s. 7; and by the same section it might be amended upon return to a *certiorari*, if the order had been made by justices in the country. [COCKBURN, C.J.—And why not in this case upon the return?] By sect. 49 the order cannot be removed at all into this court. Secondly, this order contains, in its recitals and operative part taken together, all the ingredients required by sect. 1 of 20 & 21 Vict. c. 83. It was held in *Rees v. Olafson* (3 East, 58), that every reasonable intendment will be made in favour of an order of justices, and it must be implied from the making of the order that the magistrate was satisfied concerning the facts recited therein.

The applicant for the rule, appeared in person to support it, but was not heard.

COCKBURN, C.J.—The Act has made the exercise of jurisdiction conditional on the magistrate being satisfied that the book is obscene, and that it is one the publication of which is a misdemeanour and fit to be prosecuted. It is not enough for him to state that the book is obscene; it must also be stated that he was satisfied its publication was a misdemeanour and proper to be prosecuted. It is not enough that the warrant was issued on the magistrate being satisfied of these things, nor is it sufficient that the warrant states them; but where, as in this case, the magistrate who makes the order is not the one who issued the warrant, it must appear that the one who made the order was satisfied of both these things, whereas this order only states that he was satisfied of one of them—viz., that the book was obscene. It is also said that the writ of *certiorari* is taken away; but that does not apply in any case where there is an absence of jurisdiction. I have serious doubts whether sect. 49 of 2 & 3 Vict. c. 71, be not limited in its application to proceedings under that Act, and cannot be extended to subsequent Acts. It is not necessary however to decide on that ground; for, even if it be taken to regulate orders made under this Act, 20 & 21 Vict. c. 83, yet, this objection being to the jurisdiction of the magistrate, the process of *certiorari* may clearly be invoked, notwithstanding that section, to limit the excess of an inferior tribunal. I think this omission is not a matter of form but of substance, and although it be possible that when the order is brought before us under the writ we may have power to amend it under the enactment which has been alluded to, that must be the subject of an application; and it is not necessary now to say more than that the order as it stands is invalid and must be brought before us by *certiorari*.

MELLOR, J.—I agree entirely, and I will merely add that I understand it to be a well-established principle to interpret words like these, prohibiting removal by *certiorari*, as inapplicable to excess of jurisdiction. It would be a dangerous doctrine to hold otherwise. I also think that sect. 49 relates only to offences dealt with by that Act, 2 & 3 Vict. c. 71. As to the other point, this is a peculiar jurisdiction somewhat similar to search warrants upon houses of suspected felons: the course to be followed is elaborately set out in the 1st section of 20 & 21 Vict. c. 83, and must be fol-

lowed exactly. There must be an independent judgment of the magistrate making the order, and that judgment upon the points required by the section must be set out in the order.

Rule absolute.

Solicitors for the complainant, Collette and Collette.

Thursday, June 6, 1878.

(Before COCKBURN, C.J. and MELLOR, J.)

REG. v. JUSTICES OF NEWCASTLE-UPON-TYNE;
Re parte BROWN. (a)

Intoxicating liquors—Selling without licence—Imprisonment—Distress in default of penalty—Habeas corpus—11 & 12 Vict. c. 43, ss. 19, 21—35 & 36 Vict. c. 94, ss. 3 and 51.

The applicant was convicted under sect. 3 of the Licensing Act 1872 of selling beer by retail without being duly licensed, and was fined 50l. An offender under that section is liable to a penalty not exceeding 50l., or to imprisonment for a term not exceeding one month.

The order of the justices, after reciting the conviction and penalty, proceeded to adjudge that, if the money were not paid forthwith, inasmuch as it appeared that the defendant had no goods or chattels whereon to levy the same by distress, the defendant should be imprisoned for six calendar months unless the money should be sooner paid.

Held, upon a rule for habeas corpus, that the omission of the justices to make an order in the words of sect. 51, sub-sect. 2, that a distress should be made in default of payment, rendered this order of imprisonment invalid, notwithstanding the proviso to sect. 19 of the Summary Jurisdiction Act 1848.

Held, also by Cockburn, C.J. (dissentiente Mellor, J.); that this sub-sect. 2 had no application to offences under the Licensing Act 1872, for which an alternative of imprisonment is expressly imposed.

A RULE nisi had been obtained on behalf of Thomas Brown, calling upon the justices of Newcastle-upon-Tyne, and the governor of the prison there, to show cause why a writ of *habeas corpus* should not issue to bring up the said Thomas Brown, and the warrant upon which he was there kept in prison.

The following is the warrant by virtue of which the said Thomas Brown was detained in custody:—

“Borough and county of Newcastle-upon-Tyne to wit.—To all sergeants-at-mace and constables of and for the borough and county of Newcastle-upon-Tyne, and to the keeper of the House of Correction at Newcastle-upon-Tyne, in and for the said borough. Whereas Thomas Brown, of the borough and county of Newcastle-upon-Tyne (hereinafter called the defendant), was this day duly convicted by and before us the undersigned two of Her Majesty's justices of the peace, in and for the county and borough of Newcastle-upon-Tyne, for that he, the said defendant, on the 19th day of April A.D. 1878, at the parish of St. Nicholas, in the borough and county aforesaid, unlawfully did sell by retail intoxicating liquor, to wit, seven pints of beer, without being duly licensed to sell the same, contrary to the statute in such case made and provided. And it was thereby adjudged

(a) Reported by M. W. McKILLAR, Esq., Barrister-at-Law.

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that the said defendant, for his said offence, should forfeit and pay the sum of 50*l.*, to be paid and applied according to law, and should also pay to John Bournaker, the prosecutor, the sum of 7*s.* for his costs in that behalf; and it was thereby further adjudged that if the said several sums should not be paid forthwith, then, inasmuch as it was then made to appear to us, the said justices, that the said defendant had no goods or chattels whereon to levy the said sums by distress, the said defendant should be imprisoned in the House of Correction at Newcastle-upon-Tyne in and for the said borough and county of Newcastle-upon-Tyne, for the space of six calendar months, unless the said several sums should be sooner paid. And whereas the time in and by the said conviction appointed for the payment of the said several sums hath elapsed, but the said defendant hath not paid the same or any part thereof, but therein hath made default. These are, therefore, to command you, the said sergeants-at-mace and constables, some or one of you, forthwith to take the said defendant, and him safely convey to the said House of Correction at Newcastle-upon-Tyne aforesaid, and there to deliver him to the keeper thereof, together with this precept; and we do hereby command you, the said keeper of the House of Correction, to receive the said defendant into your custody in the said House of Correction, there to imprison him for the space of six calendar months, unless the said several sums shall be sooner paid in; and for your so doing this shall be your sufficient warrant.

"Given under our hands and seals, at the police court, in the borough and county of Newcastle-upon-Tyne, this 30th day of April, A.D. 1878.

(Signed) J. L. GREGGON. (L. s.)

B. C. BROWNE. (L. s.)"

Lawrance, Q.C. and *Edge*, for the justices, showed cause against the rule.—It appears that the applicant Brown was convicted of a first offence under sect. 3 of the Licensing Act 1872 (35 & 36 Vict. c. 94), by which "Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquors at any place where he is not authorised by his licence to sell the same, shall be subject to the following penalties; that is to say (1) for the first offence, he shall be liable to a penalty not exceeding fifty pounds, or to imprisonment with or without hard labour for a term not exceeding one month." The two punishments on conviction are alternative, the imprisonment for one month not being in default of the penalty. If the justices, therefore, thought fit to impose the penalty, it is necessary to look elsewhere for the means of enforcing it; and by sect. 51: "Except as in this Act otherwise expressly provided, every offence under this Act may be prosecuted, and every penalty and forfeiture may be recovered and enforced, in manner provided by the Summary Jurisdiction Act 1848, subject to the following provisions . . . (2) Where the court of summary jurisdiction orders that a distress shall be made in default of payment of any penal sum exceeding five pounds, including under that expression costs actually adjudged in respect of an offence, the court may order that, in default of the said sum being paid as directed, the person liable to pay the same shall be imprisoned for any term not exceeding the period specified in the following scale:

For any sum exceeding five pounds but not exceeding ten pounds, three months; for any sum exceeding ten pounds but not exceeding thirty pounds, four months; for any sum exceeding thirty pounds but not exceeding fifty pounds, six months; for any sum exceeding fifty pounds, one year." The manner provided by the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43) for recovering and enforcing a penalty is by sect. 19: "That where a conviction adjudges a pecuniary penalty or compensation to be paid, or where an order requires the payment of a sum of money, and by the statute authorising such conviction or order such penalty, compensation, or sum of money is to be levied upon the goods and chattels of the defendant, by distress and sale thereof; and also in cases where by the statute in that behalf no mode of raising or levying such penalty, compensation, or sum of money, or of enforcing the payment of the same, is stated or provided, it shall be lawful for the justice or justices making such conviction or order, or for any justice of the peace for the same county, riding, division, liberty, city, borough, or place, to issue his or their warrant of distress for the purpose of levying the same, which said warrant of distress shall be in writing under the hand and seal of the justice making the same: . . . Provided always, that whenever it shall appear to any justice of the peace to whom application shall be made for any such warrant of distress as aforesaid that the issuing thereof would be ruinous to the defendant and his family, or wherever it shall appear to such justice by the confession of the defendant or otherwise that he hath no goods or chattels whereon to levy such distress, then and in every such case it shall be lawful for such justice, if he shall deem it fit, instead of issuing such warrant of distress, to commit such defendant to the house of correction, or if there be no house of correction within his jurisdiction, then to the common gaol, there to be imprisoned with or without hard labour for such time and in such manner as by law such defendant might be so committed in case such warrant of distress had issued, and no goods or chattels could be found whereon to levy such penalty or sum and costs aforesaid." And it is enacted by sect. 21, "That if at the time and place appointed for the return of any such warrant of distress, the constable who shall have had the execution of the same shall return that he could find no goods or chattels, or no sufficient goods or chattels, whereon he could levy the sum or sums therein mentioned, together with the costs of or occasioned by the levying of the same, it shall be lawful for the justice of the peace before whom the same shall be returned to issue his warrant of commitment under his hand and seal, directed to the same or any other constable, reciting the conviction or order shortly, the issuing of the warrant of distress and the return thereto, and requiring such constable to convey such defendant to the house of correction, or if there be no house of correction, then to the common gaol of the county, riding, division, liberty, city, borough, or place for which such justice shall then be acting, and there to deliver him to the keeper thereof, and requiring such keeper to receive the defendant into such house of correction or gaol, and there to imprison him, or to imprison him and keep him to hard labour in such manner and for such time as shall have been directed and appointed by the

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statute on which the conviction or order mentioned in such warrant of distress was founded, unless the sum or sums adjudged to be paid, and all costs and charges of the distress, and also the costs and charges of the commitment and conveying of the defendant to prison, if such justice shall think fit so to order (the amount thereof being ascertained and stated in such commitment), shall be sooner paid."

No counsel appeared to support the rule.

COCKBURN, C.J.—I think this rule should be made absolute on two grounds. The first depends on what is no doubt a somewhat narrow view of the conditions required by sub-sect. 2 of the 51st section of the Licensing Act 1872. One of these conditions, however, seems to be wanting in this warrant. That sub-section enables a court of summary jurisdiction to order a person to be imprisoned in default of a sum being paid as directed "where the court of summary jurisdiction orders that a distress shall be made in default of payment of any penal sum exceeding 5l." Now it does not appear from this warrant that any distress was ordered before the order of imprisonment was made. No doubt the proviso of sect. 19 of the Summary Jurisdiction Act 1848 enables a justice, if it appears to him that there are no goods or chattels whereon to levy such distress, and if he shall deem it fit, to commit a defendant to prison instead of issuing such distress warrant but the early part of sect. 51, which incorporates the Summary Jurisdiction Act, does so expressly subject to provisions, one of which is that the imprisonment shall be where the court orders a distress. That is a primary condition of the power to imprison in default or instead of a distress. It may be idle under such circumstances to issue a distress warrant, but the provision of the statute exists, and there is nothing in the statute itself, nor in the Summary Jurisdiction Act, to override such an express condition in the clause creating the mode of enforcing a penalty. Supposing, therefore, that sect. 51 were applicable to this offence when visited with a penalty, one of its conditions has not been complied with, and therefore this warrant is invalid. But secondly, on broader grounds I think this 51st section is not applicable to this particular offence, the punishment for which is a term of imprisonment in the alternative of a fine. An offender is made liable to a penalty not exceeding 50l., or to imprisonment for a term not exceeding one month. It cannot be that, because he has no means to meet the fine which the justices have thought fit to impose instead of one month's imprisonment, that he can therefore be imprisoned for six months; such a conclusion would be so glaring an inconsistency, and would savour so much of absurdity, that I am unwilling to adopt it. I am the more inclined to avoid it because this 51st section may well apply without any inconsistency to a long series of offences created by the Act for which no other alternative of imprisonment is given. Looking at the whole of the statute, sect. 51 does not, I think, apply to this case at all. The rule therefore will be absolute.

MELLOR, J.—I do not dissent from my Lord's decision, although I have but little faith in the grounds of my agreement. For this offence a man is liable to a 50l. penalty or a month's imprisonment. Punishment is frequently expressed to be

imprisonment in default of a penalty, but here there are alternative punishments, and I do not agree that Jervis's Act is not applicable to a fine imposed for this offence. There is no specific mode of enforcing this penalty, except under sect. 51, and I do not see that we are called upon to remedy the incongruity which the statute creates. My serious difficulty, however, is that, notwithstanding the proviso to the 19th section of Jervis's Act, this mode of enforcing the penalty is adopted by sect. 51 only where the summary court orders a distress in default of payment. I consider that at least it is extremely doubtful whether such an order of imprisonment can be valid without a previous order of distress; and, further, I have to be satisfied, before discharging this rule, that this sentence of imprisonment is lawful. I do not see any ground for imposing a longer sentence than a month, even although I do not agree with my Lord as to the application of the 51st section.

Rule absolute.

Solicitors for the justices, Collyer-Bristow, Withers, and Russell, for Hill Motum, Newcastle-upon-Tyne.

Thursday, May 16, 1878.

(Before COCKBURN, C.J., and MELLOR, J.)

Ex parte RICHARDS; *Re* JONES.(a)

Quo warranto—Clerk to local board—Office held at pleasure.

The local board of L. consisted of nine members. R. was elected clerk of such board in April 1857, and acted as such clerk until Sept. 1877, when a board of eight members dismissed him, and appointed J. in his place.

Held, that as R. had been dismissed by persons having authority to dismiss him, a *quo warranto* ought not to issue to displace J.

Seemly, that a bye-law of the board, to the effect that no resolution should be altered or rescinded unless one month's notice were given, nor unless as many members were present as at the meeting which adopted the resolution, did not apply to the case.

This was a rule calling upon Mr. Joseph Parry Jones to show cause why an information in the nature of a *quo warranto* should not be exhibited against him to show by what authority he claimed to exercise the office of clerk to the Local Board of Health for the district of Llangollen, in the county of Denbigh, on the grounds (1) that a month's notice of motion to dismiss Mr. Charles Richards (the relator) was not given; and (2) that at the meeting whereby Mr. Charles Richards was dismissed there was not a number of members present equal to that present at the meeting whereby he was appointed, as required by the bye-laws for the said district of Llangollen.

The Local Board of Llangollen was constituted in the year 1857, under the Public Health Act 1848, and consisted of nine members. In April 1857 the first meeting of the board was held, and all the nine members being present, Mr. Richards was unanimously elected clerk of the board, and continued to act as such until Sept. 1877, when a board consisting of eight members, with only one dissentient voice, passed a resolution that "Mr. Richards cease to be the clerk of the board on the 31st Jan. 1878," and appointed as their clerk Mr.

(a) Reported by J. M. LEE, Esq., Barrister-at-Law.

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Joseph Parry Jones. Affidavits justifying and impugning the conduct of the board were filed, but from the judgment of the court it will be seen that it is unnecessary to state their effect.

The 37th section of the Public Health Act 1848 (11 & 12 Vict. c. 63) is as follows:

The local board of health may, from time to time, appoint fit and proper persons to be surveyor, inspector of nuisances, clerk, and treasurer, for the purposes of this Act, and shall appoint or employ such collectors and other officers and servants as may be necessary and proper for the efficient execution of this Act;

And shall make bye-laws for regulating the duties and conduct of the several officers and servants so appointed or employed;

And the said local board may pay out of the general district rates to be levied under this Act, to such officers and servants, such reasonable salaries, wages, or allowances as the said local board may think proper;

And every such officer and servant shall be removable by the said local board at their pleasure, subject nevertheless in the case of the removal of the surveyor to the approval of the general board of health.

Provided always that the same person may be both surveyor and inspector of nuisances;

But neither the person holding the office of treasurer nor his partner, nor any person in the service or employ of them, or either of them, shall hold, be eligible to, or shall in any manner assist or officiate in the office of clerk; and neither the person holding the office of clerk nor his partner, nor any person in the service or employ of them, shall hold, be eligible to, or shall in any manner assist or officiate in the office of treasurer; and whosoever offends in any of the cases enumerated in this proviso shall forfeit and pay the sum of one hundred pounds, which may be recovered by any person with full costs of suit, by action of debt.

The local board had made, amongst others, the following bye-law:

No resolution of the local board shall be altered or rescinded unless one month's notice be given by the clerk to each member of the board, setting forth the proposed alteration, nor unless there be at least as many members present at such meeting as were present at the meeting when the resolution was adopted. Provided, &c.

M'Intyre, Q.C. and *A. G. M'Intyre* now showed cause, and argued that the board might dismiss Mr. Richards at their pleasure, and that therefore *quo warranto* did not lie. They referred to

Re Fox, 27 L. J. 151, Q. B.;

R. v. Wrexham Road Trustees, 5 B. & Ad. 488;

Reg. v. Guardians of St. Martin's, 17 Q. B. 148;

Darling v. The Queen, 12 Cl. & F. 520;

relying strongly on the last-named case.

F. Turner, in support of the rule, referred to the saving clauses of the Public Health Act 1875 (sects. 326 and 343), but chiefly relied on

R. v. Wrexham Road Trustees, 5 A. & E. 581.

[COCKBURN, O.J.—A case might perhaps occur where persons having the power of appointment might appoint a disqualified person, and then refuse to dismiss him; that, however, is not the case here. Nor do you show that Mr. Richards was taken in any way by surprise, so as to lose an opportunity of his case being heard.]

COCKBURN, C. J.—I entertain a very strong conviction that the bye-law has no application to this case, but only to some alteration of an order which the board in their executive character would be bound to carry out. The bye-law could never have been intended to apply to a dismissal. However that may be, I do not think a *quo warranto* lies. As for *R. v. Wrexham Road Trustees* (*ubi sup.*), I think that is a very questionable decision indeed, and I would not be bound by it, unless the very same circumstances were to occur again. Rightly or wrongly, these gentle-

men have dismissed Mr. Richards. Supposing we were to grant a *quo warranto* and displace Mr. Jones, we should not thereby reinstate Mr. Richards. We have a discretion in this case, and it would be idle to exercise it in the manner prayed.

MELLOR, J.—This is a writ which does not go without the leave of the court, and which formerly issued at the instance of the Attorney-General only. It is very questionable whether the writ applies to a case where there is a power of dismissal, but whether it does so apply or not, I am clearly of opinion that we ought not to exercise our discretion adversely to Mr. Jones in the present case. The preliminary proceedings may or may not have been regular, but in the result Mr. Richards was dismissed by persons having a legal authority to dismiss him, and that is enough.

Rule discharged.

Solicitors for the applicant, *Simpson, Hammond, Simpson, and Richards*, for *Richards*, Llangollen.

Solicitors for Mr. Jones, *Dean and Taylor*, for *Minshalls and Parry Jones*, Oswestry.

Saturday, May 18, 1878.

(Before COCKBURN, C.J., and MELLOR, J.)

BISHOP OF ST. ALBANS AND ANOTHER v. BATTERSBY. (a)

Building lease—Covenant not to use house as beer-shop or public-house—Application of covenant to house used for sale of beer not to be drunk on the premises.

The plaintiffs, on the 7th May 1868, demised a plot of land to a company on building lease for 999 years from the 25th March of that year. The company covenanted for themselves and their successors and assigns (with the usual proviso for re-entry in case of breach), that they should not nor would permit any house which might have been erected on the demised premises to be used as a beer-shop or public-house, or any theatre, or public show, or exhibition. The defendant, being a grocer and baker, in whom was vested the estate of the company by assignment, in Sept. 1876 sold beer to be consumed off the premises in pursuance of a licence in that behalf.

Held, that the defendant had committed a forfeiture. THIS was a special case stated by consent as follows:—

1. By indenture made the 7th May 1868 the Reverend Brabazon Lowther and the Right Reverend Father in God Thomas Legh Lord Bishop of Rochester (therein called "the trustees") demised to the Haydock Collieries Industrial Co-operative Society (Limited), (therein called "the lessees"), their successors and assigns, a plot of land, in the township of Haydock, described in the said indenture, and delineated in the plan drawn in the margin thereof, for 999 years from the 25th March 1868, at the rent 10l. 10s. per year, payable quarterly. [Copy annexed.]

2. By the said lease the lessees, for themselves, their successors and assigns, covenanted with the trustees, their heirs and assigns (amongst other covenants), as follows:

That they, the lessees, their successors and assigns, shall not nor will at any time or times hereafter erect or make or use, follow, exercise, or carry on, or permit, or suffer, in or upon the said land or the buildings erected or to be erected thereupon, any steam engine, fire engine,

(a) Reported by J. M. LELY, Esq., Barrister-at-Law.

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chemical work, cotton mill, or the trade or business of a melter of fat, pipe maker, tallow chandler, soap boiler, or any manufactory, business, or employment which is or can be deemed a public nuisance, and shall not nor will, if the said premises be used for any manufacturing purpose whatever, permit any smoke to issue therefrom so that the same shall be a nuisance to the owner or occupier of any premises adjoining or near thereto, but shall cause the said smoke or steam to be consumed so that the same be not discharged from the premises hereby demised in such manner as to become a nuisance in any wise. And shall not nor will permit or suffer any house or building to be erected in pursuance of the covenant in that behalf hereinbefore contained, to be appropriated for or converted into a place of public worship without the special licence in writing of the trustee or trustees for the time being as aforesaid, or the heirs of the survivor of them, or their or his assigns, and shall not nor will permit any house or houses which may have been erected on the said premises to be used as a beer-shop or public-house or any theatre, or public show, or exhibition.

3. The lease contains a proviso for re-entry by the lessors in case the lessees, their successors or assigns, should not well and duly keep (amongst other) the above covenant.

4. All the estate and interest of the said trustees (the lessors) is now vested in the plaintiffs by divers mesne assignments.

5. All the estate and interest of the said lessees is now vested in the defendant by divers mesne assignments.

6. Pursuant to one of the covenants in the said indenture certain buildings consisting of a shop and bakehouse were, after the date thereof, erected by the lessees on the said plot of land.

7. The defendant, who is a grocer and baker, carries on business as such in the aforesaid shop and premises, in partnership with his brother, Aaron Battersby, and has continued to do so ever since the premises became vested in him as aforesaid.

8. In the month of Sept. 1876 the said Aaron Battersby duly applied for and obtained an excise retail beer licence for the sale of beer to be consumed off the premises. The licence was headed as follows:

Beer Retailer's Licence,

Off the premises, in pursuance of 11 Geo. 4 & 1 Will. 4, c. 64, and Acts amending the same, and tobacco licence in pursuance of 6 Geo. 4, c. 81, 27 & 28 Vict. c. 56, s. 13.

And it authorised and licensed the said Aaron Battersby to sell by retail at the said shop beer, ale, and porter to be consumed off the premises, from the date thereof until the 11th Feb. 1877.

9. In the month of Oct. 1877 Aaron Battersby applied for a renewal of the said licence, and on the 11th of that month a fresh excise beer retailer's licence headed under the same Acts, and in the same form, as the aforesaid licence so obtained by him in Sept. 1876, as stated in the last paragraph, and authorising and licensing him to continue till the 10th Oct. in the following year to sell by retail at the said shop and premises beer, ale, and porter to be consumed off the premises, was accordingly duly granted to him. [Copy of licence annexed.] The plaintiffs were no parties to the granting of the said licences, and had no notice of the same, and they submit that the statements contained in this and the preceding paragraph of this case are inadmissible in evidence and irrelevant.

10. The said Aaron Battersby and the defendant, from the date of the granting of the said

licence in Sept. 1876 down to the 12th Nov. 1877, in addition to their carrying on their ordinary business as grocers and bakers at the said shop and premises, have been in the habit of selling there, under and in pursuance of the said several licences, beer by retail to be drunk and consumed off the premises, and not to be drunk or consumed on the premises, and no part of the beer sold by them at the said house, shop, or premises has ever been drunk or consumed thereon or thereon.

11. The plaintiffs have brought this action for recovery of the possession of the aforesaid shop and premises in consequence of the aforesaid sale of beer thereof by retail in the manner and under the circumstances and for the purposes described in the 9th and 10th paragraphs hereof on divers days between the 11th Oct. and 12th Nov. 1877, contending that the said acts of the defendant constitute breaches of the aforesaid covenant and causes of forfeiture under the above-mentioned proviso.

12. The defendant contends that none of the said acts of the defendant constitute a breach of the said covenant, or any cause of forfeiture, and that under the circumstances hereinbefore stated the plaintiffs are not entitled to recover in this action.

The court are to be at liberty, should they think that any further or other facts require to be stated, to send back this case to an arbitrator, to be named by the court, to find the same.

(1.) If the court shall be of opinion that any of the said acts of the defendant in Oct. or Nov. 1877 constitute a breach of the said covenant, and also a cause of forfeiture under the said proviso, and that the plaintiffs are under the circumstances stated entitled to recover, then judgment is to be entered for the plaintiffs for recovery of possession of the premises, together with 10l. mesne profits, or such less sum as to the court shall seem fit, and costs of this action.

(2.) If the court shall be of opinion that the said acts or any of them constitute a breach of the said covenant, but not a cause of forfeiture, and that the plaintiffs are entitled to recover against the defendant in respect of such breach of covenant, then judgment is to be entered for the plaintiffs for 10l. damages, or such less sum as to the court shall seem fit, together with the costs of this action.

(3.) If the court shall be of opinion that the said acts do not constitute either a breach of the said covenants, or a cause of forfeiture, or that the plaintiffs are not entitled to recover against the defendant under the circumstances stated, then judgment is to be entered for the defendant with costs of defence.

W. G. Harrison, Q.C., for the plaintiffs, argued that the covenant had been broken. The word "beershop" includes any place where beer is sold, whether for consumption on the premises or not, and it is not denied that beer has been sold in this house.

J. Digby, for the defendant, argued that the covenant had not been broken. The principle upon which these covenants ought to be construed is laid down by the Court of Appeal in *Germain v. Chapman* (47 L. J. 252, Ch.), and is this, that as far as possible they ought to be construed so as not to restrict the freedom of trade. And in this

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particular case the object of the lessors was clearly to avoid the collection of noisy crowds which would result from liquor being consumed on the premises, whereas it might be sold for consumption off the premises without any such noise and confusion arising at all. Beershop and beerhouse are synonymous, and as to a "beerhouse" it has been expressly decided that a covenant not to use a house as a beerhouse does not extend to the sale of beer not to be drunk on the premises:

London and North-Western Railway Company v. Garnett, L. Rep. 9 Eq. 26; 39 L. J. 25, Ch.; 21 L. T. Rep. N. S. 352.

He also referred to

Jones v. Bones, L. Rep. 9 Eq. 674; 39 L. J. 405, Ch.; 23 L. T. Rep. N. S. 304;

Pease v. Coats, L. Rep. 2 Eq. 688;

11 Geo. 4 & 1 Will. 4, c. 64;

4 & 5 Will. 4, c. 85.

COCKBURN, C.J.—No doubt the word "beershop" must be interpreted with reference to the state of things which existed in 1868 when this covenant was entered into; but I do not see any reason why that state of things, compared with the present state of things, should limit the meaning of the term in the manner which Mr. Digby contends for. The word "shop" means a place where a sale is carried on, and therefore the word "beershop" includes the particular kind of sale which is carried on in this house. It may be that the lessors intended to include such a sale, while it is of course possible that they had not contemplated it. What we have to look to is what words did they actually use, and when we find them using a term which, beyond doubt, includes the kind of sale which they now complain of, we have no alternative but to give judgment in their favour.

MELLOR, J.—I entirely agree. If the word "beershop" had a technical meaning, I might have decided otherwise; but we can look to what the parties have said and give judgment accordingly. This being a case of forfeiture, I should be very sorry to strain the law in any way against the defendant, but I do not see how we can give any other judgment.

Judgment for the plaintiff.

Solicitors for the plaintiffs, *Lee and Brodie*.

Solicitors for the defendant, *Maples, Teesdale, and Co.*

Tuesday, May 21, 1878.

(Before COCKBURN, C.J. and MELLOR, J.)

COVERDALE v. CHARLTON. (a)

Pasturage along road, right to—Trespass, when maintainable—Right of local board to let pasturage—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 3, 144, 149.

The Local Board of Cottingham, in Yorkshire, having on several occasions from 1863 to 1876 let to the plaintiff intermittently and amongst other persons the right of pasturage on the side of two roads, the one private and the other a highway, within their district, in 1876 let the said pasturage to the plaintiff by agreement in writing for a year. For more than thirty years different persons living in the neighbourhood had depastured cattle along the said roads without payment, and refusing to make payment on demand. The plaintiff, before 1876, had warned

off such persons, and the local board had from time to time taken proceedings against them under the Highway Acts, without success. The defendant, in 1876, after and with knowledge of the agreement of the plaintiff with the local board, depastured certain cattle along the said road under the care of an attendant. The local board had no legal right to let or in any way interfere with the private road, and had assumed to let the pasturage along the same by a mistake.

Held (1), that, inasmuch as by the 149th section of the Public Health Act 1875 the public road was vested in the local board, the plaintiff might by title derived from his agreement with the board maintain trespass against the defendant in respect of the pasturage along the public road; but (2), that as the local board had no right over the private road, they could not give the plaintiff, nor had the plaintiff otherwise acquired, a sufficient possessory right to maintain trespass in respect of the pasturage along the private road.

SPECIAL CASE.

1. In the year 1766 an Act was passed entitled "An Act for dividing, inclosing, and draining certain lands, grounds, and common pastures in the parish of Cottingham, in the East Riding, in the county of York." The said Act is a public Act. A copy accompanies this case.

2. The commissioners appointed by or under the said Act made their award on the 24th Aug. 1771, and thereby set out and appointed certain public and private roads within the said parish (including Endyke and Cold Harbour-lanes hereinafter mentioned).

3. Endyke-lane was set out by the said award as a private-road in the following terms:

We do order, direct, determine, and award that there shall at all times for ever hereafter be another private way or road, as and where the same is staked, ditched, or bounded out, of the breadth of thirty feet, for the use of the said proprietors whose allotments adjoin upon the same, their tenants, lessees, heirs, and assigns, their servants, horses, cattle, carts, and carriages only, leading from the turnpike road of the town of Kingston-upon-Hull and Beverley aforesaid westward into and over the south side of lands in the said New Ings herein severally awarded the said Francis Riley and Samuel Knipe, to and for them awarded the said Francis Whiting, &c."

Since the year 1818 Endyke-lane had been a public road, and as such it has since that date been repaired by the parish.

4. Cold Harbour-lane, which in the said award was described as the North Carr-road, was set out thereby as a private road in the following terms:

And we do order, direct, determine, and award that there shall at all times for ever hereafter be a private way or road, as and where the same is now staked, ditched, or bounded out, of the breadth of forty feet, for the use of the several owners of lands and grounds in Cottingham aforesaid, their tenants, lessees, heirs, and assigns, and their servants, horses, carts, and carriages only, and to be called the North Carr-road, leading to and from the said Dunawell-road eastward into and over lands in the said Inn-common and North Carr, to and from the turnpike road leading from the said town of Kingston-upon-Hull to Beverley aforesaid.

Cold Harbour-lane has continued since the date of the said award, and still is, a private road.

5. The commissioners by their said award also awarded as follows:

And we do order, direct, and award that no person or persons shall at any time hereafter turn any horses or

other cattle into such of the public or private roads as are herein directed to be fenced on each side thereof for the space of five years from the date hereof, and from and after the expiration of the said five years we do award the herbage of the said roads to the surveyors of highways for the township of Cottingham aforesaid, and the profits arising therefrom shall be applied towards the repairing of the said roads, and we do order and direct that upon all public and private roads the owners of lands adjoining and laying open to the same (when the fences are not awarded to be made to lane off the ways), shall respectively have the herbage and benefit thereof, so as they do not injure the quickwood adjoining.

6. Cottingham aforesaid, whether strictly the area of a parish or a township, is and always has been for the purpose of maintaining its highways a distinct and separate area, which is commonly and in this case hereinafter called the parish of Cottingham.

7. For the purposes of this case it is conceded both by the plaintiff and the defendant that the commissioners had no power under the said Act of awarding the herbage of any of the roads thereby set out to the said surveyors, and that the award, so far as it purported to do so, was invalid.

8. Always down to the year 1863, so far back as the memory of living witnesses extends, the surveyors of highways for the parish of Cottingham, and from the year 1863 down to the commencement of this suit the local board for the district of Cottingham, to whom the office of surveyors of highways was then transferred, have in every year agreed with various persons for the letting to them between the months of April or May and November of certain rights of herbage or pasturage in and about the sides of certain roads within the said parish (being the several roads and lanes specified in the schedule to the agreements of the 19th April 1876 hereinafter mentioned, and including Endyke and Cold Harbour-lanes), and continuously since the year 1831 down to the commencement of this action money payments have in each year been received by the said surveyors from time to time, and afterwards by the said local board, in respect of the said agreements, and applied to the repair of roads within the said parish, and save as hereinafter mentioned the persons with whom such agreements have been made have had the enjoyment of the herbage under the said agreements.

9. The entire length of the roads in respect of which such agreements have been made is about eighteen miles.

10. In every such agreement which the local board have made since the beginning of the year 1866 they have allotted specific roads or parts of roads to particular individuals in the manner which is shown by the schedule to the agreement of the 19th April 1876, and the form of such agreements has been the same as that of the last-mentioned agreement. Before 1866 the mode of letting had not been uniform, the method now usual having been sometimes adopted, while at other times the letting was by "gates," the takers of "gates" being allowed by their agreements to depasture cattle throughout all the roads comprised in such agreements at a specified charge for each animal according to its description.

11. For thirty years and upwards before the commencement of this action different persons living in the neighbourhood had from time to time during the period when the said alleged right of herbage was let, put horses or other cattle

generally in small numbers into the said roads (including Endyke and Cold Harbour-lanes) to eat the herbage therein without taking any gates or making any agreement with the said surveyors or local board. Some of these persons, on payment being demanded from them, have refused it, and have persisted in taking the herbage without payment after such refusal. Since 1863, when the local board came into existence, the number of persons taking the herbage without payment has increased, and many of them have refused to pay when payment was demanded. From 1863 till about five years before the commencement of this action, the number of persons who took the herbage without payment averaged twenty or thereabouts in each year, but this number has somewhat diminished during the last five years.

12. It was from time to time brought to the knowledge of the said surveyors and local board that those persons who during the period that the said alleged right of herbage was let were depasturing the herbage with their cattle without payment, and the said surveyors from time to time, and the local board during the whole time it has existed, have employed a person called a pinder with instructions to impound any cattle that were found in or about the sides of the said roads insufficiently attended, but beyond this they have not interfered except by such proceedings before magistrates as are hereinafter mentioned.

13. Proceedings have from time to time been taken before the East Riding magistrates in petty sessions, by the said surveyors and local board respectively, and by the lessees of the said alleged right of herbage, under the provisions of the Highway Acts, from time to time in force, viz., 5 & 6 Will. 4, c. 50, s. 74, and 27 & 28 Vict. c. 101, s. 25, but the magistrates have, in such cases, uniformly dismissed the proceedings whenever it appeared that the cattle were under the control of an attendant.

14. The plaintiff to whom, before 1876, the said alleged right of herbage in certain of the said roads had been several times let (but not from 1871 to 1875 inclusively), had from time to time warned off those whom he found taking the herbage without his permission, in the roads assigned to him, and they had desisted from openly taking the herbage there without his permission, but except as herein and in the last two paragraphs mentioned it did not appear that there had been any interference with those who were from time to time depasturing the herbage of the said roads without any payment.

15. On the 19th April 1876 the local board entered into an agreement in writing with the plaintiff (a copy of which accompanies and forms part of this case) under which the local board agreed to let to the plaintiff the right of herbage or pasturage for cattle, except sheep, in and about the sides of the roads hereinafter mentioned from the day of the date of the said agreement until the 23rd Nov. then next, at the rent of 8*l.* 10*s.* Such roads were described as follows in the schedule to the said agreement: "From Gibsons to Railway Gate, North Moor-lane, 5*l.*; Cold Harbour and Middle Dykes to Railway Gates, 2*l.* 5*s.*; Little North Carr-lane, and Endyke-lane, 1*l.* 5*s.*"

16. The day after the execution of the said agreement the plaintiff commenced depasturing the herbage with his cattle, in the roads that had

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been assigned to him under the said agreement, and thenceforth until the commencement of this action he regularly continued to do so.

17. On the 25th April 1876 three horses and eight head of other cattle belonging to the defendant were turned into Endyke-lane aforesaid, under the care of the defendant's servant, and grazed there upon the sides of the said road, and on the following day horses and other cattle of the defendant to about the same number were turned into Cold Harbour-lane aforesaid, under the care of the same servant, and grazed there upon the sides of the said roads.

18. The defendant knew that the said alleged right of the herbage in and about the sides of the said roads had been let by the said local board to the plaintiff, but refused to remove his cattle or to discontinue turning them out to graze upon the sides of the said roads. No actual obstruction of the plaintiff's cattle was caused on either day on which the alleged trespasses took place by the acts referred to in the 17th paragraph.

19. The defendant had himself, in the year 1875 been a lessee under the local board of the alleged right of herbage in certain of the said roads, but not in any of those let in 1876 to the plaintiff, and the defendant had refused to pay the local board for the right of herbage so let to him, upon the ground that other persons had depastured such herbage without his permission. Save under such letting it did not appear that the defendant had ever before the 25th April 1876 put any of his horses or other cattle to graze in any of the said roads.

It has been agreed between the plaintiff and defendant that if the judgment of the court be for the plaintiff the amount of the damages is to be 1s.

The question for the opinion of the court is, whether the plaintiff is entitled to recover.

Costs of the trial to abide the event of the action.

Wille, Q.C. (Wilberforce with him), for the plaintiff, as to the private road, argued that the plaintiff had under the circumstances stated in the case sufficient possession to entitle him to recover. They cited

Grosby v. Wadsworth, 6 East, 602;

Chatteris v. Cooper, 4 Taunt. 547;

Heath v. Milward, 2 B. N. C. 98;

Every v. Smith, 26 L. J. 344, Ex.

As to the public road he relied on sects. 3, 144, and 149 of the Public Health Act 1875 (a), which "vests" all highways in urban authorities.

(a) The 149th section is as follows: "All streets being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority."

The urban authority shall from time to time cause all such streets to be levelled, paved, metalled, flagged, channelled, altered, and repaired as occasion may require; they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers.

Any person who without the consent of the urban authority wilfully displaces or takes up, or who injures the pavement, stones, materials, fences, or posts of, or the trees in, any such street, shall be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding five shillings for every square foot of pave-

Dodd, for the defendant, as to the private road, argued that the plaintiff had no more legal possession of the pasture than the defendant; and as to the public road, contended that the local board had no power over that road, except for the purposes of repairing or otherwise improving it, and that the word "vest" in the statute ought to be read in a restricted sense, so as not to give the board any power to make money out of the road.

COCKBURN, C.J.—I think that this case differs materially in regard to the two ways. First, there is a way which is an admitted highway; and secondly, there is a way which is admittedly a private way. Our judgment must be for the plaintiff as to the highway, and for the defendant as to the private way. The question as to the highway turns upon the construction of sect. 149 of the Public Health Act 1875, read by the light of sect. 4. By sect. 149 it is enacted that "all streets which at any time become highways, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority." By sect. 4, the interpretation clause of the statute, it is provided that "street includes any highway (not being a turnpike road) and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage whether a thoroughfare or not." The public highway in the present case comes within this definition. Then by the effect of sect. 149 it is "vested in and under the control of the urban authority." To see what the urban authority may do we may also go to sect. 144, from which we learn that the urban authority "shall within their district, exclusively of any other person, exercise the office of and be surveyor of highways;" and we also learn from other parts of the Act the urban authority in an urban district is the local board. It may be somewhat startling to find that under the term street a grass lane is included; but if the Legislature chooses so to enact, of course it must be so. This highway, therefore, is vested in the local board. It is suggested that by the word "vested" ownership in the proper sense of the term is not intended to be conferred, but merely a power of dealing with the highway; but I

ment, stones, or other materials so displaced, taken up, or injured; he shall also be liable in the case of any injury to trees to pay to the local authority such amount of compensation as the court may award."

Sect. 144. "Every urban authority shall within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are or may be inconsistent with the provisions of this Act; every urban authority shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which by the Highway Act 1835, or any Act amending the same, are vested in and given to the inhabitants in vestry assembled of any parish within their district."

All ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor to the urban authority, or by or to such other person as they may appoint.

By sect. 3, "Street" includes any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not.

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think that this limited interpretation of "vested" is not the correct one. The highway is put so entirely under the control of the local board that they may turn it into a metalled road, and the section contains no words of limitation whatever. It may be that this interpretation which we are giving to the statute presses hardly on the owners of the soil on each side of the road, reversing as it does the maxim *usque ad medium filum*. But the Legislature is omnipotent, and if it is so enacted so it must be. The road belongs to the local board, and they may let it to whom they please. Secondly, as to the private way. Mr. Wills argues that the plaintiff has sufficient possession, because the defendant does not set up any right. Now the state of things which at present exists no doubt arose in this manner. This way was set out of a common, and although the way was made and allotted, the old commoners went on turning out their cattle as before. The plaintiff says that he has as good a right as anybody else. But I think we may start with this proposition: The local board had no right in the soil of this way, had no right to deal with or to let the pasture. The plaintiff has no better right than the local board—that is, none. All the plaintiff has done is to turn out his cattle. But does such an act as that give him such possession of the whole pasture as to say that he has a right of grant over the whole? Surely not. He turned out his cattle, no doubt, under a claim of right, but it is a claim which proves to be fictitious. He cannot claim such a right of possession as to be able to turn out other people. As to the private way, therefore, judgment will be for the defendant, and as to the highway for the plaintiff.

MELLOR, J.—I am of the same opinion. I confess that I think the facts are hardly so satisfactory as to point to a definite conclusion, but on the whole I am of the opinion that there is a distinction, not shadowy but real, between these two ways. I think that Mr. Dodd is wrong in his suggestion as to the meaning of "vesting." That word does not mean only "vested for limited purposes" such as flagging. No doubt certain purposes are mentioned in the latter part of the section, but the mention of them is not made with a limiting intention. There was, therefore, a right in the plaintiff to maintain trespass against a person not having a superior right to his own. We then come to the distinction between the right to maintain possession and the right to bring trespass. I throw no doubt whatever on any of the authorities which have been cited, but I cannot help observing that they all have reference to an ownership in the soil. Now the Inclosure Act at first vested the herbage, but it turned out that the Inclosure Commissioners had no power so to vest it. This private road therefore never belonged to the local board. But the rule *usque ad medium filum* was got rid of, because the road was set out under the Inclosure Act, and allotted to the lord of the manor. Now the history of the case shows that many people had turned out cattle, and that plaintiff had the right of pasturage only. The local board do not affect to let him the land itself. Beyond a mere licence therefore the plaintiff has nothing. Therefore, when the defendant says to the plaintiff, "I do not care for your agreement with the local board; I shall treat it a nullity," the plaintiff cannot

maintain trespass, because he has no exclusive right of possession.

Judgment for the plaintiff as to the highway, and for the defendant as to the private road.

Solicitor for the plaintiff, *Henry Stirke*, for *J. Seymour Moss*, Hull.

Solicitor for the defendant, *J. L. Morris*, for *Spurr and Sons*, Hull.

Saturday, June 22, 1878.

(Before COCKBURN, C.J., MELLOR and LUSH, JJ.)

BRAMPTON UNION (apps.) v. CARLISLE UNION (resps.) (a)

Poor law—Settlement by three years' irremovability—Parochial relief before passing of Act—39 & 40 Vict. c. 61, s. 34.

A pauper resided between 1865 and 1869 in a parish, belonging neither to the appellants' nor the respondents' union, for the term of three years in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable.

From 1869 to 1877 he continued to reside in the same parish, but was throughout that period in receipt of parochial relief.

In 1877 he went to a parish in the respondents' union, and was shortly afterwards ordered to be removed to the parish of his birth settlement, which was in the appellants' union.

Held, upon a case stated at quarter sessions, that there was nothing to deprive a pauper of the settlement acquired by his status of irremovability according to the terms required by sect. 34 of the Divided Parishes and Poor Law Amendment Act 1876, if existing at the time of the passing of that Act; and that the pauper had acquired a settlement by residence in the said parish.

1. THIS was a case stated by the justices of the peace for the county of Cumberland, in an appeal against an order for the removal of James Little, a pauper, wherein the guardians of the Brampton Union were the appellants, and the guardians of the Carlisle Union the respondents.

2. The said James Little, the pauper, for whose removal the order appealed against was made, was born in or about the year 1810, at Williams Gill, in the parish of Farlam, in the appellants' union.

3. In the year 1865 the said James Little went to reside at Gateshead, in the county of Durham, out of the appellants' union and continued to reside in Gateshead from that time till the 2nd April 1877.

4. The said James Little had in the year 1866 acquired by his residence in Gateshead a status of irremovability from the Gateshead Union entitling him not to be removed from the said union; and the status of irremovability continued throughout the said residence of the said James Little to the time of his going to Carlisle hereinafter mentioned.

5. At the latter part of the year 1869 the said James Little, while so residing at Gateshead as aforesaid, met with an accident, and a few weeks afterwards began to receive relief from the said Gateshead Union, and continued to receive weekly relief from the said union till he went to Carlisle as stated in next paragraph.

6. On the 2nd April 1877 the said James Little

(a) Reported by M. W. McKEELAN, Esq., Barrister-at-Law.

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[CR. CAS. RES.]

went to Carlisle to stay with his daughter, and shortly afterwards was received into the work-house of the Carlisle Union, where he has since then remained.

7. On the 6th Oct. 1877 an order for the removal of the said James Little was made by two of Her Majesty's justices of the peace for the county of Cumberland, adjudging that the place of the last legal settlement of the said James Little was the parish of Farlam in the appellants' union, and ordering the removal of the said James Little to the appellants' union.

8. The appellants' appealed to the quarter sessions of the county of Cumberland, holden in January of the present year, against the said order of removal, on the ground amongst others that the said James Little by virtue of the facts stated in paragraphs 3 and 4 obtained a legal settlement in the Gateshead Union; and the quarter sessions, being of opinion that the said James Little had not obtained a legal settlement in the Gateshead Union, and that the place of the last legal settlement of the said James Little was the parish of Farlam in the appellants' union, confirmed the said order of removal, subject to a special case.

9. The question for the court is whether, on the 6th Oct. 1877, the said James Little had a legal settlement in the Gateshead Union.

10. If the court shall be of opinion that the said James Little on the 6th of Oct. 1877 had not a legal settlement in the Gateshead Union, then the said order of removal is to be confirmed; but if the court shall be of opinion that the said James Little on the 6th Oct. had a legal settlement in the Gateshead Union, then the said order of removal is to be quashed.

Poland (with him *Shes*), for the respondents, supported the order of removal, and showed cause against the rule to bring up the affirming order of quarter sessions. By sect. 34 of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61): "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." By the Irremovability Act 1846 (9 & 10 Vict. c. 66) s. 1, the time to constitute the irremovability of any person is not to be counted "during which any such person shall receive relief from any parish." It was held in *Reg. v. Ipswich Union* (L. Rep. 2 Q. B. Div. 269) that a person who had resided in a parish for a term of three years, but whose residence therein had ended before the passing of the Act, did not acquire a settlement therein under sect. 34 of the Act of 1876. The only difference between that case and this is that the period of residence which created the settlement was there concluded by departure from the parish before the Act was passed; here the same period was similarly concluded by the receipt of relief before the Act was passed. [LUSH, J.—Here the pauper continued irremovable after the passing of the Act. COCKBURN, C.J.—Can he lose his settlement by mere receipt of relief?] The Act must receive a retrospective interpretation in order to make this residence a settlement.

Henry and *Elliot* appeared for the appellants, but were not heard.

By the COURT (COCKBURN, C.J., MELLOR, and LUSH, JJ.)—There is clearly nothing in the receipt of relief to deprive a pauper of the settlement acquired by his status of irremovability, if the residence has been for three years, which exists at the passing of the Act.

Judgment for the appellants.

Solicitors for appellants, *Remnant* and *Penley*, for *Ramsday* and *Mole*, Bampton.

Solicitors for respondents, *Grey* and *Mounsey*, for *J. C. Wannop*, Carlisle.

CROWN CASES RESERVED.

Saturday, June 29, 1878.

(Before COCKBURN, C.J., POLLOCK, B., FIELD, J., HUDDLESTON, B., and LINDLEY, J.)

REG. v. HANCOCK AND BAKER. (a)

Feloniously receiving—Restoration of stolen goods to owner—Subsequent delivery to the thief for detection of the receiver.

A lad was detained on leaving his master's premises, and a policeman sent for, who searched him and took a stolen cigar from him in the master's presence. In consequence of the lad's statement, the cigar was returned to him with five others, which the lad took to the prisoner and gave to him.

Held, that the prisoner could not be convicted of feloniously receiving the cigars knowing them to be stolen, for that they were not stolen property at the time they were received, the master and the policeman having acted in concert in supplying the lad with the six cigars, and instructing him what to do with them.

CASE reserved for the opinion of this Court by W. F. Harrison, Esq., Chairman of the Second Court at the General Quarter Sessions of the peace for the county of Surrey, held by adjournment at St. Mary, Newington, on the 3rd June 1878.

William Emmett Hancock and Henry Robert Baker were tried upon the following indictment:

Surrey.—The jurors for our Lady the Queen, on their oath present, that William Emmett Hancock, on the 23rd May 1878, then being servant to James Gabriel, one cigar of the property of the said James Gabriel, his master, feloniously did steal, take, and carry away, against the form of the statute in such case made and provided.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that Henry Robert Baker on the same day and in the year aforesaid, one cigar (being the same property as the said William Emmett Hancock in the first count of this indictment is charged with stealing) of the property of the said James Gabriel, before then feloniously stolen, taken, and carried away, feloniously did receive and have, the said Henry Robert Baker then well knowing the same to have been feloniously stolen, taken, and carried away, against the form of the statute in such case made and provided.

The prisoner Hancock having pleaded guilty, the following evidence was adduced in support of the charge against the other prisoner Baker.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

[CR. CAS. RES.]

REG. v. HANCOCK AND BAKER.

[CR. CAS. RES.]

James Gabriel proved that he was a cigar manufacturer, at 320, Walworth-road, in the parish of St. Mary, Newington, in this county, and that the prisoner Hancock entered his service as shop boy on the day named in the indictment.

That about seven in the evening, as the prisoner was about to leave work for the day, the witness saw him take a cigar (without permission) from the mantelshelf of the shop, and put it in his pocket.

That witness having already missed goods, sent for a detective, and obtained the services of Edmund Reid, an officer of the P Division.

That witness saw Reid take the cigar from Hancock and mark it, and then give it back to the prisoner with five others and certain instructions.

This witness stated in cross-examination that he occasionally had in his possession broken cigars, which he worked up again, and was never in the habit of giving them to persons in his employ.

Edmund Reid proved that he was a detective officer of the P Division, and that between seven and eight in the evening of the day in question he was called to the prosecutor's, and in his presence searched the prisoner Hancock, and found the cigar in his trousers pocket. That he questioned this prisoner, and, in consequence of what he learnt from him, marked the cigar and returned it to him, at the same time giving him five other cigars and instructions how to act. That this prisoner thereupon went, followed by Reid, to a coal store, in Smith-street, Portland-street, Walworth, where Reid saw the other prisoner Baker standing; that Hancock went up to Baker and handed something to him. That Reid then accosted Baker, telling him who he was, and inquired what Hancock had given him, to which inquiry Baker replied "Nothing," meaning that Hancock had given him nothing. To which Reid replied, "I saw him give you something." That Baker then said, "I know you are a constable, and here they are," at the same time handing Reid six cigars, one being the marked one. That Reid thereupon said to Baker, "You've incited this boy to rob his master, and received the cigars he has stolen." That another lad named Maunders was there at the time. That he then apprehended Baker, and took him to the police station.

The prisoner Hancock, a lad thirteen years of age, was then called for the prosecution and gave the following evidence:

"On the 23rd May last I entered the employment of the prosecutor, and about 7 p.m., on leaving work for the day, I took a cigar and put it in my pocket. Shortly after I gave it up to detective Reid, who returned it to me with some others. I took it because prisoner Baker, whom I knew, had told me to get him as many as I could. He had told me that day at dinner time that if I did he would give me something on the following Saturday. I took all the six cigars to the coal store in Smith-street, where he works, and gave them to him. Detective Reid and William Maunders then came up, and Reid spoke to Baker, and then we all went to the police station."

In cross-examination this witness stated that before coming to prosecutor's he had been in a printing office in the city, which was his first place, and lost it through being absent from work part of a day to get fitted with some new clothes.

That he never said anything to Baker about boys being allowed damaged cigars, nor told him that prosecutor had offered him (Hancock) damaged cigars. That Baker did not say to him, "Get me some damaged cigars," but "Get me as many as you can."

William Maunders, another lad in the employ of the prosecutor, proved accompanying Hancock and detective Reid to Smith-street, and seeing Hancock hand some cigars to Baker, who said, "Thank you, I'll see you by-and-by, that'll do, won't it?" And then put them in his pocket; when someone standing near said, "Look out," and Baker then took them out of his pocket and held them in his hand under his coat, and after something more was said, handed them to Reid.

This witness stated in cross-examination that he had been two years in the prosecutor's employment, and that the latter had never given him a broken cigar. That when cigars were damaged they were made up afresh.

The statement made by the prisoner Baker before the committing magistrate was then put in and read as follows:

"Yesterday at dinner time Hancock came round to the coal shed and said, 'I have started work, Harry.' I said, 'Where at?' He said, 'At Gabriel's in the Walworth-road.' He said, 'Other boys have damaged cigars given them what gets chucked into the damaged bag, and Mr. Gabriel offered me two at dinner time.' He said, 'I wouldn't have them then, but Mr. Gabriel said he would give me some more to-night when I leave off work.' I said, 'I'll buy them off you.'"

This closed the case for the prosecution.

The prisoner Baker's counsel then submitted that there was no case to go to the jury, on the ground that the stolen cigar, the subject of the indictment, had been taken out of the possession of the thief by the detective officer in the presence of the owner, and was therefore not stolen goods when the prisoner Baker received it; and the case of *Reg. v. Dolan* (Dearsley C. C. 436; and 24 L. J. 59, M. C., 6 Cox C.C. 449) was cited and relied on.

I refused; however, to stop the case, and told the jury, after the usual caution as to the prisoner's (Hancock's) evidence, that if they believed that the prisoner Baker received the marked cigar from Hancock with the knowledge and belief that the latter had stolen it, they ought to find him (Baker) guilty.

The prisoner having been convicted, his counsel applied that a case might be reserved for the opinion of this honourable court, which the court assented to, the judgment on the prisoner Baker being respited in the meantime, and the prisoner released on bail.

If the Court should be of opinion that the conviction was right, it is to stand; otherwise it is to be quashed.

Baggalloy, for the prisoner Hancock, submitted, on the authority of *Reg. v. Dolan* (24 L. J. 59, M. C.; Dears. C. C. 436; 6 Cox C. C. 449), that the conviction was wrong. At the time Hancock received the cigar from Baker it had ceased to be a stolen chattel, it having been previously restored to his master and given back to Baker for a specified object. The fact that five other cigars along with the one Baker had taken were given to him to take to Hancock showed that Baker was then acting under the master's instructions.

COCKBURN, C.J.—At the time the cigar was received by the prisoner it had been reduced into the possession of the master, or, if you please, of the police, and Baker was then employed as an instrument to detect Hancock.

HUDDLESTON, B.—The cigar was taken by the policeman, and the instructions to Baker what to do with it were given by the policeman, but then the master was present all the time. In *Reg. v. Dolan*, Cresswell, J. said: "If it were necessary to hold that the policeman by taking the stolen goods out of the pocket of Rogers restored the possession of them to the owner, I should dissent. The goods in the policeman's hands were in the custody of the law, and the master could not have brought trover for them; but when they were given back to Rogers, and the master desired him to go and sell them, the master, I think, may be said to have employed Rogers for that purpose." That learned judge treated the thief as the agent of the master, for the purpose of detecting the receiver.

COCKBURN, C.J.—In *Reg. v. Dolan* Lord Campbell evidently assumed that what was done in that case by the police was done in concert with the master. I should infer the same in the present case.

Lilley for the prosecution.—The conviction was right. When the cigar was taken from the prisoner Baker by the police, it was in the custody of the law, and the policeman was not bound to restore it to the master. Here the master gave no authority to the policeman to act as he did. [COCKBURN, C.J.—Who gave the other five cigars to the policeman to give to him?]

COCKBURN, C.J.—The present case is undistinguishable in principle from *Reg. v. Dolan*, and the conviction must be quashed.

The rest of the Court concurred.

Conviction quashed.

Saturday, June 29, 1878.

(Before COCKBURN, C.J., POLLOCK, B., FIELD, J., HUDDLESTON, B., and LINDLEY, J.)

REG. v. PETCH.(a)

Larceny—Wild rabbits—Taking and carrying away—Possession.

The prisoner was employed to trap wild rabbits, and it was his duty to take them when trapped to the head keeper. Contrary to his duty he trapped from time to time rabbits, and took them to another part of the land and placed them in a bag, which another keeper observing, went and took some of the rabbits out of the bag during the prisoner's absence and nicked them, and put them into the bag. His reason for nicking them was that he might know them again. The prisoner afterwards took away the bag and the rabbits with the intention of appropriating them to his own use.

Held, that the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them.

THIS was a case reserved for the opinion of this Court by B. B. Hunter Rodwell, Esq., Q.C., M.P. the chairman of the second court of the West Suffolk Quarter Sessions.

The prisoner was indicted under the statute 24 & 25 Vict. c. 96, sect. 67, for larceny, as a servant to the Maharajah Dhuleep Sing, of sixty-one dead rabbits, the property of his master. There was also a count for receiving.

The prisoner was employed by the Maharajah to trap rabbits upon a part of his estate, and it was the duty of the prisoner forthwith to take daily the rabbits so trapped to the head keeper.

On the morning of the 9th Feb., about half-past eleven, an under-keeper named Howlett, also employed by the Maharajah, was out on his beat in the parish of North Stowe, where he observed the prisoner go three or four times from the places where his rabbit traps were set to a spot near a furze bush on his beat. On examining this later in the day, he found sixty-one dead rabbits in a bag hidden in a hole in the earth near the furze bush. Howlett took twenty of the rabbits out of the bag and marked them by cutting a small slit under throat. He then replaced them in the bag, and covered it up in the hole in the ground as before. In cross-examination Howlett said that his reason for marking the rabbits was that he might know them again.

Early on the following Sunday morning the prisoner was seen by Howlett and a police constable, who had been watching the spot, to take the rabbits from the hole in the ground and put them in his cart, and he was driving the cart away along the road in a contrary direction to the head keeper's house, where he should have deposited them, when he was stopped and taken into custody by the police.

Counsel for the prisoner contended that there was no evidence to go to the jury of the larceny charged in the indictment, and referred to *Reg. v. Townley*, L. Rep. 1 C. C. R. 315; 12 Cox. C. C. 59.

The Court, however, held that there was evidence to go to the jury of larceny, and that the present case was distinguishable from that of *Reg. v. Townley*, in consequence of the continuity of the possession having been broken by Howlett, the servant of the Maharajah, having taken twenty of the rabbits out of the bag and marked them as described.

The Court agreed with the contention of counsel for the prisoner that there was no evidence of any intention on the part of the prisoner to abandon possession of the rabbits, and this point was not left to the jury.

The Court left the case generally to the jury, who found the prisoner guilty of the larceny charged, and the prisoner was sentenced to three months' imprisonment with hard labour; execution of the judgment was respited until the decision of this court.

The Court reserved for the opinion of this Court the question whether, upon these facts, the prisoner was properly convicted of the larceny charged.

Kingsford (Malden with him).—The conviction was wrong. There was no larceny here. "Theft may be committed by taking and carrying away without the consent of the owner (even if he expects and affords facilities for the commission of the offence) anything which is not in the possession of the thief at the time when the offence is committed, whether it is in the possession of any other persons or not . . . If the thing taken and carried away is for the first time rendered capable of being stolen by the act of taking and carrying away, and if the taking and carrying away are one

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

CR. CAS. RES.] *Re A Scheme for Administration of Hodgson's School at Wiggonby.* [Priv. Co.

continuous act, such taking and carrying away is not theft, except in the cases provided for in arts. 326, 327. It seems that the taking and carrying away are deemed to be continuous if the intention to carry away after a reasonable time exists at the time of taking." (Sir J. F. Stephen's Dig. Crim. Law, art. 296.) In this case the rabbits were always in the prisoner's possession, and never in that of the master, and that being so, *Reg. v. Townley* is an authority that the prisoner is not guilty of larceny. This continuity of possession of the rabbits was not broken by the act of Howlett going and nicking the rabbits. That was done for the purpose of identifying them, not for reducing them into the possession of the master. [FIELD, J.—And with the intention that the prisoner should have possession of them.] The distinction taken by the chairman is not consistent with the facts. The judgment of Blackburn, J. in *Reg. v. Townley* was referred to, and also the case of *Reg. v. Read* (14 Cox C.C. 17; L. Rep. 3 Q. B. Div. 131).

No counsel appeared for the prosecution.

COCKBURN, C. J. — This conviction must be quashed. The case is really governed by that of *Reg. v. Townley*, where the law on the subject is fully stated in the judgment of Blackburn, J. At common law, to constitute larceny it was necessary that there should be a taking and carrying away of the chattels. And among the instances put in the old books are those of growing trees, and lead fixed to a building, which constitute part of the freeholds where a severance was necessary to turn them into chattels, and unless there was an interval between the one act of turning them into chattels and the other act of taking them away during which there was a change in the possession from the person who severed them to that of the owner, the final act of carrying them away by the person who severed them did not form the subject-matter of larceny. So in the present case, although property in wild animals, as decided in *Blades v. Higgs* (11 H. of L. Cas. 621) becomes that of the owner by being killed on his land, it does not follow that when a man without right goes upon the land and kills wild animals they become so reduced into the possession of the owner of the land as to render the man liable to the charge of larceny for carrying them away. In *Reg. v. Reid* the principle was the same as that which governs this case. It is true that in this case the prisoner was employed to trap rabbits, and he had authority to kill rabbits, and that availing himself of that authority, he trapped and killed rabbits, but that was not in fulfilment of his duty, but with the intention of taking the rabbits for his own purposes and not for his master. He reduced them into his own possession and not that of his master. In no sense did he reduce them into the possession of his master, for he took them direct from the trap to where the bag was concealed and put them into his bag. The only circumstance that appears to distinguish this case is the fact that the keeper Howlett marked some of the rabbits, but that was done not with the intention of altering the possession of them, but for the purpose of identifying them. That fact does not make any difference in the case. I am of opinion that the conviction should be quashed.

POLLOCK, B.—I am of the same opinion. This

case was reserved that it might be determined whether there was any distinction between it and *Reg. v. Townley*, and whether the nicking of the rabbits by the keeper could be considered as a reducing of them into the possession of the master. There is really no distinction. It is impossible to say that all that the prisoner did was not in his conduct as a thief.

FIELD, J.—I am of the same opinion. There is no question raised as to any reduction of the rabbits into the possession of the master by the act of trapping them, but it is said that the continuity of possession by the prisoner was broken by the act of the keeper in going to the trap and nicking the rabbits. It appears to me that there is no foundation for any distinction between this case and *Reg. v. Townley*.

HUDDESTON, B.—I am of the same opinion. There was no intention on the part of the prisoner to abandon his possession of the rabbits. I agree that the act of the keeper in nicking the rabbits was not for the purpose of reducing them into the possession of the master, but for identifying them. I do not agree in the distinction of this case from *Reg. v. Townley* drawn by the chairman of the court of quarter sessions. There was no evidence from which it might have been inferred that the rabbits had been reduced into the possession of the master.

LINDLEY, J.—I am of the same opinion.

Conviction quashed.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

June 5 and 6, 1878.

(Present: The Right Hons. Lord SELBORNE, Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT P. COLLIER.)

Re A Scheme for the Administration of Hodgson's School at Wiggonby. (a)

Endowed Schools Act 1869, sects. 11, 19, 23—Religious opinions of governing body—Powers of commissioners—Educational interests of privileged persons.

On a petition of appeal against a scheme framed by the commissioners under the Endowed Schools Act 1869 (32 & 33 Vict. c. 56):

- Held* (1) *That a provision that the rector of the parish, for the time being, should be a member of the governing body (ex officio), was not a "provision respecting the religious opinions of the governing body," with sect. 19 of the Act.*
- (2) *That clauses establishing a visitatorial jurisdiction in the commissioners were within sect. 23 of the Act, which authorises the commissioners to insert in any scheme "all powers and provisions that may be thought expedient for carrying its objects into effect."*
- (3) *That a provision that children who, under the original deed of foundation had been the special object of the founder's bounty, should have occasional chances of competing, when educated elsewhere, for scholarships and exhibitions, did not pay "due regard" to their educational interests as required by sect. 11 of the Act, the scheme not providing for their admission as of right to the school as day scholars.*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

PRIV. CO.] *Re A Scheme for Administration of Hodgeson's School at Wiggonby.* [PRIV. CO.]

Seemle, that when the commissioners think it right to abolish any privileges or advantages given to any class by the original foundation, it is not necessary to give to such class any new privilege, preference, or advantage.

THIS was an appeal by the existing trustees of a foundation known as "Hodgeson's Endowed School at Wiggonby," in the parish of Aikton, in the county of Cumberland.

The school was founded by an indenture, dated the 19th Oct. 1792, and made between Margaret Hodgeson of the one part, and nine persons therein described, being trustees nominated by the said Margaret Hodgeson for the management of the charity of the other part; and the school was further endowed by the will of Margaret Hodgeson, dated the 3rd April 1797.

The school had no other endowment, except some small bequests made at various times, and invested by the trustees.

The respondents were the Charity Commissioners for England and Wales, who had framed a scheme for the management of the foundation in exercise of their powers under the Endowed Schools Acts 1869, 1873, and 1874.

The scheme was approved by the Lords of the Committee of Council on Education on the 10th Aug. 1877, but the appellants presented a petition of appeal against it, for reasons which appear sufficiently from the judgment of their Lordships.

Wills, Q.C. and Latham appeared for the appellants, the trustees of the charity.

H. Davey, Q.C. and Romer, for the respondents, the Charity Commissioners.

June 6.—The judgment of their Lordships was delivered by

LORD SALBORNE.—Five objections were taken by the appellants, the governors of the Wiggonby School to the scheme settled by the Charity Commissioners for the future administration of that foundation, under the endowed Schools Acts; as to two of which their Lordships did not think it necessary to hear the respondents. There remain three other objections, which their Lordships will consider, not exactly in the same order in which they were presented to them. The first relates to the appointment of the rector of Aikton for the time being as an *ex-officio* governor, which was said to be a "provision respecting the religious opinions of the governing body," contrary to the concluding words of sect. 19 of the Act of 1869. It has been decided, by Her Majesty in Council, that, in cases falling within the 17th section of the same Act, the holder for the time being of an ecclesiastical office in the Church of England cannot lawfully be made an *ex-officio* member of the governing body of an educational endowment; the commissioners being by that section required to provide, in every scheme to which it is applicable, "that the religious opinions of any persons shall not in any way affect his qualification for being one of the governing body." The ground of that decision may be presumed to have been that particular religious tenets are implied in, and are necessary conditions of, the tenure of an ecclesiastical office, and must, therefore, "affect the qualification," consisting in the incumbency of such an office. The words at the end of sect. 19 are very different. They direct, not what a scheme shall, but what (without the consent of the existing governors) it shall not

provide. What they prohibit is, not a qualification for a particular place on the governing body, which may be "in any way affected" by a man's religious opinions, but any provision "respecting the religious opinions of the governing body." And this occurs in a section relative to a particular class of denominational schools, of which it is intended to preserve (subject only to a conscience clause) the denominational character, and which, for that reason, are thereby expressly exempted from the operation of the 17th section, unless the existing governors consent that they shall be made subject thereto. Their Lordships agree with the argument of the respondent's counsel, that the object of the concluding part of sect. 19 was only to fortify the former part of the same section, and to prevent the commissioners from making particular religious opinions more or less necessary, in these cases, than they were before, to qualify, generally, for the office of governor. This particular school is a Church of England school in the strictest sense; and by the law, as settled by the House of Lords in the *Ilminster School case* (*Baker v. Lee*, 8 H. of L. Cas. 495), all the members of its governing body ought properly, before the scheme was made, to have been members of the Church of England. No religious opinions are implied in the office of rector of the parish of Aikton, except those which, independently of the scheme, would have been held, by the Court of Chancery, to be necessary to qualify for the office of governor or trustee. In the plain and natural sense of the words, "any provision respecting the religious opinions of the governing body," there is here no such provision; and to say that the office of rector shall not in this case be made a qualification for one place on that body, merely because the holder of that office must necessarily belong to the church, in the catechism of which the children of this school are to be instructed (and instructed publicly in the church by the rector himself), and the worship of which they are required to attend, would, in their Lordships' opinion, be to contravene the spirit of the entire section by an unnecessary implication from the letter of this part of it. Before leaving this point, it may be right to notice a passage in the will of the foundress, which was referred to in the argument, to the effect that it was her "meaning and desire that no minister of the gospel in holy orders officiating at any church or chapel shall, at any time, be schoolmaster of the said school, nor any of the trustees for the time being." Their Lordships understand this passage, not as directing that no clergyman officiating at any church or chapel shall be a trustee, but that neither any such clergyman, nor any one of the trustees for the time being, shall ever be schoolmaster of the school. The objection with which their Lordships think it convenient next to deal had reference to the 33rd and 34th clauses of the scheme, which were said to confer upon the Charity Commissioners larger powers of deciding questions arising under the scheme, and binding all persons interested by such decisions, than belong to them by law under the Acts defining their general powers as to charities; and it was suggested, that such larger powers were in excess of the objects for which the commissioners were authorised to provide by schemes under the Endowed Schools Acts. Their Lordships are not satisfied that the difference be-

between these particular clauses and the general powers of the commissioners is a really substantial one, or is at variance with the spirit and general intention of the Acts by which those powers are conferred; but, taking that difference to be as great as it was contended to be by the appellant's counsel, it does not follow that these clauses are therefore *ultra vires*. The 23rd section of the Act of 1869 authorises the commissioners to insert in any scheme "all powers and provisions that may be thought expedient for carrying its objects into effect;" and their Lordships have reason to believe that these particular clauses are in a common form, which has been adopted in many schemes for other endowed schools already approved by Her Majesty in Council. Their purpose, that of establishing in the commissioners, with respect to the cases for which they provide, a species of arbitral or visitatorial jurisdiction, sufficient to indemnify the governors and to bind the objects of the charity within certain limits, may reasonably have been thought expedient for carrying the objects of the scheme into effect. And it is to be observed that they relate only to questions affecting the regularity or the validity of proceedings "under the scheme," and as to the proper construction or application of the provisions "of the scheme." Their Lordships, after full consideration, are of opinion that it cannot be held to be *ultra vires* of the authority by which the scheme itself was made, so to provide for the settlement of questions of this nature arising under that scheme. The objection which their Lordships have reserved for consideration in the last place arises under the 11th section of the Act of 1869, which is thus worded: "It shall be the duty of the commissioners, in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons are entitled, and that whether as inhabitants of a particular area or otherwise, to have due regard to the educational interests of such class of persons." The 39th section of the same Act makes any scheme, "not having due regard to any educational interests" in the cases contemplated by this 11th section, the proper subject of an appeal (by the governing body) to Her Majesty in Council. The appellants say, that in the present scheme due regard is not had to the educational interests of three classes of persons, who have hitherto, under the deed and will of the foundress, enjoyed special privileges or educational advantages, which will be abolished or modified by the scheme, viz.:—(1) All persons of the name of Hodgson, whencesoever coming, who may think fit to attend this school; (2) All children of poor persons within the parish of Aikton not having real estate worth 20*l.* per annum; and (3) All children of poor persons within the parishes of Brough-by-Sands and Beaumont not having real estate worth 12*l.* per annum. By the deed and will the benefits of the foundation were open to these three classes of persons (under some limitations, as to age, affecting the two latter of them), and to them alone. The objection is, that the scheme supersedes all provisions of the deed and will by which these privileges and advantages were conferred, and makes its own provisions the sole rule (subject to an immaterial exception in clause 37) for the future administration of the charity; and that there is no provision in any

part of the scheme by which any educational interests of any of these classes of persons are directly or indirectly regarded, except the 29th clause. That clause gives certain opportunities of competing for scholarships or exhibitions to boys or girls educated either in the school of the foundation, or in "some elementary school in any of the parishes mentioned in the schedule" (being ten parishes in Cumberland, of which Aikton, Brough-by-Sands, and Beaumont, are three), with an absolute preference, as to scholarships, of duly qualified candidates from the school of the foundation, and a *ceteris paribus* preference, as to exhibitions, of candidates from the school of the foundation, or from "an elementary school in the parish of Brough-by-Sands or of Beaumont." Their Lordships are of opinion that unless, upon the true construction of the scheme, children of the three classes who were the objects of the foundress's bounty are still admissible, as of right, upon fair and equitable terms, to the school itself, due regard has not been had to their educational interests, by merely giving them these occasional chances of competing, when educated elsewhere, for scholarships and exhibitions. Their Lordships do not doubt that it was intended by the commissioners (as they have been assured by the commissioners' counsel at the bar) that all such children, if resident within such a distance as might be consistent with their attending the school as day scholars (and indeed all other children, whether of the three parishes favoured by the foundress or of any others who might be able to do so) should be admissible to the school under such reasonable regulations as the governing body might from time to time make. And if it were clear that the scheme had provided for this, their Lordships would have thought that sufficient regard had been shown to the educational interests of those classes (although their exclusive privileges would have been abolished), subject only to the question whether they ought, under any circumstances, to have priority in the order of admission to the school. But the difficulty is, that the scheme nowhere directly says what children—of any classes or class whatever—are to be admissible to the school, and contains no rules whatever as to their admission. All this seems to be left to the Governors. The capacity of the school buildings (which are to be enlarged) is, indeed, to be "suitable for not less than 100 day scholars," and it may be inferred, from clauses 24, 25, and 28, that the commissioners had in view the general character and conditions of a public elementary school, capable of receiving the benefits provided for such schools by the Elementary Education Act of 1870. But even if the Elementary Education Act of 1870 could for this purpose be referred to, there is nothing in that Act which, being read into this scheme, would show that children from the parishes of Brough-by-Sands and Beaumont, or persons of the name of Hodgson not residing in the parish of Aikton, would be admissible, as of right, to the school. There being nothing to that effect in the scheme, the very large powers of making regulations, conferred upon the governors by clause 32, would seem to enable them (if they should think fit) to exclude these classes of children, or some of them; or, at all events, to decline to recognise them as entitled of right to the benefit of the charity. It may be

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that, as the school buildings are situate in the parish of Aikton, there would be a necessary inference in favour of the right of poor children of that parish; but their Lordships do not see how, without falling back on the directions (which are exclusive) contained in the deed and will of the foundress, such an implication could be extended to children from the other two parishes, or to persons of the name of Hodgson not resident in Aikton. Their Lordships, therefore, have come (though reluctantly) to the conclusion, that there is not in this scheme enough to satisfy the requirements of the 11th section of the Act of 1869, and they think it their duty to advise Her Majesty to remit it to the Charity Commissioners for amendment; with a declaration, that, in its present form, it is defective, as not having due regard to the educational interests of the several classes of persons who were entitled, under the deed and will of the foundress, Margaret Hodgson, to the privileges or educational advantages which it is intended to abolish or modify. Although it would not, in their opinion, be proper, by Her Majesty's order, to give any further directions for the government of the commissioners, it may be useful for their Lordships to add, that they do not adopt the view that any new privilege, preference, or exclusive advantage need be given, by any scheme under these Acts, to a class originally favoured, when the commissioners think it right to abolish the original privilege or advantage. In the present case, it appears to them, that if children named Hodgson, who can conveniently attend the school as day-scholars, and children from the three parishes originally favoured, are recognised as entitled to be educated, under reasonable regulations, in this school, no preference or advantage need be conferred upon them beyond this, that, as the school is to be limited to 100 children, it may probably be right to give them priority of admission, *ceteris paribus*, if the number of duly qualified applicants for admission should at any time exceed the number of vacancies for the time being in the school. As to age, and as to examination (if the governors should think it right to submit candidates for admission to a competitive or any other kind of preliminary examination), their Lordships see no reason why they (the Hodgsons included) should not be placed on exactly the same footing with other children, not of the favoured classes; who may, if found better qualified in these respects, be admitted in preference to them. And their Lordships think that due regard may well be paid to the educational interests of the Hodgsons, without allowing them to remain in the school beyond the age which may be limited as to other scholars. Their Lordships do not think that this is a case which either the appellants or the respondents ought to be ordered to pay costs.

Solicitors for the appellants, *Bell, Brodrick, and Gray*.

Solicitors for the respondents, *Farrer, Ouwry, and Co.*

Thursday, June 6, 1878.

(Present: The Right Hon. Lord SELBORNE, Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT P. COLLIER.)

Re SHAFTOE'S CHARITY AT HAYDON BRIDGE. (a)

Endowed Schools Act 1869, sects. 13 and 39—Vested interests—Persons directly affected by scheme—Right of appeal.

Sect. 39 of the Endowed Schools Act 1869 (32 & 33 Vict. c. 56) gives to the governing body of any endowment, or to any person or body directly affected by any scheme, an appeal to the Queen in Council, on the grounds (1) of any decision of the commissioners from which an appeal lies; (2) of the scheme not saving or making due compensation for their vested interests as required by the Act; (3) of the scheme not being in uniformity with the Act; and to the governing body alone on the ground (4) of the scheme not having due regard to the educational interests of any privileged class.

Sect. 13 of the Act defines the vested interests to be saved, or for which compensation is to be made, as those of existing foundationers, exhibitioners, masters, pensioners, and governors.

Held, that the inhabitants and ratepayers of the chapelry in which a school was situated, who had enjoyed the privilege of sending their children to the school free of payment, had no locus standi under sect. 39 to appeal against a scheme which took away such privilege.

THIS was an appeal by Matthew Winter and others, described as "inhabitants and ratepayers of the chapelry of Haydon and Woodshields in the county of Northumberland," against a scheme of the Charity Commissioners for England and Wales for the administration of the foundation at Haydon Bridge, in the county of Northumberland known as "Shaftoe's Charity."

The schools were founded by John Shaftoe by indentures of lease and release, dated respectively 16th and 17th June 1685, and were regulated by two Acts of Parliament passed in 1785 and 1819.

The respondents framed a scheme under the Endowed Schools Act 1869, for the administration of the school, which was approved by the Lords of the Committee of Council on Education, but the appellants presented a petition of appeal against it.

H. Tindal Atkinson appeared for the appellants.

H. Davey, Q.C. and Romer, who appeared for the respondents, took the preliminary objection that the petitioners were not persons directly affected by the scheme within the meaning of the Endowed Schools Act 1869, or persons to whom a right of appeal was given, and that they had no *locus standi*.

The judgment of their Lordships was delivered by

LORD SELBORNE.—Their Lordships are of opinion that the preliminary objection taken to the hearing of this petition must prevail. By the 39th section of the Endowed Schools Act of 1869 the right of appeal against schemes settled by the commissioners is defined and rather strictly limited. Of course it must be taken for granted that Parliament had good reason for those limitations; at all events it is not open to any tribunal

to review those reasons or to consider whether they were expedient or otherwise. The provision of the section is that on certain specified grounds, of which there are four, there may be an appeal by petition to Her Majesty in Council against the scheme; as to three of the grounds, by the governing body of the endowment or by any person or body corporate directly affected by the scheme, or, on the fourth ground, by the governing body alone. Whoever appeals under that clause is required to state in the petition to Her Majesty in Council the grounds of the petition; and their Lordships take that to mean that he must show on the face of the petition that he appeals on one of the grounds expressly recognised by the clause, and is a person directly affected by that of which he complains. Now these petitioners describe themselves in the course of their petition as "the undersigned inhabitants and ratepayers of the chapelry of Haydon and Woodshields;" and the only ground which they allege for their objection to the scheme, repeated indeed in various forms of expression several times over, is that by the founder's deed they have a right, and that all inhabitants and ratepayers of the chapelry in common with them have a right, to have their children taught free of expense in the school; and that this right will be taken away, or subjected to charges of which they complain, by the scheme. It was said at the bar that there might be other objections connected with a branch of the charity not educational, but their Lordships find in the petition no such ground alleged. There is no reference on the face of the petition to any objection whatever, except the loss of privileges in respect of education given to the inhabitants of this place by the founder's deed, and given to them evidently as a class. No individual complains that he has a child at the school whose status will be interfered with. Manifestly they come here as representing the class of inhabitants and ratepayers, and the general interest of that class in the benefit of this place of education under the founder's will. Their Lordships are of opinion, and would be of opinion even if there were no previous authority, that this is not an interest within the category of "vested interests" saved or required to be saved by the Act, and therefore that in respect of any vested interests these petitioners are certainly not directly affected by this scheme. The class of vested interests to be provided for is expressly defined by the 13th section of the Act, and so far as relates to any matter connected with this complaint it is defined in a manner which excludes the subject of the complaint; being only "the interest of any boy or girl" (which their Lordships take to include the interest of the parent), "who was at the time of the passing of this Act on the foundation of any endowed school." The case clearly, therefore, is not one falling under the second sub-section of clause 39, in which there ought to be a saving of a vested interest or compensation for taking it away. Under which, then, of the other sub-sections can it fall? Certainly not under the first, because the thing complained of is not a decision of the commissioners in a matter in which an appeal to Her Majesty in Council is expressly given by the Act. Does it fall under the third, "of the scheme, being one which is not within the scope of or made in conformity with the same?" Now, their Lordships do not inquire, though they may be able

perhaps to form an opinion, but they will not inquire whether the objections taken in this petition are of a nature which could have been brought within that division of the clause; but one thing is quite clear, that no one under the clause can complain upon that ground without showing that he is directly affected by that of which he complains. These petitioners, in the strict and natural sense of the word, are not "directly" interested; they have no present personal interests in this matter which are taken away; they have merely, as members of the class constituted by the inhabitants of a particular area, a general privilege or educational advantage; that, is the opportunity, if from time to time they or their children should require it, of sending their children for education, free of charge, to this school. But the loss of such opportunities, so far as they are interfered with by the scheme, affects not directly and immediately, but indirectly and contingently, each of these individuals. That point does not rest merely upon any judgment which their Lordships might now form, if the case were free from decision, as to the meaning of the word "directly" in the clause. Three cases were referred to. Their Lordships have not satisfied themselves, on referring to the records of those cases, that more than one of them is certainly in point; but one of them, unquestionably, is so. That is the case of *Harrow School* (not reported), which was determined on the 17th June 1874, at this Board, not, indeed, by the Judicial Committee, but by a special committee, which included among its members Lord Hatherley and Sir Montague Smith. The petition was by an inhabitant of Harrow, and it is at the present moment here; the objection to the scheme was, that the founder had, by his will, provided for the free admission and perpetual education and instruction of the children and youth of the parish of Harrow, and that the benefits given to the inhabitants of Harrow were practically taken away by the scheme. It was in substance the same objection that is made here; the only difference being, that the complaint was by one individual, and not by so many standing in the same situation as these petitioners. No doubt it was not under the same Act of Parliament—it was under the Public Schools Act (31 & 32 Vict. c. 118); but that Public Schools Act, in the 9th section, provided, that it should be lawful for the trustees of any scholarship, exhibition, or emolument to which any statute made under the powers of the Act might relate, or for any person or body corporate directly affected thereby," to petition Her Majesty in Council against such statute. The case, therefore, was exactly like the present, with this difference only, that in that Act there was not anything equivalent to sub-sect. 4 of this clause 39. Their Lordships will consider what difference that sub-section makes presently. This inhabitant of Harrow having petitioned that he, as an inhabitant of Harrow, was directly affected by statutes which took away the privileges of the inhabitants of Harrow, their Lordships made this minute of their decision after hearing the arguments: "The Lords of the committee came to the conclusion that, looking at the provisions of sect. 9 of the Public Schools Act 1868, the petitioner was not directly affected by the new statutes for the government of Harrow School, and agreed to advise Her Majesty that it was

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desirable that those statutes should be approved and confirmed by Her Majesty." It does not appear that in point of form the objection was taken as a preliminary objection; it was treated as substantially a question upon the merits; and their Lordships expressly determined that the petitioner had not an interest which was directly affected, and on that ground advised Her Majesty to confirm the statutes. It appears to their Lordships that were it not for the more precise definition in this 39th section of the grounds on which a person directly affected may appeal, and were it not for the addition of the 4th sub-section, that would be an authority directly in point. What difference does the more precise definition and the 4th sub-section make? A difference not favourable, but unfavourable, to these petitioners; because, while none of the other grounds are such as tend to show that in the view of this Act of Parliament these petitioners are directly affected, the 4th sub-section distinctly shows the reverse; because that precise class of interests, in respect of which these petitioners complain under this scheme (that is to say, interests consisting in privileges or educational advantages to which a particular class of persons are entitled—and it may be observed that the 11th section expressly adds, "whether as inhabitants of a particular area or otherwise")—that particular class of interests is distinctly dealt with, as one which cannot be directly affected by the scheme, and as to which therefore the right of appeal is given, not to "the governing body of any endowment to which a scheme relates, or any person or body corporate directly affected by such scheme," but to the governing body only. In this case their Lordships do not know whether the governing body of the endowment has actively consented or not to the scheme; but certainly they have not appeared as petitioners against it: and it would be going against the plain intent of the Legislature, if in the face of that limitation of the right of appeal for such a cause to the governing body alone, their Lordships were to entertain the present appeal on the petition of the inhabitants and ratepayers, as if they were directly affected by the scheme. Their Lordships will therefore humbly report to Her Majesty their opinion that this petition ought to be dismissed, the Charity Commissioners not asking for costs.

Solicitor for the appellants, *John Tucker*.

Solicitors for the respondents, *Farrer, Overy, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

June 5, 19, and July 3, 1878.

(Before JESSEL, M.R., and JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

ATTEE v. HAWK AND WIFE. (a)

Will—Charitable bequest—Railway debenture stock—Statute of Mortmain (9 Geo. 2, c. 36).

Debenture stock of a railway company is not a charge upon or an interest in land within the

(a) Reported by E. S. ROOME, Esq., Barrister-at-Law.

Mortmain or Charitable Uses Act, but is pure personality, and can be bequeathed for charitable purposes.

Decision of Hall, V.C. reversed.

Holdsworth v. Davenport (35 L. T. Rep. N.S. 319; L. Rep. 3 Ch. App. 185); and *Re Mitchell* (37 L. T. Rep. N. S. 145; L. Rep. 6 Ch. Div. 655) affirmed.

THIS was an appeal from a decision of Hall, V.C. (reported 37 L. T. Rep. N. S. 399). John Bates, by his will, bequeathed to the Corporation of Brighton 9000l. debenture stock of the Midland Railway Company for charitable purposes, for the benefit of the poor of Brighton. The question raised was, whether railway debenture stock was within the Act 9 Geo. 2, c. 36, commonly known as the Mortmain or Charitable Uses Act; and whether, therefore, a valid bequest of such stock could be made to a charity. The point turned to a great extent on the effect of the provisions of the Companies Clauses Consolidation Act 1863, which are referred to in their Lordships' judgment. The Vice-Chancellor held that the gift of John Bates was void under the Mortmain Act, on the ground that the debenture stock was a charge upon, or an interest in, land; and that the stock in question belonged to the testator's next of kin.

The corporation appealed.

Southgate, Q.C. and *Millar* for the appellants.

Dickinson, Q.C. and *Bunting* for the next of kin.

Eddis, Q.C. and *H. Greenwood* for the residuary legatees.

W. Pearson, Q.C., O. Morgan, Q.C., W. Renshaw, and Langley for other parties.

The following cases were cited:

Myers v. Perigal, 18 Sim. 533; 2 De G. M. & G. 599;

Ashton v. Lord Langdale, 17 L. T. Rep. N. S. 175; 4 De G. & S. 402;

Holdsworth v. Davenport, 35 L. T. Rep. N. S. 319; L. Rep. 3 Ch. App. 185;

Walker v. Milne, 13 L. T. Rep. 542; 11 Beav. 507;

Gardner v. London, Chatham, and Dover Railway Company, 15 L. T. Rep. N. S. 552; L. Rep. 2 Ch. App. 201;

Wickham v. New Brunswick and Canada Railway Company, 14 L. T. Rep. N. S. 311; L. Rep. 1 P. C. 64;

Chandler v. Howell, 35 L. T. Rep. N. S. 592; L. Rep. 4 Ch. App. 651;

Thornton v. Kempson, 20 L. T. Rep. 185; Kay, 592;

Alexander v. Brame, 30 Beav. 153;

Finch v. Squires, 10 Ves. 41;

Re Mitchell, 37 L. T. Rep. N. S. 145; L. Rep. 6 Ch. Div. 655; 26 & 27 Vict. c. 118, s. 23.

The judgment of the Court was delivered by

JAMES, L.J.—This is an appeal from a decision of Hall, V.C., that debenture stock of the Midland Railway Company is subject to the prohibitions of the statute of 9 Geo. 2, c. 36, restraining gifts of land to charitable uses. That decision is in direct conflict with a recent decision of Malins, V.C., in *Holdsworth v. Davenport*; and, assuming the case of debenture stock to be the same for this purpose with the debentures formerly given by railway companies and other public bodies (which will require to be considered), there are two conflicting decisions, one by Lord Langdale, holding that they were not, and one by Knight Bruce, V.C., holding that they were within the prohibition. Having to deal with this conflict of authority, it is well to refer to the Act itself, and a little to the

history of the decisions upon it. The Act recites as follows: "Whereas gifts or alienations of lands, tenements, or hereditaments, in mortmain, are prohibited or restrained by Magna Charta and divers other wholesome laws, as prejudicial to and against the common utility, nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs; for remedy whereof be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by authority of the same, that from and after the 24th day of June, which shall be in the year of our Lord 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever," unless by deed indented and executed before two witnesses twelve months before the death of the donor, and enrolled in the Court of Chancery six months after such execution, the said limitations not to extend to purchases or transfers made for valuable consideration. It had from the earliest times been the policy of the common law, as interpreted by the judges, to discourage the inalienability of land, and this altogether irrespective of the peculiar mischief supposed to arise from the vesting of lands in mortmain, which deprived the Sovereign and the lords of the profitable incidents of feudal tenures; and this policy in more modern times approved itself to the Legislature. It was deemed in itself a mischief that lands should be rendered inalienable, and the Legislature found that this mischief was being mischievously increased in one particular way—that is to say, it was found that dying persons were, sometimes from spontaneous weakness, and sometimes from their readiness to yield to the many influences which can be brought to bear on persons *in extremis*, too easily minded to give lands to charitable uses (words of the widest signification) and to be posthumously benevolent at the expense of their lawful heirs. And this was the mischief, and the sole mischief, which the Legislature set itself to prevent—viz., to prevent the increase of inalienable land through the weakness of, or practices upon, dying persons, or through posthumous charity. Upon examination of the enactments it will be found that the Act is in entire consistency with the recital. In the Act there is no prohibition of gifts of land by deeds *inter vivos*; but there are regulations securing that such gifts shall not be in substance posthumous merely by avoiding the form. There is no prohibition of any amount of testamentary charity confined to pure personal property; but the Act does, in the most comprehensive terms, forbid any

such testamentary or posthumous charity as to any interest in land or other real estate, or as to any charge or incumbrance affecting the same. At first sight it may seem that the enactment has gone far beyond the scope of the recited object, for it extends, as has always been held, even to a pecuniary legacy, so far as it is payable out of land or any charge or incumbrance on land. But it will be found on examination that all the comprehensive words in the prohibitory enactment were in truth necessary or useful to prevent evasions and devices contrary to the main intent of the Act, although, from the impossibility of legislating for every particular case, they have been found to apply in a great many cases to gifts which were, neither in effect nor intention, contrary to the real object of the Legislature. No interest in land can be given because, under colour of a gift of a mere pecuniary interest, the land itself could easily be given. Let a perpetual annuity of 100*l.* a year be given out of lands worth 50*l.*, the heir of course would let the annuitant take the lands themselves. A charge or incumbrance of 10,000*l.* on lands worth 5000*l.* would be an easy, practical mode of giving the lands themselves. And take the strongest case of apparently a mere legacy of a sum of money out of personal estate. A testator whose whole assets were worth only 5000*l.* gives a legacy of 10,000*l.* to charitable uses, and makes some official or other person interested in the charity his executor and residuary legatee. The result would be that the charity would get the assets in specie, which might include long terms of years in land and mortgages, and which by foreclosure or long possession would become the land itself. There is really nothing in the Act which has so far gone, or at all gone, beyond its recited object as to preclude the application of the rule of construction, the rule of common sense, that you are to construe the enacting part by the light of the recital of its object. Accordingly, it has been held that a share or interest in a trading partnership or business, incorporated or unincorporated, is not within the prohibition, although it may have, as indeed almost every business has, some interest in land with which, or on which, it is carried on; or although it may have amongst its assets any amount of mortgages, charges, or incumbrances on land; and shares in railways and shares in other public companies of a like nature, are now universally admitted not to be obnoxious to the prohibition of the Act. It was never supposed that a bond debt or other specialty binding the heir was within the Act, although its very object was to affect the real estate of the obligor. The personal estate of a testator is not for this purpose affected by the fact that an item in it is a share in the unascertained and unadministered assets real and personal of another testator. Now how, dealing with the matter on principle, does the case of a railway debenture stand? Previously to the cases about to be mentioned it was very difficult to say that it was not a charge or incumbrance on land within the words of the statute. There are in this country a great many railways which are private and individual property. All, or almost all, the Canal Acts, passed about the end of the last century and the beginning of this contained powers enabling the proprietors of any mine or work within a certain distance of the canal to make a railway or tramway communication with the canal, the same to

be open to the public on payment of the same tolls as were taken by the canal itself. Now, it is clear that a mortgage or a debenture, in the very words of the ordinary railway debenture given by the owner of such a railway, would, in fact, be precisely similar to a mortgage on land. The mortgagee could, by himself, or at all events by a receiver, get into the actual possession of the line of railway, and, if the incumbrances were too heavy to be redeemed, that possession would be perpetual. Knight Bruce, V.C., who was, as I happen to know, very familiar with that class of railway property to which I have referred, evidently, in *Ashton v. Lord Langdale*, considered that the debenture given by the corporate body of its undertaking and tolls was, in legal effect, an operation, the same as a similar charge on a private owner's railway would be, and on that assumption it was impossible for him to arrive at any other conclusion than the one he did. On the other hand, Lord Langdale must have thought that there was something essentially different between the charge created by a private owner of a railway and a charge made under statutory authority by a parliamentary body established and empowered to make, maintain, and manage for public convenience a great public highway, the maintenance and working of which may be of vital importance to the State itself; and he held, accordingly, in *Walker v. Milne*, that the holder of a railway debenture issued by such a body did not acquire a charge on land, any more than a shareholder in the company acquired an interest in the land. The nature of such a debenture came under the consideration of the Court of Queen's Bench in *Doe v. St. Helen's Railway Company* (2 Q. B. 364), and of the Court of Exchequer in *Hart v. The Eastern Union Railway Company* (7 Ex. 246), by which it was established that the debenture, wide as its words were, did not pass the soil, and did not pass the rolling stock of the company. And, on the same principle, it was held in *Gardner v. The London, Chatham, and Dover Railway Company* that a debenture holder could not take or touch the soil of the lands required and used for the actual working of the railway, nor the soil of any surplus lands which had been acquired, but were not required for actual use, nor the rolling stock; nor could he, by himself or his receiver, get the management of the line, nor do anything in derogation of the authority of the statutory managers, who could not delegate to anyone else their powers, nor shift their responsibility. The words of the security were subordinated to the essential nature of the undertaking, and limited so as not to extend to the very destruction of the thing the maintenance of which in perpetuity was the intent and object of the Legislature; and the result of that case was that the receiver, whose appointment the debenture holders were entitled to have made, was in truth nothing but a cashier or treasurer imposed on the company. He could not appoint or discharge a ticket-taker or a railway porter, or an engine driver or platelayer. Every servant of the railway would still be under the directors, and their wages and salaries fixed by them. All purchases and contracts for the use of the railway would be made by them. The receiver, as treasurer, would take all the moneys received by every officer of the company, would thereout pay all outgoings on the warrant of the directors, the statutory managers of the

concern, and would then apply the net surplus, being the net earnings of the business, in discharge of his immediate principals, the debenture holders. His functions would be, except as to the net surplus, neither more nor less than those of a banker appointed to receive all the moneys of a large brewery, and to pay all cheques of the persons properly authorised to draw on the account. Now, with the light thrown by these cases on the legal operation and effect of a railway debenture, it is impossible not to prefer the decision of Lord Langdale in *Walker v. Milne* to the decision of Knight Bruce, V.C. in *Ashton v. Lord Langdale*. But the case before us is really not that of a debenture, but of debenture stock. It seems to be called debenture stock *lucus a non lucendo*, because it is anything but a debenture. There is no debt except, indeed, as to the annual interest; the capital cannot be called in, and cannot be paid off. It is a right to a perpetual annuity, payable out of the concern. There is no conveyance or assignment of anything to the stockholder, or to any trustee for him. There is an entry in the books of the concern that there is so much debenture stock on which there is so much to be paid half-yearly to the holders, just like the entry of the National Debt in the great books at the Bank of England. And the whole of the rights of a stockholder depend on the Act of Parliament authorising railways and other bodies to create such a stock. The 22nd section of the Companies Clauses Consolidation Act 1868, so far as material, is as follows: The company may, from time to time, raise money by the creation and issue, at such times and on such terms, subject to such conditions and with such rights and privileges as the company thinks fit, of stock, and may attach to the stock so created such fixed and perpetual preferential interest as it may think fit, not exceeding the prescribed limit. By the 23rd section it is directed that the debenture stock, with the interest thereon, shall be a charge on the undertaking prior to all shares and stock of the company, and shall be transmissible and transferrable like other stock of the company, and shall in all other respects have the incidents of personal estate. By the 24th section it is provided that the interest on debenture stock shall have priority of payment over all dividends or interest on any shares or stock of the company, ordinary, preference, or guaranteed. So far it is quite clear that the debenture stock is of the same nature as other stock of the company, only with the important difference that it ranks in payment over all other stock, and that all arrears must be paid before a farthing is to reach the proprietors of the other stock. It is nothing but preference stock with a special preference. There is nothing to give to the stockholders any right, either at law or in equity, under any circumstances to take possession of a single item of the property of the company *in specie*, whether real or chattel. Now is any difference made in this respect by the provisions as to the appointment of a receiver? The receiver, when appointed, is to receive the whole or a competent part of the tolls or sums liable to the payment of the interest, and after payment of interest on the mortgages and bonds of the company, to distribute the money rateably among the proprietors of debenture stock. In England the receiver is to be appointed by two justices of the peace, on the application of a prescribed proportion

of stock proprietors. It is difficult to conceive how this could, directly or indirectly, tend to make any land inalienable or give to the stockholder, either immediately or as the ultimate result of any amount of insolvency, the possession or the right to the possession of any portion of the property of the company which must remain legally and equitably in the possession of the company and under the absolute control and dominion of the statutory body of managers. The expression, no doubt, is "tolls or sums," but it is tolls or sums liable to the payment of the interest. It is possible to conceive the case of a company, the owner of a market, a port, or other franchise, with nothing to do but to receive tolls and pay its creditors, just as in the case of a turnpike or bridge the whole tolls may be taken by the creditors, leaving the road or bridge to be repaired by the parish or county. But with a railway company this is impossible. The actual tolls taken, whether from other carriers, or from freighters, or passengers, must, from the very nature of the case, remain under the dominion of the directors, to enable them to do what is required for the preservation of the road and the safety of life and property. The only thing really chargeable is the net earnings of the company, the same fund out of which, if sufficient, the dividends and interest of the other stockholders are to be paid. Again, there is by the Act a special machinery for the summary appointment of a receiver; but, without that special machinery, a person having a charge on the net earnings of such a body could have got a receiver of those net earnings, if the managing body were to disregard its duty of applying them exclusively to the payment of the debenture stock interest. I apprehend that, even with regard to preference shares, properly so called, if the directors, acting in the interest of a majority of ordinary shareholders, were to misapply or not to apply such net earnings, the court would have no difficulty in appointing a receiver to receive and properly apply the same. By the 31st section it is, no doubt, provided that, in all respects not otherwise by or under the Act or the special Act provided for, debenture stock shall be considered as entitling the holders to the rights and powers of mortgagees of the undertaking other than the right to require the repayment of the principal money. But what are the rights and powers of mortgagees of the undertaking consistent with the powers conferred by the special Act on the railway directors? They are not powers to take the land, or enter on the land, or in any way to interfere with the ownership, possession, or dominion of the statutory owners and managers. The result is that the debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land, tenement, or hereditament, or any interest in land, tenement, or hereditament, or a charge or incumbrance affecting land, tenement, or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is.

Appeal allowed.

Solicitors: *Clark and Calkin*, agents for *Clarks and Howlett*, Brighton; *Singleton and Tattershall*.

Friday, March 8, 1878.

(Before JAMES, COTTON, and THESIGER, L.JJ.)

Re MARMAN'S TRUSTS. (a)

Lunacy—Pauper lunatic—Maintenance—Jurisdiction—Fund in court—Payment to legal personal representatives—Claim of asylum for maintenance—16 & 17 Vict. c. 97, ss. 94, 104.

The claim in respect of the maintenance of a lunatic in an asylum is merely a debt of the lunatic, and the court has no jurisdiction, on the death of the lunatic, to interfere with the right of his legal personal representatives by ordering payment of the expenses of his maintenance out of a fund in court to which the lunatic had become entitled.

THIS was an appeal from a decision of Bacon, V.C.

In 1844, John Moore, a pauper of unsound mind, not so found by inquisition, was, by an order of the justices of Brighton, to which parish he was chargeable, placed in a lunatic asylum at Bethnal Green.

In 1855 Moore became entitled, as next of kin of persons who had interests under the will of Mary Marman, to a fund which had been paid into court by the executors of the will, and upon a petition presented in the name of Moore by his next friend, an order was made for payment to the treasurer of the guardians of the poor of Brighton of a sum of money for the past maintenance of Moore, and an inquiry was directed what provision ought to be made for his future maintenance out of the residue of the fund.

After payment of the aforesaid sum the fund amounted to 436*l.* 15*s.* 5*d.* Consols.

In 1856 an order was made by the court that Moore should continue in the asylum at Bethnal Green until further order, and the guardians of the poor of Brighton consenting thereto and agreeing to maintain and clothe Moore at the said asylum at the annual charge of 31*l.* 4*s.*, it was ordered that 31*l.* 4*s.* should be allowed for his maintenance and clothing for the past year, and that the yearly sum of 31*l.* 4*s.* should be allowed for his future maintenance and clothing during his life or until further order.

In 1859 Moore was removed by order of two justices of the county of Sussex, under the powers given by the 16 & 17 Vict. c. 97, s. 77, but without any order of the Court of Chancery, to the new Sussex County Lunatic Asylum, at Hayward's Heath, where he remained till his death, in March 1875.

After his removal, no payment was received by the guardians for Moore's maintenance. The costs of his maintenance at the new asylum amounted to less than 31*l.* 4*s.* a-year.

In 1876 Moore's legal personal representative presented a petition for payment of the fund to her.

The guardians, who were served with the petition, claimed payment out of the fund of the amount expended by them on Moore's maintenance since June 1858.

The Vice-Chancellor ordered payment of the fund to the petitioner, after payment thereof of the costs of both parties.

From this decision the guardians appealed.

Swanston, Q.C. and *Renshaw* for the appellants.—We are entitled to be paid under the order of 1856, which ought not to be so strictly construed

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as to defeat its object, namely, to provide for the costs of the lunatic's maintenance. In removing the lunatic, we acted under the powers conferred upon us by the 16 & 17 Vict. c. 97, s. 77; and we are entitled, under the 94th and 104th sections of that Act, to be repaid the amount we have expended, even if we are not entitled under the order.

Hemming, Q.C. and *Freeman* for the respondent.—The order of 1856 was for payment of the expenses incurred by the guardians in keeping the lunatic at a specified asylum, and the order was put an end to when he was removed from that asylum. The guardians may have a claim for the expenses since incurred by them in maintaining the lunatic, but they cannot enforce it against this fund. They are simply creditors of the lunatic, and must recover their debt from the lunatic's personal representatives, and even then they cannot recover more than six years' arrears. The Court of Chancery has no jurisdiction over persons of unsound mind as such, and when a person is incapable of managing his own property, the court authorises a trustee to deal with it for his benefit: *Beall v. Smith* (29 L. T. Rep. N. S. 625; L. Rep. 9 Ch. 85.) The principle upon which the court acts in such a case is shown in *Re Upfull's Trusts* (3 Mac. & G. 281).

Swanston, Q.C. in reply.—This claim is within the spirit of the order of 1856, the intention of which was to provide for the maintenance of the lunatic at a proper asylum, and not at a particular asylum. If the order has been properly framed there could be no doubt about our claim; rate-payers ought not to suffer loss because that order was carelessly drawn up. *Vane v. Vane* (L. Rep. 2 Ch. D. 124) shows that the court has jurisdiction to make the order we ask for.

JAMES, L.J.—I am of opinion that, with the exception of the trifling sum of 24*l.*, which became payable under the order of 1856, before the lunatic was removed, and to which the attention of the Vice-Chancellor was not directed, the order of the Vice-Chancellor was quite right. The truth is, that the counsel for the appellants rested their case partly upon the order of 1856 and partly upon a *quantum meruit*. But a right cannot be pieced together out of fractions of two rights; the right must be in one way or the other. I think the appellants have no right under the order of 1856. That was an order for the yearly payment of 31*l.* 4*s.*, which the court considered a proper sum to be allowed for the maintenance of the lunatic in a particular asylum which the court had sanctioned; and the order came to an end when the lunatic was removed, just as it would have come to an end if he had recovered, or if a friend had taken him into his care. The guardians did not apply during the man's life for a new order applicable to the altered circumstances of the case. Therefore they have been guilty of the same kind of *laches* as if they had never asked for any order at all. We cannot make the order asked for, because it was not applied for while the court had jurisdiction to make it. At the lunatic's death the fund in court went to his legal personal representatives, who will be liable to pay out of it what is legally due for the lunatic's maintenance, just as he is liable to pay any other debts of the lunatic to the extent of the fund. The order of 1856 being at an end, the claim of the guardians

is a mere debt and recoverable as such. There is no charge for the debt on the fund, and we cannot make it a charge merely because the guardians might have obtained a charge if they had applied for it in the lunatic's lifetime. As for the 24*l.* actually due under the order, that is not a subject of the appeal. The appeal must, therefore, be dismissed with costs.

COTTON, L.J.—The question is whether the Vice-Chancellor was right in directing payment to the lunatic's legal personal representatives of a sum to which the lunatic was absolutely entitled. How can the right of the legal personal representatives be interfered with? It is said, first, that under the order of 1856, certain sums are payable out of this fund to the appellants. I should be sorry to decide the case on a mere technicality, but in my view the order authorises no payment beyond the 24*l.*, which became payable before the lunatic was removed. The order of 1856 was made on a reference for an inquiry as to what should be allowed for the maintenance of this lunatic, and it was ordered that he should remain at a particular lunatic asylum, where it was found that the annual expenses of his maintenance would be 31*l.* 4*s.*, and that sum was ordered to be paid annually to the guardians for his maintenance. As a matter of construction that must be taken to mean for his maintenance while residing there. I do not say that it was contempt of court to order the man's removal to the county lunatic asylum, without applying to the court, or that the maintenance there was not equally good; but in my opinion it was not intended by the order of 1856 to recoup the guardians generally for all costs in respect of the man's maintenance, but to pay them a particular sum each year for his maintenance at this particular asylum. We cannot now give them the costs of his maintenance at another asylum on the ground that the court would have done so if it had been asked at the time of the lunatic's removal. It probably would have done so, but, as things now stand, the question is whether the order of 1856 enables us to interfere with the rights of the legal personal representatives. The lunatic is dead, and this is not a case in which we are asked to deal with a fund for the benefit of a person of unsound mind, who cannot deal with it himself. We are asked to interfere with the right of the legal personal representative, who is capable of dealing with the fund, and I know of no case in which the court, after the death of a lunatic, has interfered with the rights of his legal personal representative by paying debts or otherwise. During the life of the lunatic, it is a different matter. I am of opinion that we have no jurisdiction to make such an order as is asked for.

THESSIGER, L.J.—I am of the same opinion. I think the order of 1856 was conditional upon the maintenance of the lunatic at the particular asylum mentioned in it, and that the order came to an end in 1859, when he was removed. We are then asked to take an equitable view of the case, and make a retrospective order. I am of opinion that we have no jurisdiction to do so, and that the amount due to the guardians can only be recovered from the legal personal representatives in the regular way.

Solicitors for the appellant, *Clarke and Calkin*.

Solicitors for the respondent, *Rogerson and Ford*.

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THE MAYOR AND CORPORATION OF PENRYN v. BEST.

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SITTINGS AT WESTMINSTER.

June 21, 22, and 26, 1878.

(Before BRAMWELL, BAGGALLAY, and THESIGER, L.JJ.)

THE MAYOR AND CORPORATION OF PENRYN v. BEST. (a)

*Market—Right to compel sale in market or payment of toll—Immemorial custom—Grant by Crown—Evidence.**The grant of a market does not of itself confer the right to prevent people from selling goods in their shops on market days, but the grantee of an ancient market may by law have such a right.**Plaintiffs had acquired the rights of the grantee, under a charter of Henry III., of a market to be held on Monday, but such market was not, in fact, held. Plaintiffs had held a meat market on Saturday as long as living memory went back, and had claimed and enforced a right to compel butchers to close their shops on Saturday and sell in the market, paying stallage, or to make payments in place of stallage if they sold in their shops on Saturday. Defendant, a butcher, sold in his shop on Saturday, and refused payment.**In an action for disturbance of market,**Held, that plaintiffs had shown a title to a Saturday market, that the right claimed by them might legally exist as incident to such market; and (reversing the judgment of the Exchequer Division, which had proceeded on a misapprehension as to the evidence given) that there was sufficient evidence of enjoyment to establish such right, and plaintiffs were entitled to recover.**APPEAL by the plaintiffs from the judgment of the Exchequer Division (Cleasby, B. and Hawkins, J.), reported 38 L. T. Rep. N. S. 318. The action was for disturbance of a market.**In the year 1259 King Henry III. by charter granted that the Bishop of Exeter and his successors might have a market in the manor of Penryn every week on Monday, and also in every year a fair of three days' duration on days named, and that they should have the aforesaid market and fair "cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi mercatum et feriam pertinentibus."**This charter was proved at the trial, and evidence given which brought the right of market down to the time when the plaintiffs acquired the rights of the Bishop of Exeter by purchase from the Ecclesiastical Commissioners. This evidence, and the pleadings in the action, are set out in the report in the court below.**Evidence was given of the holding by the plaintiffs of a meat market on Saturdays, as far back as living memory went, a person named John Robins, who was sixty-three years of age, being one of the witnesses called to prove this. There was no evidence to connect the Saturday market with the Monday market granted in 1259, and no market was in fact held on Mondays.**It was the practice for the butchers in Penryn to close their shops on market days, and go into the market house, and there sell their meat in stalls provided by the council of the borough, paying 1s. 6d. stallage.**In 1862 two butchers opened their shops on Saturdays during the market, and refused to pay to the council for selling meat in their shops on**market days. Writs were issued against them, and they paid the money claimed with costs, and have ever since paid when they sold in their shops on Saturdays. The defendant, who was a butcher in Penryn, having refused such payment, this action was brought.**June 21 and 22.—Herschell, Q.C. and Charles, Q.C., for the plaintiffs, appellants.—It must be conceded that the mere grant of a market does not necessarily give a right to compel people to close their shops on market days; but it is clear from the authorities that such right may be incident to a market by grant, custom, or prescription:**Mayor of Macclesfield v. Chapman, 12 M. & W. 18;**Mosley v. Walker, 7 B. & C. 40;**Mayor v. of Macclesfield v. Pedley, 4 B. & Ad. 397.**The plaintiffs here have a stronger case than the plaintiffs had in Mayor of Macclesfield v. Pedley; it is as strong as the plaintiff's case was in Mosley v. Walker. The only distinction is the existence of the charter of the Monday market, but that can have no bearing on the incidents of the Saturday market. The Earl of Egremont v. Saul (6 A. & E. 924) is, if anything, an authority in the plaintiffs' favour; it only decides that the words of the charter there did not give a right to take tolls, but it shows that the charter did not destroy the evidence of immemorial usage. The judgment of the court below proceeded on a misapprehension as to the evidence. Cleasby, B. says: "The evidence in the present case, except as to the existence of a market, only dates from the year 1848." This is clearly a mistake, for it dates from as far back as a witness aged sixty-three could remember.**Murphy, Q.C. and Wormald for the defendant, respondent.—The right here claimed can only exist by immemorial custom, and it cannot be granted by the Crown. If the market is not immemorial, neither can the custom incident to it be so, and therefore the plaintiffs, in order to establish their right, must ask the court to infer that at the time when the Monday market was granted there was already a Saturday market in existence belonging to the Bishop; but there is no evidence to warrant such an inference. The Crown has not the power to grant the right here claimed, and can never have had it, for had such power ever existed it would have been a franchise, and could not have been lost: (see Viner's Abridgment, Prerogative, b. 18.) Then the right claimed by the plaintiffs cannot exist as incident to a right of market; the cases which have been cited as showing the contrary are open to review in the Court of Appeal. [BRAMWELL, L.J.—I think the law as laid down in those cases is now the law of the land, and can only be upset, if at all, by the House of Lords.] As to the judgment of the court below, if for the statement that the evidence only dates from 1848 were substituted "from living memory," the inference drawn would still be justified.**Charles, Q.C., in reply, referred to**Prince v. Lewis, 5 B. & C. 363;**Curwen v. Salkeld, 3 East, 538.**Cur. adv. vult.**BRAMWELL, L.J.—I am of opinion that this appeal must be allowed. If I differed on a point of law from Cleasby, B., I should have great misgiving in doing so, but our opinion is upon a matter of fact, upon which we think there has*

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

been a misapprehension in the court below. Now, the first question that arises here is, have the plaintiffs shown a title to a Saturday's market? I think we ought to hold that the plaintiffs have a title to such a market. One can have no doubt that such a market has been held, as long as living memory goes, and there is nothing to show that there is not a right to a Saturday market, except certain charters which would go to show they had a right to a Monday market. It is a most convenient thing that every supposition, not wholly irrational, should be made in favour of long-continued enjoyment. I have not the slightest doubt in the world that, if these plaintiffs were attempting to hold a Monday market as of right, the most vigorous efforts would be made to show they had no right to do so; I think, therefore, we ought to hold that the plaintiffs have shown a title to a Saturday market. Then the next question is this: was there such a right attached to the market as was necessary to enable the plaintiffs to maintain this action? It was contended, and, in my opinion, truly enough, that if there was a modern grant, or, that if you had the actual instrument granting a market in a particular place, that would not, of itself, entitle the grantee of that market to shut up shops; but on the other hand authorities were cited, and it was stated as law (and I do not think if we thought it wrong we ought to overrule it considering the number of years it has prevailed; I think we ought to take it as part of the law of the land) that the grantee of the market not only has certain rights within the place where the market is held, but may also be entitled to say to persons within a certain area, "You must shut up your shop when my market is held, or you must pay me some compensation for selling in your shop!" I take it, that is established in law, and can only be altered by the Legislature, or, at all events, by the Supreme Court of Appeal, after the number of years it has been in existence. Now, so far we go, I am glad to say, with the court below, and the only question is, whether they were right in the conclusion they drew from the evidence. It seems to me they would have been right if the facts had been as they assumed in their judgment. I understand the assumption in the judgment is, that the earliest evidence of any such exclusive right as the plaintiffs were asserting was in the year 1848, but that really is not so; on the contrary, the evidence is this, that as long as living memory can trace back (and one of the witnesses called was sixty-three years of age, therefore we may assume he may well remember fifty years ago, or possibly more) the state of facts has existed upon which the plaintiffs rely. There is evidence that as long as living memory can trace this state of things, which is undisputed, existed, that when this market was held all the butchers' shops in Penryn were shut up, even those which were within a stone's throw of the market-house, and the butchers, even those who occupied the shops within a few yards of the market-house, not only shut up their shops, but went into the market and sold their meat, as any other person going into the market to sell their articles would have done. Now, that is a remarkable thing to my mind. It is said by Mr Murphy, that of itself it proves very little, because, as the market would be the place to which intending

purchasers would throng, butchers would naturally go there, and shut up their own shops. I really cannot think so; one cannot help thinking that, though the butcher might like his stall in the market, he might also keep his shop, which was within a few yards of it, open; but every one of them in Penryn shut their shops. I think that is a very remarkable thing, and cannot be accounted for if such a right as the plaintiffs contend for did not exist. Further, there is this: in the year 1862 there were two recalcitrant butchers, who resisted the right of the corporation, and the corporation then insisted upon their right, and these butchers acquiesced, and paid the dues claimed. They did not shut up their shops, they continued to have them opened, but upon the terms of making compensation to the plaintiffs upon the footing that the plaintiffs were entitled to the right they now claim. It is a possible observation to make, was it, or was it not, much better for them to pay the trifle they had to pay, than run the risk of litigation with a corporate purse? I think that is a just remark; but then it is almost met by this, that, at the present moment, this defendant does not think so, and I do not know why we should say his predecessors in the butcher trade may not have had the same opinion, and have acquiesced in it, because they knew the corporation were right. But suppose it is a piece of evidence which admits of the observation Mr. Murphy made, what else can a plaintiff prove in such a case? He cannot prove more than that he has asserted his title when the occasion has arisen, and that assertion has been acquiesced in. If evidence of title were to be met by such arguments as this, I am not sure it would not weaken the title of the best estates in the world, because, when a man was found trespassing, and was sued, and gave in in respect of it, and the owner of the property relied upon that as proving possession, it might be said, "It was much better for the man to pay you a few shillings than to fight you." Assuming, for the reasons I have given, that there was a good Saturday market here, and assuming, as I think we are bound to do, there might be such a right attached to the person entitled to a market as the one claimed, it really does seem to me the plaintiffs have proved it, and I agree that the evidence, when appreciated, is stronger than in the case of *Mosley v. Walker* (*ubi sup.*). As I have said before, the judgment of Cleasby, B. and Hawkins, J. was founded upon this, that the earliest evidence of enjoyment was in 1848. If that had been so, and it had been left uncertain what had been the practice of the butchers and the corporation prior to 1848, and within the time of living memory, I should have thought it was a very different case; but the evidence being as I have pointed out, it seems to me we ought to give judgment for the plaintiffs.

BAGGALLAY, L.J.—I am of the same opinion, and have very few words to add. I entirely assent to the principle of law applicable to cases of this kind, as enunciated by Cleasby, B., first, that the mere grant to a man does not, of itself, confer a right to prevent persons selling in their shops on market days, though within the town or manor where the market might be held; and secondly, that such right may be acquired by immemorial enjoyment or prescription. I agree in almost all the conclusions which the Court of Exchequer drew from the facts not in dispute before them.

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[CHAN. DIV.]

I accede to the conclusion arrived at, that it was clear the plaintiffs were entitled to a market on Saturdays, with or without the incident claimed. I think I may say I agree with all the conclusions drawn from the facts, with one exception, to which the Lord Justice has referred. It appears to me the misapprehension as regards that fact may have easily arisen. I presume the Court of Exchequer had before them, as we have before us, a document of some five-and-twenty pages of printed matter. There were only three witnesses called. The evidence of the town clerk, who became town clerk in 1848, and who spoke to the time during which he knew the borough, occupied fourteen or fifteen pages of the evidence. Then at page 17 there are a dozen lines only of the evidence of John Robins, who proved all the circumstances. There is also this, Mr Robins was not cross-examined upon his evidence. Thereupon Mr Herschell, who appeared for the plaintiffs, said, "As my friend does not cross-examine, I do not call any more witnesses on this point." It is clear the evidence of this Mr. Robins escaped the notice of the Exchequer, and Mr. Jenkins being, as they thought, the only witness who spoke to what was the custom during the time he had known the borough, they went upon his evidence.

THESTIGER, L.J.—I am of the same opinion. Inasmuch as there really is no difference, as regards the law, between the view taken in this court and that taken in the court below, the whole question resolves itself into, what was proved at the trial? and I entirely agree in what has fallen from Bramwell, L.J. I would merely say this, the view we take of the facts is the view which was taken by Lord Coleridge, who tried the case. I find at the end of the case he says this: "Whatever may be said of the legal origin of this, and whatever the rule of law may be, the fact is proved, that, for a great number of years past, and no time is shown at which it did not happen, this custom at Penryn, of shutting up the butchers' shops on Saturday, and going into the market, or paying as if they went into the market, is proved beyond all doubt." It appears to me, as has been suggested by Baggallay, L.J., that the mistake in the court below must have arisen from not having appreciated the evidence given by Mr. Robins, which was very short; and it is to be observed that at the close of his evidence, there being no cross-examination, further evidence as to what the facts were, as regards this shutting up of the butchers' shops, was stopped by Mr. Herschell, who was the counsel for the plaintiffs.

Judgment reversed.

Solicitors for the plaintiffs, *Gregory, Rowcliffe, and Co.*, for *G. A. Jenkins*, Town Clerk, Penryn.

Solicitors for the defendant, *Harris and Powell*, for *Dobell*, Truro.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Feb. 22 and 23, 1878.

(Before FRY, J.)

ATTORNEY-GENERAL v. BIPHOSPHATED GUANO COMPANY. (a)

Right of way—Contract to dedicate to the public—Purchaser for value without notice.

B., in possession of certain property under an agreement for a lease, contracted to make a road, and throw it open to the public in place of one which he stopped up. The road was made and used by the public to the date of the action. After it was made a lease of the property was granted to B. "subject to existing rights of way." The lease referred to a plan of the property on which the road was shown, but it was marked "private road."

Held, that the contract was binding on B., and those claiming under him with notice.

Held, also, that the effect of the words in the lease alone would have been to put a purchaser on inquiry; but that the description of the road on the plan was to take away that effect, and that the user by the public, which had been proved, was not sufficient to affect a purchaser with notice that the road was public.

Held, also, that a purchaser for value with notice was protected by the want of notice in the vendor.

THIS was an information and bill filed in Sept. 1874, by the Attorney-General, at the relation of the vestry clerk of East Greenwich as informant, and the vestry clerk as plaintiff, claiming an injunction to restrain the defendants from obstructing a road which crossed certain land of which they were leasees, and over which it was alleged the public had a right of way.

In 1864 the trustees of Morden College, who were owners in fee of the land in question, agreed to demise it to Capt. Blakely for eighty years, from the 25th March of that year. Capt. Blakely wished to divert a public footpath which crossed the property, and in the document submitted by him to the vestry and the other necessary authorities he proposed, "If the said old highway and footway be so stopped up and diverted as aforesaid, to give and make a new roadway to the waterside, forty feet in width between the places marked with the letters D and E respectively in the said plan, and to throw the same open to the public." This was assented to by the vestry in Dec. 1864, and sanctioned by the court of quarter sessions in April 1865. The footway having been diverted and the new road made, on the 14th May 1866, the trustees of Morden College executed a lease of the property to Capt. Blakely, in which it was described as "all that piece of land as the same is more particularly delineated in the plan drawn in the margin hereof," and was demised "subject to the existing rights of way over it." The new road was shown on the plan and marked "private road."

Capt. Blakely afterwards assigned the lease for value to the Blakely Ordnance Company, who had no notice of his agreement with the vestry, or of the existence of a right of way over the road, except what was conveyed by the lease itself and an actual inspection of the property.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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After several other assignments the lease became vested in Mr. Weguelin. The defendants were his sub-lessees, and they obstructed the road. The meane assignees bought under the description and plan in the original lease; but Weguelin bought under conditions of sale, and a new plan which showed the road with a ferry at the end of it.

The defendants contended that there was no contract which bound Blakely or those claiming under him, and that the question was solely one of dedication.

North, Q.C. and Speed, for the informant and the plaintiff, contended that the defendants had notice of the contract and of the existence of the road, as the lease was granted "subject to existing rights of way," which put them and their predecessors on inquiry. Further, the road had been used by the public for some time, and the plan under which Weguelin bought gave him notice.

Fischer, Q.C., Patchett, Q.C., and Kingdon, for the defendants, contended that on the plan on the lease the road was marked "private," therefore subsequent purchasers had no notice. The road had not been used in such a manner as to give notice of its being a public road.

Speed in reply.—The words in the lease, "subject to existing rights of way," put the defendants and their predecessors on inquiry. [*Fry, J.* referred to *Jones v. Smith* (1 Ph. 244) and that class of cases, with reference to a party being relieved from notice of the contents of a deed, which might or might not affect the property, by a statement *bona fide* believed that the deed did not affect it.] The word "private" had only a limited meaning, as a road might be private property although there were rights of way over it.

Fry, J., after stating the facts, and that in his opinion there was a contract between the vestry and Blakely that he should form a road and dedicate it to the public, which contract might be enforced against Blakely and against every person who took the land to which he became entitled under his agreement with notice of that contract, continued:—Now the only question I have to consider is, whether or no the defendants are entitled to say that they are purchasers for value without notice. The first step in that inquiry of course arises on the lease of May 1866, whether from that lease every subsequent purchaser must be deemed to have notice. Now that lease describes the property as "subject to existing rights of way over the said land," and if the matter had stopped there I should have held that every person who took a title derived from that lease was bound to make this inquiry: What were the rights of way over that land existing on the 14th May 1866? And whether they did make the inquiry or not, they would be affected with notice of the information they would have received on making that inquiry. But it appears that the premises so demised were described in the lease as "a piece or parcel of marsh land in the county of Kent, with the several messuages or tenements, factories, workshops, and buildings thereon erected and built as the same, are more particularly delineated and described in the plan drawn in the margin hereof." When I look at the plan drawn in the margin hereof, I find that the road dealt with by the contract of 1865 appears, but it appears and is described as a "private road." Now the effect of

that description seems to me to amount to this: It seems to me to say to everybody who looks at the deed and the plan, that although you will find a road physically existing upon the land, that road is a road for the use of the owner of the estate, over which no third person has any right of way. It says in short, that although there are existing rights of way, or may be existing rights of way over the land, there is no existing right of way down that private road. The road is there for the use of the owner of the land, the road is there free from any right of way in any other person over it—it is private. "Private" implies that nobody else has any right over it. To my idea it means privacy. But it is further to be observed according to the case of plaintiff and of the defendant, at that time other rights of way existed; therefore there was enough to satisfy those words in the lease: "subject to all existing rights of way." It appears to me that, while it says that there are rights of way, it also says that there are no rights of way over this private road. Therefore it seems the lease did not carry notice to this company of any rights of way existing under this contract. It did more; it negatived the existence of that right of way. Of course Capt. Blakely, the lessee under that lease, could not say that he had not notice of that contract, because he was a party to it; but he assigned the lease to the Blakely Ordnance Company. Now is there any evidence to bring home to my mind that the Blakely Ordnance Company took with notice in effect either of the contract or of an existing right of way? With regard to the contract, there is not a tittle of evidence to show that they knew anything about it. With regard to the public right of way, there is this, that undoubtedly at that time persons occasionally used the road; but upon the whole of the evidence I come to the conclusion that the user was not of the description which would necessarily bring to the mind of a person who inspected the property the knowledge that there was a public highway. It was a short piece of road leading up from the river, at which end there had been, or perhaps was then, a temporary jetty; at the other end of it was a public footpath, and if men did land at that spot occasionally there would be a trespass of that description that a reasonable owner would not be likely to interfere with. I must couple that with the fact that it is in evidence before me that before these buildings were erected, watermen would land passengers anywhere where they could find a place hard enough, at any place where they could get to the bank without sticking in the mud. Under those circumstances that user of this piece of road would not carry to the mind of a person the existence of a public highway. There is no evidence whatever to show that the Blakely Ordnance Company took from Capt. Blakely with notice. The same observation applies with regard to the assignment of the Blakely Company to the Agra Bank and Mr. Dent. I have no evidence beyond that of the description in the lease, to which I have referred to affect them with notice. But when I come to the assignment of the Agra Bank and Dent to Weguelin the matter is in a somewhat different position, because it appears that Weguelin bought under conditions of sale and a plan, and that plan undoubtedly did represent that there was a ferry at the end of this road,

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and I am not prepared at the present moment to say that there might not have been notice that there was a right of way over the land from the ferry to the nearest highway. But that appears to be immaterial, and for this reason: I conceive that where A. buys without notice, and sells to B., who has notice, B. sells free of notice. That is well ascertained law; and if that is the law with regard to one kind of incumbrance, it is the same with regard to another kind of incumbrance. The reason of that law is evident. If it were not so, the right of the person who purchased without notice would be limited—his market would be limited. That is the general principle of law; therefore it is immaterial for me to determine whether Mr. Weguelin had or had not notice. If Mr. Weguelin was entitled to hold free of notice, it follows that persons holding from him are also free of notice. In the result I hold that, although there was a contract which originally might have been enforced against Capt. Blakely, it cannot be enforced against the defendants, because they are purchasers for value without notice. I give judgment for the defendants with costs.

Solicitors for the informant and plaintiff, W. Bristow.

Solicitors for the defendants, Mark Shepherd.

QUEEN'S BENCH DIVISION.

Saturday, May 11, 1878.

BRADLEY (app.) v. METROPOLITAN BOARD OF WORKS, GREENWICH DISTRICT (resps.) (a)

Metropolitan sewers, expense of construction of—Apportionment by vestry amongst owners—No limit of time for apportionment—Metropolitan Management Act 1861 (25 & 26 Vict. c. 102), ss. 52, 53.

By sect. 53 of the Metropolitan Management Act 1861 (25 & 26 Vict. c. 102), "where any sewer shall be constructed by any district board in a street in which previously to such construction there have been no sewers, but sewers rates have been levied, the expense of constructing such sewer . . . shall be borne in part only by the owners of the houses abutting on such street, and the amount to be borne by such owners shall be determined by the district board in each particular case, and the amount so charged shall be payable either before the works shall be commenced, during their progress, or after their completion, as the board shall determine, either in one sum or by instalments within such period not exceeding twenty years as the board shall direct."

In 1868 a sewer was constructed by the respondents in a street in which the appellant owned a house within the meaning of the above section. In 1876, the appellant still remaining owner of the house, an apportionment was made upon him by the respondents of the expense of the sewer.

Held, that the apportionment was not too late, and that there was no time limited within which such an apportionment must be made.

THIS was a case stated by a police magistrate.

1. On the 28th March 1878 the appellant was summoned upon a complaint charging that on the 21st March 1878 he refused to pay 18l. 18s. 5d., being the amount charged upon, and to be contributed by him as owner of a house forming, and certain lands

abutting on, a street called St. John's Park, in the parish of Greenwich, Kent, being a proportion of the expense of constructing a sewer for the drainage of the street, and the works appertaining thereto. Upon the hearing, on the 3rd April 1878, I made an order upon him for the payment of the sum of 18l. 18s. 5d. in the terms of the summons.

2. In 1868 the board constructed a sewer in and for the drainage of St. John's Park, the said St. John's Park being a new street within the meaning of the Metropolitan Management Act 1855 (18 & 19 Vict. c. 120), and the Metropolitan Management Amendment Act 1862 (25 & 26 Vict. c. 102), ss. 52 and 53. (a) In such new street there had been no sewer previously to the construction of the said sewer, in which sewers rates had been levied between the 1st Jan. 1863 and the 31st Dec. 1869.

3. The sewer was constructed under a contract for the construction of sewers in ninety-nine streets within the district of the board, some of such streets being old streets and some new streets

(a) The following is the text of the sections referred to:

Sect. 52: Where any sewer shall, after the passing of this Act, be constructed by any vestry or district board in or for the drainage of any new street, or of any house or houses erected since the 1st day of Jan. 1856, the expense of constructing such sewer and the works appertaining thereto, including the costs of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners of such street or houses, and of the land bounding or abutting on such street respectively, and the said expenses shall be apportioned by the vestry or district board in such proportions as they may deem just, and the amount charged upon or payable in respect of each house or premises shall be payable before the works shall be commenced, during their progress, or after their completion, as the vestry or district board shall in each case determine, either in one sum or by instalments, within such period not exceeding twenty years as the vestry or district board shall direct; and any such sum or instalments shall be recoverable from the present or any future owner of the said house or premises either by action at law, or in a summary manner before a justice of the peace, at the option of the vestry or board.

Sect. 53: Where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively; and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed by the vestry or district board out of the sewers rates levied in their parish or district; and the amount so charged by the vestry or district board upon or in respect of each house or premises shall be payable either before the works be commenced, during their progress, or after their completion, as the vestry or board in each case determine, either in one sum or by instalments within such period not exceeding twenty years as the vestry or board shall direct; and any such sum or instalment shall be recoverable from the present or any future owner of such house or premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board: Provided, that no street or property in respect of which sewers rates have been levied for five years prior to the first day of January 1856 shall be subject to be charged under the provisions contained in this section.

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within the meaning of the Acts, and completed on or about the 1st Dec. 1868.

4. On the 14th Jan. 1866, and before the making of the contract, the board resolved that, in order to carry into effect the provisions of the Metropolis Management Act 1862, with regard to the expenses of constructing sewers in new streets, where there had been previously no sewer or only an open sewer, a person should be appointed with directions to lay before the board a correct statement of all streets formed or laid out since the 7th Aug. 1862, so that the board might determine upon the proper charges under the authority of the statute.

5. On the 1st Dec. 1869, at a special meeting of the board, resolutions were passed, that, in the several streets in the district in which sewers had been constructed by the board, but in which sewers rates had been levied between the 1st Jan. 1851 and 31st Dec. 1855, the owners of land and houses therein be charged 30 per cent. of the cost of such sewers; between the 1st Jan. 1856 and the 31st Dec. 1858, 40 per cent., between the 1st Jan. 1859 and the 31st Dec. 1862, 60 per cent., and between the 1st Jan. 1863 and 1869 90 per cent., together with all incidental expenses in each case, that twelve calendar months be allowed to owners for payment of the charges and expenses to be so borne by them respectively under the provisions of the statute, and that such payments be made by three equal instalments, that is to say, one-third within four months of the date of the board's order, one other third at the end of the next succeeding four months, and the remaining one-third at the end of twelve months from the same date.

6. In pursuance of these resolutions the board from time to time, during and since the year 1869, and on and prior to the 14th June 1876, made various apportionments of the cost of certain of the sewerage works mentioned in the contract amongst the persons liable to contribute to such cost under 25 & 26 Vict. c. 102, ss. 52, 53. The works mentioned in the contract were in the first instance paid for out of moneys raised upon the credit of the sewer rates of the parish of Greenwich, repayable by instalments with interest, and all moneys which had been received by the board under such apportionments have been applied so far as they would go by the board in payment of the instalments and interest, and the remainder of each instalment and interest has been made up out of the mortgaged rates.

7. No apportionment in respect of the sewer in St. John's Park was made until the 14th June 1876, when the board apportioned 90 per cent. of the cost of constructing the sewer in such street amongst the owners of the houses in the street, and of the land bounding and abutting thereon, and on the same day the board made an order for the payment of the amount apportioned. The amount so charged to the appellant was 18l. 18s. 5d.

8. The appellant was at the time of the construction of the sewer and of making the apportionment, and now is, the owner of a house in, and of land bounding and abutting on, the street called St. John's Park.

9. The appellant contends: 1. That the apportionment of the 14th June 1876 is bad, inasmuch as it was not made in accordance with 25 & 26 Vict. c. 102, and that the owners of houses and lands bounding and abutting on the street called St.

John's Park cannot now be charged with the costs of the construction of the sewer or any part thereof. 2. That the costs of and incidental to the construction of the sewer must be defrayed and borne by the Greenwich District Board of Works, and paid for out of the sewer rates.

10. The question for the opinion of the court is, whether the apportionment of the 14th June is a valid apportionment.

J. Brown, Q.C. (Biron with him), for the appellants, argued that although no time was expressly limited by the statute for ascertaining the contribution payable under sect. 53, a reasonable time was intended, and that upon the ground of public convenience the court would imply such reasonable time.

Philbrick, Q.C. (Petheram with him) argued that, as the statute had not fixed the time, the court had no power to fix it.

J. Brown, Q.C. in reply.

COCKBURN, C.J.—I am clearly of opinion that we have no power to introduce into the statute a limit of time which the Legislature have not introduced, and it is beyond all question that no limit has been introduced here. If the board were guilty of unreasonable delay, that might be a ground for a *mandamus* calling upon them to exercise the powers of the Act. But however that may be, this appeal wholly fails.

MELLOR, J.—There might be cases in which a delay in making the apportionment would be reasonable, but whether the delay were reasonable or not, I feel sure that we have no power to invalidate an apportionment when made, for no time or making it is limited by the statute.

Judgment for the respondents.

Solicitors for the appellant, *Hughes, Hooker, and Buttanshaw.*

Solicitor for the respondent, *Spencer.*

Saturday, June 22, 1878.

(Before COCKBURN, C.J., MELLOR and LUSH, JJ.)

SPON LANE COLLIERY COMPANY (apps.) v. BAKER AND OTHERS (resps.) (a)

Coal Mines Regulation Act 1872 (35 & 36 Vict. c. 76) ss. 46-51—Inspector's jurisdiction—Remedy for danger—Withdrawal of workmen.

The appellants' coal mines adjoin coal mines belonging to other persons, which have been long disused. Water had accumulated in one of the disused pit-shafts which communicated with the same seam as the appellants'; and the respondent, one of Her Majesty's inspectors of mines, gave notice thereof to the appellants under sect. 46 of the Mines Regulation Act 1872, and that he was of opinion that the matter was dangerous and threatened or tended to the bodily injury of the workmen employed; he thereby required the appellants forthwith to remedy the said matter.

The appellants were convicted upon an information for failing to comply with this requisition, and the quarter sessions on appeal quashed the conviction, subject to a special case. The quarter sessions found that there was danger to the appellants' workmen from this accumulation of water; that the appellants had used reasonable diligence to acquire the right to reduce the water, but had

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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not complied with the notice; and that, notwithstanding the request of the inspector, the appellants' workmen were continued at their work.

Held (per Cockburn, C.J. and Mellor, J., dissentients Lush, J.), that the authority to an inspector under sect. 46 to require a remedy for a danger, did not extend to the withdrawal of workmen, which is expressly provided for under sect. 51, sub-sect. 6; and that by the proviso to sect. 46 the conviction could not be sustained.

THIS was a special case stated by the Staffordshire quarter sessions upon an appeal heard on the 15th Oct. 1877, against a conviction of the appellants by two justices of the county, dated the 21st August 1877, made under the Coal Mines Regulation Act 1872. On the hearing of the said appeal, the said court of quarter sessions ordered that the said conviction should be quashed subject to the following special case:

1. The appellants are the owners and occupiers of the lands and coal mines called the Spon-lane Colliery, within the mines inspection district of South Staffordshire and Worcestershire, and the respondent, James Philip Baker, is Her Majesty's Inspector of Mines for such district. The other respondents are justices of the county of Stafford.

2. The lands and coal mines of another colliery called the Bromford colliery, which, prior to the 12th June 1877, and then and thereafter were and still are the property of the Blakely Hall Colliery Company, adjoin the Spon-lane colliery.

3. On the Spon-lane colliery are two perpendicular pit shafts. They pass from the surface of the earth down to a seam or vein called the thick coal, lying at a depth of 365 yards or thereabouts beneath the surface. One pit shaft is used for the purpose of drawing water through it from the mines, the other pit shaft is used for the purpose of working the mines of the Spon-lane colliery, by raising and lowering men and materials through the said pit shaft. A waterway communicates between the two pit shafts, about seventy-four yards above the said seam or vein.

4. On the Bromford colliery is one perpendicular pit shaft. It passes from the surface of the earth down to the same seam or vein which underlies both collieries, and is about on the same level as the pit shafts of the other colliery, but the depth varies in other parts of the said collieries on account of the inclination of the seam and the faults or dislocations therein. At the dates referred to in paragraph 2, the pit shaft of the Bromford colliery had been disused nearly two years, and water had accumulated in it. Adjoining the Bromford and Spon-lane collieries is another colliery called the Littleton Hall Colliery, which, prior to the 12th June 1877, mentioned in paragraph 2, and then and thereafter until the 5th Sept. 1877, belonged to and was occupied by Mr. William Henry Dawes, but the pit shafts therein ceased working shortly after the stoppage of the working at the Bromford colliery.

5. Prior to the dates aforesaid, much of the thick coal had been worked and gotten of the said seam or vein, at and in each of the said collieries, and water entering into and accumulating in either of the said collieries naturally passed from one to the other through the imperfectly collapsed gob and hollows of the workings in the seam as aforesaid.

6. Previous to the matters hereinafter men-

tioned, the appellants' pit shafts had been filled with gob or soil to the height of about seventy and seventy-five yards respectively from the bottom of the pits; this filling extending up to just below the opening of the headway, but water percolated through this stopping and was drained away in the usual manner.

7. On the 12th June 1877, twelve men employed by the appellants were working in this headway or inset. The top of the column of water then in the Bromford pit shaft was 120 yards above the level of the entrance to the headway or inset, and the respondent, James Philip Baker, considered that there was danger of the flow of water from this pit shaft increasing and flooding the headway in the appellants' colliery, and so endangering the lives of the men working therein.

8. The Coal Mines Regulation Act 1872 (35 & 36 Vict. c. 76) sect. 46, applies to the mines aforesaid, and the respondent J. P. Baker is an inspector duly appointed under sect. 43 of the Act. The state of things described in paragraph 7 is not provided against by any express provision of this Act, or by any special rule.

9. Sect. 46 enacts that:

If in any respect (which is not provided against by any express provision of this Act or by any special rule) any inspector find any mine to which this Act applies, or any part thereof, or any matter, thing, or practice in or connected with any such mine to be dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person, such inspector may give notice in writing thereof to the owner, agent, or manager of the mine, and shall state in such notice the particulars in which he considers such mine or any part thereof, or any matter, thing, or practice to be dangerous or defective, and require the same to be remedied; and unless the same be forthwith remedied, the inspector shall also report the same to a Secretary of State.

If the owner, agent, or manager of the mine objects to remedy the matter complained of in the notice, he may, within twenty days after the receipt of such notice, send his objection in writing, stating the grounds thereof to a Secretary of State, and thereupon the matter shall be determined by arbitration in manner provided by this Act; and the date of the receipt of such objection shall be deemed to be the date of the reference.

If the owner, agent, or manager fail to comply either with the requisition of the notice, where no objection is sent within the time aforesaid, or with the award made on arbitration within twenty days after the expiration of the time for objection or the time of making the award (as the case may be) he shall be guilty of an offence against this Act, and the notice and award shall respectively be deemed to be written notice of such offence.

Provided that the court, if satisfied that the owner, agent, or manager has taken active measures for complying with the notice or award, but has not with reasonable diligence been able to complete the works, may adjourn any proceedings taken before them for punishing such offence, and if the works are completed within a reasonable time no penalty shall be inflicted.

No person shall be precluded by any agreement from doing such acts as may be necessary to comply with the provisions of this section, or be liable under any contract to any penalty or forfeiture for doing such acts.

10. On the said 12th June 1877, the respondent James Philip Baker, having ascertained or believing that the facts stated in paragraph 7 then existed, gave to the appellants the following notice in writing:

Coal Mines Regulation Act 1872,
35 & 36 Vict. c. 76, s. 46.

Notice.

To the Spon-lane Colliery Company, Limited, owners of the Spon-lane colliery or mine.

Whereas, on inspection and information in respect to the condition of the above-mentioned mine, I find the following matter, viz.: That a serious and increasing

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accumulation of water exists near to or in connection with your mining works at the above-named colliery, and which may rush into your mine or pit shaft and overwhelm everything and everybody therein, and whereas I am of opinion that the said matter is dangerous, and threatens or tends to the bodily injury of the workmen or any other persons employed therein and thereat, now I hereby give you notice forthwith to remedy the said matter.

JAMES P. BAKER,

H. M. Inspector of Mines for the District of South Staffordshire.

12th June 1877.

11. This notice was sent by post and received by the appellants on the 13th June 1877. The accumulation of water mentioned in the said notice was not immediately reduced, and the respondent J. P. Baker reported the same to a Secretary of State. The appellants did not within twenty days of the receipt of this notice or at any time send any objection in writing stating the grounds thereof to a Secretary of State.

12. The appellants having, in the opinion of the respondent J. P. Baker, failed to comply with the requisition of the notice, he said an information in writing against them on the 10th Aug. 1877, before a justice of the peace for the said county.

13. The appellants were summoned to answer the charge, and appeared before the respondents, two justices of the peace for the county, on the 21st Aug. 1877, when the case was heard and the appellants convicted as above stated.

14. The appellants gave the necessary notices and recognizance and appealed against the conviction to the next court of quarter sessions for the county.

15. The appeal was heard on the 17th Oct. 1877; evidence was given showing the situation of the respective pit shafts to be as described in paragraphs 4, 5, 6, 7, and 8 of this case; the accumulation of water in the Bromford pit shaft, the rate of influx into the appellants' pit shafts; and that, save for a period of a few days, during which they were withdrawn, the men continued at work in the headway. It appeared that on the 8th June, the respondent J. P. Baker, at an interview with the appellants, discussed the possibility of erecting a dam in their pits to exclude the water, and the appellants were quite willing to erect such a dam, but it was ultimately thought by all parties that such an expedient would not be satisfactory, and the idea was abandoned. Upon receiving the notice above set forth, the appellants entered into negotiations with the owners and managers of the Bromford colliery and tried to make arrangements for the raising of the water from that pit shaft, and so reducing and removing the accumulation of water there. Owing to the pit shaft and machinery in the Bromford colliery being out of repair this could not be done without executing considerable works, which would occupy some months.

16. The appellants then entered into negotiations with Mr. William Henry Dawes for permission for the appellants to pump the water out of the pit shaft at Littleton Hall Colliery, but were refused; upon which negotiations for a purchase of the Littleton Hall pit shaft by the appellants were commenced, and on the 5th Sept. last they entered into an agreement for the sale to them of the Bromford colliery.

17. On the 10th Sept. the appellants first began to draw out the water from the pit shafts at Little-

ton Hall colliery, and have from that time reduced the accumulation of water complained of.

18. It was proved or admitted that the appellants, in acting as above stated, had taken, and were prosecuting practicable measures for removing the accumulation of water.

19. It was contended on behalf of the appellants that the conviction must on any view of the facts be erroneous, as no offence under the Act could have been committed till long after the 12th of August, mentioned in the information. The court of quarter sessions, however, heard the appeal on the merits and quashed the conviction.

20. The court found as follows: "That there was danger to workmen from a serious and increasing accumulation of water; that the appellants had used reasonable diligence to comply with the inspector's notice, so far as taking means to reduce the water, but nothing was done down to Sept. 10th towards reducing the water. That up to that time 723 tons of water in each twenty-four hours came into the pit, and notwithstanding the request of the inspector, the men were continued at their work."

The question for the opinion of the court was whether the order of the court of quarter sessions quashing the said conviction was right. If the court should be of opinion in the affirmative, the said order was to be affirmed.

If the court should be of opinion in the negative, the order was to be quashed, and the original conviction was to stand.

The information of the respondent J. P. Baker, mentioned in paragraph 13 of the special case was:

That the Spon-lane Colliery Company (Limited), in the county of Stafford, on the 12th day of August 1877, then being owners of a colliery called or known by the name of The Spon Lane, situate at Spon-lane, in the county of Stafford, the same being a coal mine or colliery within the true intent and meaning of the Act 35 & 36 Vict. c. 76, did then and there neglect to observe the 46th section of the said Act.

Bosanquet, for the appellants, showed cause against the rule to quash the decision of the quarter sessions.—Sect. 46 is directed only against a danger or defect in or connected with a mine which is not provided for by any express provision of this Act; in the event of which, the inspector may state the particulars in a notice, and require the same to be remedied by the owner, agent, or manager of that mine. The quarter sessions have found as a fact that the appellants had used reasonable diligence to comply with the inspector's notice; and that their further finding that the men were continued at their work is immaterial, because the only provision in the Act with regard to the withdrawal of workmen in case of danger is expressed in the general rules contained in sect. 51, and therefore the proceeding in this case is not applicable. [LUSH, J.—Sect. 46 strikes me as being intended for an additional protection to life beyond the general rules.] The section applies only to cases not expressly provided, and by subsect. 6 of sect 51 the circumstances of this case are exactly met: "If at any time it is found by the person for the time being in charge of the mine or any part thereof that by reason of noxious gases prevailing in such mine or such part thereof, or of any cause whatever, the mine or the said part is dangerous, every workman shall be withdrawn from the mine or such part thereof as is so found dangerous, and a competent person who

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shall be appointed for the purpose shall inspect the mine, or such part thereof as is so found dangerous, and if the danger arises from inflammable gas shall inspect the same with a locked safety lamp, and in every case shall make a true report of the condition of such mine or part thereof, and a workman shall not, except in so far as is necessary for inquiring into the cause of danger or for the removal thereof, or for exploration, be readmitted into the mine, or such part thereof as was so found dangerous, until the same is stated by such report not to be dangerous. Every such report shall be recorded in a book which shall be kept at the mine for the purpose, and shall be signed by the person making the same." By sub-sect. 9: "Where a place is likely to contain a dangerous accumulation of water, the working approaching such place shall not exceed eight feet in width, and there shall be constantly kept at a sufficient distance, not being less than five yards in advance, at least one bore-hole near the centre of the working, and sufficient flank bore-holes on each side." The contravention of any of these general rules is by the concluding paragraph of the section made an offence against the Act; but the conviction appealed against was not under this section.

Gorst, Q.O. and Bowen, for the respondents, supported the rule, and the conviction of the justices at petty sessions.—We admit that this was a conviction under sect. 46 for disobedience to the inspector's notice, and not for contravention of any general rule. Sub-sect. 6 of sect. 51 relates only to a danger found by the person in charge of the mine; and although no doubt the danger in this case might have been so found, yet the omission of the person in charge is sufficient to bring this matter within sect. 46. The general rules point out the remedy under these circumstances to be the withdrawal of the men, and the inspector is authorised to require the matter to be remedied.

Cockburn, C.J.—I wish I could take the opinion of the 46th section which my brother Lush has expressed during this discussion. As I read it, a danger only is contemplated, which a mine owner can remedy physically, irrespective of the withdrawal of men from the vicinity of the danger. It does not say that in the alternative of the owner being unable to remedy the danger, the men employed are to be withdrawn, nor does the notice in this case profess to provide or this alternative. Assuming that the circumstances of this case are within the enactment contained in this section (and of this I desire to express no opinion), the conviction must fail, because the owner is found to have used reasonable diligence to comply with the inspector's notice, so far as he could on his own premises. He cannot go upon his neighbour's land and remedy a danger which exists there: neither morally nor legally has he power or is he under the obligation to put an end to such a danger as this by trespass. The danger to human life might be averted by stopping the works and withdrawing the men; but an inspector has no power to require such a proceeding from an owner under sect. 46; he can only require an owner to remove the danger itself where he has legally the power to do so. The 6th general rule of sect. 51 is the only provision in the Act for withdrawing the men, and that can only be when the person in charge of the

mine finds it dangerous. I cannot add to the legislation.

Mellor, J.—I am of the same opinion. I think sect. 46, read in connection with the general and special rules of sects. 51 and 52, applies only to matters in each mine as affected by the dangers existing in the mine itself. The substantial object of the Act is the prevention of danger to human life, and rule 6 of sect. 51 requires the withdrawal of the men under the particular circumstances there stated. Whether in the present case the inspector could interfere or not, he has no power under sect. 46 to require the workmen to be withdrawn; that can be done only when it is found by the person in charge that the mine is dangerous. The inspector has done what the words of sect. 46 authorise him to do; he has given notice of a matter pregnant with danger, and has required the same to be remedied. I can only read the section as it is; and to my mind it relates only to matters which are capable of being physically remedied. The owner's answer to this requisition is that he can do no more than he has done to effect a physical remedy. To create an offence, the failure to comply with the notice must be in respect of a matter which is within the competency of the owner to remedy. Here the appellants were unable on their own premises to remedy the danger, and they did what they could to acquire the right to do so on their neighbour's premises; in the words of the proviso to sect. 46 the court of quarter sessions was satisfied that the owner had taken active measures for complying with the notice, but had not with reasonable diligence been able to complete the works. A reasonable time for adjournment under such circumstances had not elapsed at the time of the conviction, and the quarter sessions therefore rightly quashed the conviction.

Lush, J.—I am unable to agree with the opinion formed by the rest of the court as to the meaning of sect. 46 of this Act. Two objections have been raised to this conviction; first, it is said that the circumstances are expressly provided for by sub-sect. 6 of the general rules contained in sect. 51; and therefore the office of the inspector cannot be invoked under sect. 46. But I find that sect. 46 supposes the existence of bodily injury, and therefore danger to the lives of persons employed. It appears to me that these two provisions are quite independent of each other, and there is nothing to prevent the inspector from interfering when the person in charge of the mine is ignorant of any existing danger, or unwilling to recognise it. Indeed, the jurisdiction of the inspector remains the same, whatever the manager of the mine may think fit to do. The second objection is that the withdrawal of the workmen in case of danger is not within the inspector's power to require of the owner. It is admitted that to withdraw the men would be a remedy against the dangerous matter to which the inspector has drawn attention; but it is said that, as there are particular circumstances under which this proceeding is expressly required in sub-sect. 6 of sect. 51, the omission of any express authority to the inspector to require it under sect. 46 is conclusive that no such remedy was contemplated by that section. I cannot think that the inspector's jurisdiction for the protection of life was intended

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to be so limited. He is not restricted as to the remedy he may require; and if, as in this case, it is impossible for the owner to remedy the danger, of which notice has been given, by any other means, he is, I think, bound to withdraw his workmen. The form of notice to be given by the inspector is indicated in the Act, and so long as there is a remedy against the danger open to the owner, I do not think it was intended that he or his manager should choose whether the notice is to be obeyed or not.

Judgment for appellants.

Solicitors for the appellants, *E. Doyle and Son*, for *Jackson*, Bromwich.

Solicitors for the respondents, *The Solicitor to the Treasury*.

COMMON PLEAS DIVISION.

March 22 and April 6, 1878.

(Before LINDLEY, J.)

HUNT v. THE WIMBLEDON LOCAL BOARD. (a)

Contract—Not under seal—Amount exceeding 50*l*.
Local board—Public Health Acts—11 & 12 Vict. c. 63, s. 85; 38 & 39 Vict. c. 55, ss. 173, 174.

*The surveyor of a local board, by direction of the board, entered into a contract with an architect for the preparation of plans for offices for the board. The plans were prepared, and submitted to and approved by the board, but were ultimately abandoned, as involving too large an expenditure. In an action by the architect against the local board, the jury assessed the value of the plans prepared by the plaintiff at 94*l*.*

38 & 39 Vict. c. 55, s. 174, enacts that, "with respect to contracts made by an urban authority under this Act, the following regulations shall be observed, viz. (1) Every contract made by an urban authority whereof the value or amount exceeds 50*l*. shall be in writing, and sealed with the common seal of such authority."

Held, that the plaintiff could not recover for work done under a contract not under seal.

THIS was an action by an architect for work and labour done in preparing plans and drawings for the erection of offices, in accordance with instructions given to the plaintiff by the defendants' surveyor, acting under the authority of the defendants. The plans were submitted to and approved by the defendants, and advertisements for tenders were published; but the amount of the tenders received being too high, none was accepted. Ultimately offices upon a less extensive scale were erected from plans furnished by another architect.

At the trial, before Lindley, J., at Westminster, on the 13th and 14th March last, the jury found that the board authorised their surveyor to employ the plaintiff to prepare the plans, and that the board ratified the act of their surveyor in procuring such plans. They also found that new offices were necessary for the board, and that the plaintiff's plans were necessary for the erection of the offices for which they were designed, and they assessed the damages to which the plaintiff was entitled at 94*l*.

The learned judge reserved for further consideration the question whether, having regard to sect. 85 of the Public Health Act 1848, and

sect. 174 of the Public Health Act 1875, the plaintiff could recover from the defendants an amount exceeding 50*l*., in the absence of a contract under the seal of the board.

Sect. 85 of the Public Health Act 1848 (11 & 12 Vict. c. 63) enacted,

That the local board of health may enter into all such contracts as may be necessary for carrying this Act into execution; and every such contract, whereof the value or amount shall exceed ten pounds, shall be in writing, and (in the case of a non-corporate district) sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof, and (in the case of a corporate district) sealed with the common seal, and shall specify the work, materials, matters or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall fix and specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed; and every contract so entered into and duly executed by the other parties thereto shall be binding on the local board by whom the same is executed and their successors, and upon all parties thereto, and their executors, administrators, successors or assigns, to all intents and purposes. Provided always, that the said local board may compound with any contractor or other person in respect of any penalty incurred by reason of the non-performance of any contract entered into as aforesaid, whether such penalty be mentioned in any such contract, or in any bond or otherwise, for such sums of money or other recompense as to such local board may seem proper. Provided also, that before contracting for the execution of any works under the provisions of this Act, the said local board shall obtain from the surveyor an estimate in writing as well of the probable expense of executing the work in a substantial manner, as of the annual expense of repairing the same, also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise. Provided also, that before any contract of the value or amount of 100*l*. or upwards is entered into by the said local board, ten days' public notice at the least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same, and the said local board shall require and take sufficient security for the due performance of the same.

Sect. 173 of the Public Health Act 1875 (38 & 39 Vict. c. 55) enacts that,

Any local authority may enter into any contracts necessary for carrying the Act into execution.

And sect. 174 enacts that,

With respect to contracts made by an urban authority under this Act, the following regulations shall be observed, namely:

1. Every contract made by an urban authority, whereof the value or amount exceeds fifty pounds, shall be in writing and sealed with the common seal of such authority.

2. Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed.

3. Before contracting for the execution of any works under the provisions of this Act, an urban authority shall obtain from their surveyor an estimate in writing as well of the probable expense of executing the work in a substantial manner as of the annual expense of repairing the same, also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise.

4. Before any contract of the value or amount of one hundred pounds or upwards is entered into by an urban authority, ten days' public notice at least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same, and such authority

shall require and take sufficient security for the due performance of the same.

5. Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed, and their successors, and on all other parties thereto, and their executors, administrators, successors, or assigns, to all intents and purposes. Provided that an urban authority may compound with any contractor or other person in respect of any penalty incurred by reason of non-performance of any contract entered into as aforesaid, whether such penalty is mentioned in any such contract, or in any bond or otherwise, for such sums of money or other recompence as to such authority may seem proper.

March 22.—*Patchett*, Q.C. moved to enter judgment for the plaintiff.

Marriott, Q.C. and *Paterson* showed cause.—They cited

Sanders v. St. Neots Union, 8 Q. B. 810; 15 L. J. 104, M. C.;
Freud v. Dennett, 4 C. B. N. S. 576; 27 L. J. 314, C. P.; s. c. in Equity, 5 L. T. Rep. N. S. 73;
South of Ireland Colliery Company v. Waddle, L. Rep. 3 C. P. 468; 37 L. J. 211, C. P.; s. c. on appeal, L. Rep. 4 C. P. 617; 38 L. J. 338, C. P.;
Cook v. Ward, L. Rep. 2 C. P. Div. 256; 46 L. J. 554, C. P.; 36 L. T. Rep. N. S. 893;
Re Le-da Banking Company, Howard's case, L. Rep. 1 Ch. 561; 36 L. J. 43, Ch.;
Riche v. Ashbury Railway Carriage and Iron Company, L. Rep. 9 Ex. 224; 7 H. L. Cas. 658; 44 L. J. 185, Exch.; 81 L. T. Rep. N. S. 839;
Re County Palatine Loan and Discount Company, Cartmell's case, L. Rep. 9 Ch. 691; 48 L. J. 588, Ch.; 81 L. T. Rep. N. S. 52.

Patchett, Q.C. and *B. Clarke*, contra.—They cited

Clarke v. Cuckfield Union, 21 L. J. 340, Q. B.;
Sanders v. St. Neots Union, 8 Q. B. 810; 15 L. J. 104, M. C.;
Novell v. Mayor of Worcester, 9 Ex. 457; 23 L. J. 139, Ex.;
Reuter v. Electric Telegraph Company, 6 E. & B. 341; 28 L. J. 46, Q. B.;
Nicholson v. Bradford Union, L. Rep. 1 Q. B. 620; 35 L. J. 176 Q. B.;
Pearce v. Morrice, 2 Ad. & E. 96.

Our. adv. vult.

April 6.—*LINDLEY*, J.—This is an action brought to recover compensation for certain plans made by the plaintiff for offices contemplated by the defendants, but never in fact erected. The plans were made by the directions of the defendant's surveyor, and, when made, they were submitted to the defendants' board, and were so far approved and adopted that quantities were taken out and advertisements were issued for tenders for the erection of offices according to the plans. The tenders, however, proving too high, they were not accepted, and the offices designed by the plaintiff were not constructed. The plans, therefore, were of no further use to the defendants. Other offices have, however, been constructed for them from other plans. The jury have found that the defendants' board authorised their surveyor to employ the plaintiff to prepare the plans, and ratified the act of their surveyor in procuring them; and the jury have further found that some new offices were necessary for the purposes of the defendants, and that the plaintiff's plans were necessary for the erection of the offices for which they were designed; and they assessed the damages to which the plaintiff is entitled (if he is entitled to any from these defendants) at 94l. Under these circumstances, the plaintiff would clearly be entitled to judgment, were it not for

the fact that the defendants are a corporation, and that their power of contracting is regulated by Act of Parliament. The Act which was in force when the plans were ordered was the Public Health Act 1848 (11 & 12 Vict. c. 63). This Act was repealed and replaced by the Public Health Act 1875 (38 & 39 Vict. c. 55), before the plans were finished. But the 85th section of the first Act, although broken into paragraphs, and differently printed, was substantially re-enacted by sects. 173, 174 of the second Act; and, having carefully compared the above sections, I can find no difference material to the present case between sect. 85 of the Act of 1848 and sects. 173 and 174 of the Act of 1875, except that 50l. is substituted for 10l. as the limit for contracts which do not require any particular formalities. It is admitted that the defendants were a local board within the meaning of sect. 85 of the Act of 1848, and an urban authority within the meaning of sect. 174 of the Act of 1875; and it is admitted that there was no contract under seal with the plaintiff, and no ratification under seal of any contract with him. Neither was there, in fact, any resolution expressly authorising the preparation of the plans, or expressly referring to or ratifying their preparation for the board. The question I have to determine is whether, under the above circumstances, and having regard to the above enactments, the defendants are liable to pay for the plans in question. Now, in the first place, it is to be observed that the defendants are not a trading or commercial corporation having gain for its object; they are created for the purposes mentioned in the Public Health Acts, and they are in fact the representatives of and trustees for the inhabitants of Wimbledon for such purposes. I cannot therefore regard as applicable to this case those numerous decisions which show that incorporated companies having gain for their object are liable in respect of contracts not under seal, provided they are necessary for and incidental to the purposes for which they are created. Such cases, for example, as *South of Ireland Colliery Company v. Waddle* (*ubi sup.*), and *Reuter v. Electric Telegraph Company* (*ubi sup.*), do not in my opinion govern this case. Neither can I treat the defendants as a corporation to which no Act of Parliament is specially applicable. It is not necessary, in order to decide this case, to try to reconcile the conflicting decisions upon the general question whether a corporation not governed by any special Act of Parliament is liable on unsealed contracts of which it has had the benefit. Where the unsealed contract is of such a nature as to be the subject of an action for specific performance, and such contract has been in part performed, under circumstances which render the equitable doctrines of part performance applicable, the contract will, I apprehend, bind such a corporation (*Crook v. Seaford*, L. Rep. 10 Eq. 678; 6 Ch. App. 551); but, in other cases, it is extremely doubtful whether the mere fact that a contract, not otherwise binding on the corporation, has been wholly or partly performed renders the corporation liable to be sued either on the contract or on a *quantum meruit*. *Nicholson v. Bradford Union* (*ubi sup.*), *Clarke v. Cuckfield Union* (*ubi sup.*), and *Haigh v. North Brierly Union* (E. B. & E. 873; 28 L. J. 62, Q. B.), are the leading authorities in favour of the corporation being liable; and *Waghorn's case* (not reported) before

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LORD RIVERS v. ADAMS; SAME v. ISAACS; SAME v. FERRITT.

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Manisty, J. may be added to them. On the other hand, *Mayor of Ludlow v. Charlton* (6 M. & W. 815), *Lamprell v. Billericay Union* (3 Ex. 283), *Smart v. West Ham Union* (10 Ex. 367; 24 L. J. 201, Ex.; 11 Ex. 867; 25 L. J. 210, Ex.) at law, and *Kirk v. Bromley Union* (2 Ph. 640), and *Crampston v. Varna Railway Company* (L. Rep. 7 Ch. App. 562), in equity, are leading authorities to the contrary. In this case, however, I have to construe and apply a special Act of Parliament; and, although some of the provisions of the above-mentioned sections are not, in my opinion, applicable to such a contract as I have here to deal with, the provision requiring a seal where the contract is for more than 10l. or 50l., as the case may be, is, I think, applicable to it; and, having regard to the objects and terms of those sections, and to the case of *Frend v. Dennot* (*ubi sup.*), I am unable to hold that the clause requiring a seal is a merely directory clause. In *Nowell v. Mayor of Worcester* (*ubi sup.*), other clauses requiring other things to be done by the board were held to be directory only, because the plaintiff could not ascertain whether they were done or not. This reason has no application to the clause requiring contracts to be sealed; and it appears to me that I should be depriving the ratepayers of the protection intended to be afforded them by the statutes with which I have to deal, if I held the defendants liable to pay for work done under a contract required by those Acts to be under seal, and not in that form. The observations of Rolfe, B., in *Mayor of Ludlow v. Charlton* (*ubi sup.*), are, in my opinion, very pertinent to cases of this description; and, thoroughly concurring, as I do, with those decisions which have relaxed the old rule as to the necessity for a seal to bind certain classes of corporations, I do not feel myself at liberty to depart from the plain words of the statutes by which this case is governed. Notwithstanding, therefore, the answers given by the jury to the questions put to them, I give judgment for the defendants with costs.

Judgment for the defendants.

Solicitor for plaintiff, W. J. Foster.

Solicitor for defendants, W. H. Whitfield.

EXCHEQUER DIVISION.

May 15, 16, 17, and 20, 1878.

(Before KELLY, O.B., CLEASBY and POLLOCK, BB.)

LORD RIVERS v. ADAMS; SAME v. ISAACS; SAME v. FERRITT. (a)

Trespass—Right of commoners—Lost royal grant—Special case—Right to begin.

The inhabitants of T. F. claimed, as inhabitant householders or occupiers of ancient messuages therein, the right of cutting furze, &c., on T. F. common. The inhabitants based their claim in virtue of a lost royal grant, and adduced evidence of user in favour of such a presumption.

Held, that the grant, if it ever existed, was bad in law for uncertainty, and that the evidence of such grant must be of a positive nature; mere presumption is not sufficient to substantiate it.

There was a special case stated by order and by consent of parties. The actions were actions of trespass brought against three inhabitants of cottages in Tollard Farnham in Dorsetshire, to determine the

rights, if any, of the several defendants to cut underwood and furze on land belonging to the plaintiff, the lord of the manor. The defendants claimed by prescription and lost royal grant to the inhabitants of the parish. The writs were issued on the 12th June 1873, and on the 15th Aug. 1873 the actions were consolidated and referred to A. E. Miller, Q.C., to state the facts in a special case for the opinion of the court. The arbitrator stated the questions for the opinion of the court to be as follows:

(1) Whether the inhabitants of Tollard Farnham, or any of them, are entitled to any, and what, right of cutting furze or underwood on the *locus in quo*, either as part of Tollard Farnham Common or on any other and what grounds; and if so, then

(2) Whether such right is vested in all the inhabitants of the parish of Tollard Farnham; and if not, then

(3) Whether such right is vested in all the inhabitant householders in the said parish; and if not, then

(4) Whether such right is confined to the occupiers of ancient messuages within the said parish.

(5) Whether any and which of the defendants were entitled, as such inhabitants, householders or occupiers, to commit the alleged trespasses.

(6) Whether any, and which, of the defendants were, on any other and what ground, entitled to commit the said alleged trespasses.

O. S. Bowen and B. S. Wright for the plaintiff.

Edward Clarke and McClymont for the defendants.

Defendants' counsel claimed the right to begin on the ground that by reason of the nature of the case the *onus probandi* was on the defendants; but the Court ruled that the right to begin was with the plaintiff, it being the established practice of the court for the plaintiff to begin on the hearing of a special case.

O. S. Bowen for the plaintiff.—The first question to be determined in this case is whether such a right as that claimed by the defendants can exist at all in law; a right, that is, for "the inhabitants" of a parish, as such, to cut underwood in *alieno solo*. A *profit à prendre in alieno solo* cannot be claimed by custom, but only by prescription, and a vague and fluctuating body like the inhabitants of a parish could not take such a right under the grant of any private person:

Gateward's case, 6 Co. Rep. 59 b; Cro. Jac. 152;

Selby v. Robinson, 2 T. Rep. 758;

Grimstead v. Marlowe, 4 T. Rep. 717;

Constable v. Nicholson, 32 L. J. 240, C. P.; 14 C. B.

N. S. 230;

Knight v. King, 20 L. T. Rep. N. S. 495.

It is true that a Crown grant to "inhabitants" incorporates them so far as is necessary to sustain the grant, provided that there is either rent or some other consideration reserved to the Crown; or that the grant is merely an exemption from forest laws, and not a grant of an interest in the profits of another's land (Comyn's Digest, tit. Corporation, Fr. 6); but the Crown grant must have actually existed. A merely fictitious plea of one is not sufficient. If it were so, it would have been made use of in *Selby v. Robinson* (*ubi sup.*), where the facts were similar to those in this case. Since "inhabitants" cannot

(a) Reported by A. M. TARBLETON Esq., Barrister-at-Law.

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prescribe for this right, the court surely ought not to presume a lost royal grant in their favour. The nature of the right here claimed and of the evidence offered in support of it show that it is practically a claim by custom, but it is disguised as a claim by lost royal grant on account of the rule that such a right is not claimable by custom. That rule would have absolutely no effect if it were permitted to evade it in the manner here attempted, and the attempt has never hitherto been made. In the present case the allegation of lost royal grant is a mere pleader's fiction. In a recent case of *Angus and Co. v. Dalton* (L. Rep. 3 Q. B. Div. 85) it is laid down by Cockburn, C. J., that if from the nature of the case it is improbable that a grant should have been made the court will not presume one; and here the only time at which such a grant was possible was during the last year of the reign of Edward VI., that being the only time at which the Crown was owner of the soil of the *locus in quo*, as well as lord of the forest in which it was situate, and during that time the records are perfect, and no trace of a grant is found in them. During the time when the Crown was only lord of the forest and not also owner of the soil, a Crown grant could only operate as a relaxation of the forest laws, and could not convey to the grantees an interest in the soil of the lord of the manor which would be valid as against him. The case of *Willingale v. Mailland* (L. Rep. 3 Eq. 103) may seem to support the contention of the defendants, but it does not really do so. In the present case there is no evidence of any royal grant, while in *Willingale v. Mailland* the grant was admitted on the pleadings; in that case the Crown was both lord of the manor and lord of the forest, while here the Crown has only once, and then only for about two and a half years, been lord of the manor, and the consideration which there existed in the maintenance of severe forest laws over a large tract of country does not exist here, because the *locus in quo* never was a forest but only a chase. As to the difference between a chase and a forest, see Manwood's Forest Law, chap. 1, par. 4. Moreover, *Willingale v. Mailland* is not undisputed: (see *Chilton v. Corporation of London*, L. Rep. 7 Ch. Div. 732.) At all events, it does not extend so far as to cover this case. Supposing that such a right could exist in the inhabitants, the evidence here, far from supporting the plea of a lost royal grant to the inhabitants, points strongly to manorial rights enjoyed by the tenants of the manor as being the true explanation of the user proved. The tenants of the manor enjoyed a manorial right, and the poor enjoyed to some extent a user by sufferance, it not having been worth while to prevent them. These two together account for all the user on which the defendants rely to prove a right in the inhabitants. Finally, if the claim of the defendants to take the underwood under a public right as being "inhabitants" fails, they cannot then employ the same user which they claim to have exercised under the qualification of "inhabitants" in support of pleas of a private prescriptive right. See the judgment of Lord Denman in *Blewitt v. Tregonning* (3 Ad & E. 587).

Edward Clarke for the defendants.—*Blewitt v. Tregonning* is not a parallel case to this; the two claims there in question were prescription and custom. Here it is expressly

stated in the special case that the court is to decide which (if any) of the rights claimed is made out by the evidence. With regard to the extent of user found to have in fact existed, it is identical with that claimed; and with regard to the right in which that user was exercised, the evidence of reputation strongly supports the contention that the right belonged to the inhabitants. Absolute precision is not to be expected in evidence of reputation (per Cleasby, B., in *Hall v. Nottingham*, L. Rep. 1 Ex. Div. 1). The evidence of the chase rolls points to a similar conclusion. Substantially it is found that no inhabitant of the village was ever prevented from taking wood, and that no one not being an inhabitant of the village was ever allowed to take it. [KELLY, C.B.—It strikes me that *Willingale v. Mailland* distinctly decides that the right you claim can exist.] Yes, and with regard to the plaintiff's contention that in order to bring ourselves within *Willingale v. Mailland* the soil must be in the Crown, and that here the soil of the *locus in quo* was in the Crown for only two years, we say that the manor of Tollard Farnham was a comparatively recent subinfeudation of the manor of Cranbourne, and that the Crown was owner of the soil for about 150 years previous to the subinfeudation, during which time the grant may well have been made, and if so, the subsequent subinfeudation would have been subject to any rights previously granted. See the judgment of Mellish, L.J. in the *City Commissioners of Sewers v. Glasse* (L. Rep. 7 Ch. App. 456). *Chilton v. Corporation of London*, referred to by the plaintiff, does not shake *Willingale v. Mailland* on the point for which we wish to use it. The plaintiff contends that this was a chase, but a chase in the hands of the Crown becomes a forest (Manwood's Forest Laws, edition of 1717, p. 80), and it is proved that this co-called chase had a royal court of attachment as well as foresters and verderers, officers that Manwood tells us only exist in forests. The absence of record of penalties inflicted for exercising the user, coupled with the fact that constant user is proved to have existed, is almost conclusive that the user was of right. The presentments made by tenants of the manor that they as tenants had the right are not evidence as against inhabitants not being also tenants that the right was not in the inhabitants. User has been proved in respect of three classes of persons—1st, tenants of the manor; 2nd, leaseholders substituted in later times for copyholders; 3rd, inhabitants not falling within either of the above classes. The leaseholders had no estate in respect of which they could prescribe, nor could they act by custom of the manor. When copyholders become leaseholders they lose their copyholders' privileges unless those privileges are then made the subject of express demise:

Massam v. Hunter, Yelverton, 189;
Crowder v. Oldfield, 1 Salkeld, 189;
Watkins on Copyholds (edit. 1825), 452.

The user by leaseholders is not accounted for by the explanation of manorial right suggested by the plaintiff. That only partly explains the user proved, and the proposition that, where user has been proved, the court will refer that user to a legal origin that suitably accounts for, is well supported by authority. The fact of the user is evidence of the existence of the grant, and the nature of the user is evidence of the terms of the grant:

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Stanley v. White, 14 East, 832;
Johnson v. Barnes, L. Rep. 7 C. P. 592;
Warrick v. Queen's College, Oxford, L. Rep. 6 Ch.
 App. 716, 722;
Willingale v. Mailland, L. Rep. 3 Eq. 103.

[KELLY, C.B.—Did any grant similar to the one you claim ever exist in history? Yes, 13 Eliz. c. 25, refers to such a grant. See also Kemble's Saxons in England, vol. 2, pp. 78-84, and the Itineraries of 8 Edw. III. (quoted in *Willingale v. Mailland* from Lord Hale's MSS. in Lincoln's-inn Library, vol. 44).

Bowen in reply.—As to the rights of leaseholders to act by custom of the manor, the authorities cited for the defendants refer to enfranchisement, not to the mere substitution of leasehold for copyhold tenure. Enfranchisement destroys the tenure altogether, but these leases specially preserve it:

Dodge v. Carpenter, 5 Man. & Sel. 49;
Lascelles v. Lord Onslow L. Rep. 2 Q. B. Div. 438.

The right of common survives in equity if not at law:

Styant v. Stakes, 2 Vern. 250.

No such grant as the one here claimed has ever been known, and upon the evidence there is no room for its presumption. *Cur. adv. vult.*

Aug. 8.—Judgment was now delivered by KELLY, L.C.B.—The question argued before us in this case has been, whether the inhabitants of the parish of Tollard Farnham, in the county of Dorset, have the right to cut and take faggots or baskets of the underwood growing upon a part of the common which has been inclosed by the plaintiff. At present we deal with the question which was fully argued before us, namely, the right of the inhabitants as inhabitants. The user, and the extent of the user, is stated in the case to have been as of right, but the nature of the right in respect of which it was exercised is one of the questions to be decided. The defendant in the first action (Adams) says in his evidence, that the common was free to anybody in the parish. So that as far as the user goes it agrees with the claim set up, and notwithstanding some expressions to be found in the evidence, there is no ground for regarding this as a case in which a particular provision has been made by royal grant or otherwise for the poor of the parish. If such a right could be claimed by custom, there is evidence of user which, coupled with the evidence of reputation, might raise a question whether the custom did not exist. But the right claimed is a *profit à prendre* in the soil of another, and the authorities are uniform, from *Gateward's case* (6 Coke Rep. 60) to *Chillon v. The Corporation of London* (L. Rep. 7 Ch. Div. 735), that such a custom is bad in law. See *Selby v. Robinson* (2 Term Rep. 758); *Constable v. Nicholson* (14 C. B. N. S. 230; 32 L. J. 240, C. P.), where other authorities are given. Many sound reasons are given in the authorities for this conclusion. It is only necessary to advert to some of those given in *Gateward's case*, because they may be applicable to another view of the present case. It was not a case in which the inhabitants of a certain village generally claimed a *profit à prendre*, but the plea alleged that, by custom, all persons inhabiting any ancient messuage should, by virtue of their inhabitancy, have a certain right of common. It was adjudged by all of the justices that such

custom was against law for several reasons. Among others: "Secondly, what estate shall he have, who is inhabitant only, in the common, when it appears he hath no estate or interest in the house, but a mere habitation or dwelling; and, thirdly, such common will be transitory, and altogether uncertain, for it will follow the person, and for no certain time or estate, but only during his inhabitancy, and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance; fourthly, it would be against the nature and quality of a common, for every common may be suspended or extinguished; but such a common will be so incident to the person that no person can extinguish it, but as soon as he that releases and removes, the new inhabitants shall have it." It might be added also in relation to such a right as is claimed in the present case, namely, to be provided with fuel from the common, that mere inhabitancy is capable of an increase, almost indefinite, and if the right existed in a body which might be increased to any number, it would necessarily lead to the destruction of the subject-matter of the custom. There cannot, therefore, be such a custom. And for the same reasons and for other reasons there cannot be a prescription, and there could not be a valid grant to so fluctuating a body and a body so incapable of succession, in any reasonable sense of the word, so as to confer a right upon each succeeding inhabitant. The judgment in *Constable v. Nicholson* (32 L. J. C. P. 240), is correctly given in the head-note, except in the use by some mistake of the word "easement" for "right." It is as follows: "The right of the inhabitants of a township to take stones from the land of another for the purpose of repairing the highways is a *profit à prendre*, and cannot therefore be claimed by custom. Neither can it be claimed by prescription, as inhabitants are incapable of taking by that description "such an easement" (it ought to be "such a right") "unless under a grant which incorporates them." The following are the words of Willes, J., in his judgment as regards the prescription or supposed grant, after disposing of the question of custom: "The prescriptive right is not claimed for a corporation, or persons taking by succession, but only for a fluctuating body of inhabitants. The prescription pleaded is a grant to that body, but not so as to have the effect of incorporating them. It is clear that such a right cannot exist." See also the decision of the Master of the Rolls to the same effect in the current number of the Law Reports: (*Chillon v. The Corporation of London*, L. Rep. 7 Ch. 735.) The claim then can only be supported as resting upon a supposed grant by the Crown to the inhabitants of the right in question, as such a grant alone would have the effect of incorporating them; and the argument addressed to us was upon the propriety and indeed necessity of presuming such a grant from the user set out in the case. But there is a difference between a corporate body, and the persons who for the time being compose it, and the members for the time in their own individual right take nothing by the grant to the corporation. There was a considerable argument before us upon the effect of a grant by the Crown to the inhabitants of a parish or village. The question seems

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to have arisen frequently in early times, and there are several decisions in the Year-books on the subject which are to be found in all the Abridgments, under the title "Corporation." The effect of them appears to be that where there is a grant by the Crown to the inhabitants of a particular parish or village, if the grant is made for a specified purpose, it has the effect of incorporating them so as to carry that purpose into effect, but otherwise is inoperative. [After referring to these authorities, his Lordship continued:] The case, therefore, stands thus: we are called upon to say, because there has been user by the inhabitants individually in virtue of this right, not that there has been merely a grant to the same persons who exercise the right (which would be the proper inference in ordinary cases without regard to the probability of its actually taking place, but which would in this case be imperative), but that there has been a grant in such a form as to convert them into a body corporate having perpetual succession. It appears to us that we ought not to presume this, not because it is impossible, but because it is inconsistent with the past and existing state of things. We were to presume that a corporation has been formed many hundred years ago, when there is no trace at any time of its having ever existed. If the inhabitants had held meetings in reference to this right, or appointed any officer to look to the right, or done any act collectively of that description, the case would be different. We should then have the inhabitants acting in a corporate capacity in reference to this right, and from their doing so, and from their existence *de facto* as a corporation, we might, according to the ordinary rule, find a legal origin by a grant from the Crown; but to say that a corporation was created which has never existed, would be carrying the fiction of a grant further than has ever been done, or than is consistent with reason. And the presumption is made wholly unreasonable, when we have, as in the present case, while the supposed corporation is existing and entitled to take the haskets, another body actually existing and legally existing, namely, the tenants of the manor who are exercising inconsistent rights, and publicly asserting their entire control over the underwood of the common. There is also another reason against making this presumption, which was strongly and properly pressed by the learned counsel for the plaintiff, and which is not applicable to any of the cases in which similar presumptions have been made, namely, that we are asked to presume the action of the Crown in favour of a right in the inhabitants which could not exist as a custom, because it is unreasonable and contrary to law, and that the Crown, because this could not be done otherwise, got over the difficulty several hundred years ago by constituting them a corporation. We cannot make this presumption, not because it is improbable, but because it is most unreasonable. We were much pressed on behalf of the defendants with the case of *Willingale v. Mailland* (L. Rep. 3 Eq. Cas. p. 103), but when that case is examined it has no bearing upon the exact question which is raised in the present case. It was a demurrer to a bill for want of equity. The bill alleged that Queen Elizabeth, being lady of the manor of Loughton, which was within the royal forest of Waltham, had by her Royal Charter granted to the inhabitants of the parish of Loughton, that the labouring or poor people inhabiting the

said parish, and having families, might, at certain times of the year, cut certain underwood, and that the rightful disposition of the wood so cut should be for their own consumption, and for sale, for their own relief, to other inhabitants of the parish for their consumption. The bill being demurred to, the facts were admitted as stated, and it was therefore admitted that there was a grant in the very precise terms stated, which it was contended had the effect of incorporating the inhabitants for the purpose of carrying into effect the specified charitable object. Accordingly the Master of the Rolls says, at p. 109: "It should be observed that, though it is true, as stated in Sheppard's Touchstone, that a grant cannot be made beneficially to the inhabitants of the parish as grantees, yet it is certain that a grant may be made by a private individual in the shape of a charity in trust for the poor inhabitants, and that such a trust is perfectly good." He afterwards adds, "The books are full of cases in which grants of this description have been supported and established, and the court has carried the trusts into execution." He afterwards refers to the Act of 11 & 12 Vict. c. 43, by which Hainault Forest was disafforested, and in which a certain privilege of widows residing within a certain district was recognised as a ground for compensation, and eventually decides that as it stands on the bill, if the whole bill be taken as true, there was a case of relief. It is to be noticed that nothing whatever was granted to the inhabitants, neither land nor privilege of any sort. The only grant to the inhabitants was, that the labouring poor should have the privilege as alleged. We are not here dealing with a trust to be performed for the benefit of a limited body, but with the right of the inhabitants generally, and the case renders no assistance in considering without a grant to the inhabitants generally what ought to be presumed from user. A passage in the 4th Institute, page 297, was referred to because it was said that Tollard Farnham was within the forest of Cranbourne—Coke is treating of the courts of the forest, and he says: "And concerning claims" (meaning claims in the court of the forest), "it is specially to be observed that by the forest law, a grant made of a privilege within the forest, all the inhabitants being freeholders within the forest, or such other commonalties, not incorporated, is good." The answer to this was that it has reference to claims made in the court of the forest, the claim being for what is called a privilege, which involves more the idea of exemption from the forest law than the acquisition of property; and further that, although we have abundant proof that Cranbourne was a chase, there is no proof that it was ever a forest in the proper sense of the word, and still further, that we are not dealing with privileges under the law of the forest, but with property under the common law. We are therefore engaged in a different court from the court of the forest upon a different subject, viz., property, and not privilege, and there is an absence of proof of their being a forest; so that the passage in Coke is inapplicable. It was impossible to pass over these matters which were so fully argued before us; but there is another reason why we cannot be called upon to find a grant from the Crown in the present case. In most cases where a grant is presumed from user in favour of an individual, the proof of user is definite and complete, but in the present case we

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are called upon to infer a grant not to an individual, but to a class, namely, the inhabitants of a parish, and therefore in order to found it, there must be proof of user not by some inhabitants, but by the class, that is, by inhabitants generally. [His Lordship referred to certain evidence by way of presentments taken from the court rolls of the manor and proceeded:] With regard to the right to take fuel, asserted by the tenants, the fact that other inhabitants of the parish exercised the right would only prove a right in those other inhabitants as inhabitants, and would not prove the right in the inhabitants generally, and in this way the case fails. The statements in the case, and the schedules, entirely fail to prove the user by the inhabitants generally as inhabitants, such as to justify the presumption of a grant by the Crown. We were not asked to presume a grant to such of the inhabitants as were not tenants of the manor. We now go back to the title of the defendants by prescription. As regards the defendant Ferrett, as his house was a new one, this claim clearly could not be sustained. The same objection applied to the defendant Isaacs, because his house was also a new one, and although it was built near to an old house and upon a small garden belonging to it, the old house remained, and was occupied, so that it was not in substitution for, but in addition to the old house, and thus any prescriptive right acquired by the old house could not apply to this. As regards the house occupied by the person under whom the defendant Adams justifies, the matter stands thus. He occupies a house partly new and partly old, and it may be collected from the statement that the old part may originally along with the other old building have constituted one house, or it may have been originally a separate house, and a question might arise, whether a user was sufficiently made out in respect to the present house, so as to make the prescription apply. But an opinion was intimated in the course of the argument that there was no evidence of the exercise of the right to take baskets as belonging to any particular house. On the contrary, it was proved that the right was exercised in respect to inhabitation of houses whether old or new. We should have felt justified in coming to the conclusion that Harriet Adams, as alleged in the third plea, was seised in fee of the house occupied by her, and that it was not comprised in the lease of the 15th March 1781, mentioned in paragraph 68 of the case; but we could not have come to the conclusion that the other allegation in the plea was made out, viz., that she and her predecessor in title had exercised the right of taking estovers as to the messuage appertaining. This is a conclusion of fact, and though the actual taking of baskets by the occupiers of the house was proved to the fullest extent, and though the case does not expressly find in what alleged right it was taken, yet the evidence shows that the right was exercised in respect of inhabitation. The defendant in the action, Charles Adams, says, at p. 150, the common was free to everybody in the parish. It is only necessary upon this part of the case to refer to the case of *Campbell v. Wilson* (3 East 294), quoted with approval in *Angus v. Dalton* (L. Rep. 3 Q.B. Div. 108), to show the necessity of connecting the user with the right claimed. In that case there had been an inclosure award, putting an end to all former

rights of way, and a certain private right of way was set out. The question which arose was whether, from user for nearly twenty years as of right, a grant could properly be presumed, and the argument was that the user over the *locus in quo* was a user under the award, and by mistaking the place set out. All the members of the court expressed their opinion that if it had been shown that the user was in fact under the award, though adverse and of right, it could not have been made a foundation for presuming a grant. The language of all the judges is to the same effect, but that of Lawrence, J. is most precise. He says, at p. 301: "But it has been said that if the enjoyment were shown to have originated by mistake, however adverse it may have been, that is against the presumption, and that the learned judge misled the jury in this respect, but no facts appear to warrant the objection, otherwise it might be very material to be considered. For if from an exercise of the right of way from time to time it had appeared that the party had asserted his right to be grounded on the award, though it were exercised ever so adversely, I do not know how the jury would be warranted in referring to any other ground than what the party himself insisted on at the time." It is plain that, if we refer the user to any other right than the one in respect of which it was actually exercised, we might be doing the greatest injustice, for the lord might allow the inhabitants of cottages to exercise the right as inhabitants, knowing that it was a right which there was no necessity to interrupt, and he might afterwards be bound by his own interruption because another right was acquired. For the above reasons we think that all the questions at the end of the case must be answered in the negative, and that there must be judgment for the plaintiff in all the actions. Acting upon the paragraph at the bottom of page 22 of the case, we direct that the plaintiff's costs be assessed equally between the three defendants.

Bowen.—My Lord, the case prays for an injunction to prevent the repetition of similar trespasses, and, as the judgment is for Lord Rivers, I apprehend I am entitled to that?

KELLY, C.B.—That certainly you are entitled to. You will have a perpetual injunction.

Solicitors for the plaintiff, *Home and Hunter*.

Solicitors for the defendants, *Duncan and Merton*.

QUEEN'S BENCH DIVISION.

June 27, 28, and Aug. 8.

(Before COCKBURN, C.J., MELLOR and LUSH, JJ.)

MARTIN v. MACKONCHIE. (a)

Prohibition—Court of Arches—Sentence for contumacy—Suspension ab officio et beneficio—Previous sentence in suit—3 & 4 Vict. c. 86.

In a suit instituted under the Church Discipline Act 1840, and sent by letters of request to the Court of Arches, the Dean of that court had, on the 7th Dec. 1874, pronounced the defendant, the vicar of a parish, guilty of certain ecclesiastical offences, and sentenced him to suspension ab officio for six weeks. On the 26th June 1875 a monition to desist from the practices, thus condemned as unlawful, was served on the defendant.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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On the 23rd March 1878, upon application to the court by affidavits, the Dean was satisfied that the defendant was continuously disobeying the said monition, and on the 29th March a further monition to desist from the said practices was served on the defendant. An application to enforce these monitions was made, and, upon failure to appear after notice, the Dean, on the 11th May, decreed that the defendant had disobeyed the said monitions, and for his disobedience therein declared him to have been guilty of contumacy, and for his conduct aforesaid sentenced him to be suspended *ab officio et beneficio* for the term of three years, the defendant to pay the costs of suit.

Held (by Cockburn, C.J. and Mellor, J., dissentiente Lush, J.), on a rule for a prohibition, that this sentence was beyond the jurisdiction of the Dean of Arches; and that this court had power to prevent its execution by prohibition.

THIS was a rule *nisi* for a prohibition to Lord Penzance, the Dean of the Court of Arches, to set aside an order made by him, directing the defendant in the suit to be suspended *ab officio et beneficio* of his vicarage, for three years, as a punishment for contempt of court in continuing to disobey a monition of Sir Robert Phillimore, whilst judge of that court.

June 5.—Charles, Q.C. (with him Phillimore) obtained a rule *nisi* on the defendant's behalf.

June 27 and 28.—The Solicitor-General (Sir Hardinge Giffard, Q.C.), A. J. Stephens, Q.C., and Jeune, for the promoter of the suit, showed cause.

Charles, Q.C. and Phillimore supported the rule.

The facts and arguments are sufficiently stated in the considered judgments of the learned judges.

Cur. adv. vult.

Aug. 8.—LUSH, J.—This suit was instituted by letters of request from the Bishop of London, pursuant to the 13th section of the Church Discipline Act (3 & 4 Vict. c. 86). The cause was heard on the 7th Dec. 1874, when the Court of Arches decreed that the defendant had been guilty of certain practices which were offences against the laws ecclesiastical; pronounced sentence of suspension *ab officio* for six weeks; and admonished the defendant to abstain in future from the practices thereby condemned. The defendant appealed from this judgment to the Privy Council, but abandoned the appeal before it came to a hearing. On the 26th June 1875 a monition in accordance with the decree was duly served, and suspension published. On the 18th March last, notice was served on the defendant, alleging that he had, in contravention of, and disobedience to, the monition, on certain days therein specified (several of which were within two years from that date, and the last of which was the 24th Feb. last), done certain specified acts (being acts which he had been admonished to abstain from), and that the promoter would on the 23rd March, upon proof of the premises, ask that it might be declared that the defendant had not obeyed the monition in the particulars therein set forth, and would further ask that the monition might be enforced, as to the court should seem meet; and that the defendant might be condemned in the costs of the proceeding. Copies of the affi-

davits intended to be used were served at the same time. The defendant did not appear, and on the 29th March a second monition was served upon him, which recited the previous proceedings in the suit, the decree, the service of the former monition and the notice; and which alleged that on the 23rd March then instant, the court, having read the affidavits, copies of which had been served, did pronounce and declare that the defendant had failed to obey the monition in not having abstained from the before-mentioned practices; and did further admonish the defendant to abstain for the future from those practices. On the 20th April a further notice was served, to the effect that it had been alleged that subsequently to the service of the last-mentioned monition, namely, on the 31st March and the 7th April, the defendant had repeated the practices against which he had been admonished, and that the promoter would apply to the court on the 11th May, and would, upon proof of the premises, ask that it might be declared that the defendant had not obeyed the monitions, and that the same might be enforced as to the court should seem meet, and that the court might take such other steps in the matter as justice might require. Copies of the further affidavits intended to be used accompanied the notice. The defendant still declined to appear at the time appointed, and the court, after reading the affidavits and taking time to consider, declared that the defendant had disobeyed and contravened the monition of the court, and decreed that he should be suspended *ab officio et beneficio* for a period of three years, and be condemned in the costs of the application. Thereupon an application was made to this court for a prohibition, on the ground, and the only ground on which a prohibition can be granted, namely, that in awarding a suspension under such circumstances the Court of Arches had exceeded its jurisdiction. A rule to show cause was granted, which came on for argument shortly before the last assizes, when the court took time to consider its judgment. The contention of the defendant is that he has been punished for a contempt of court; that a contempt of court is punishable only by imprisonment under 58 Geo. 3, c. 127; that such a proceeding as the present is not in accordance with the established practice of the Court of Arches, and that even if it were shown to have been so prior to the passing of the Church Discipline Act, the provisions of that Act rendered its continuance illegal. It was not disputed that the sentence complained of is one which might lawfully have been pronounced for such ecclesiastical offence as the court had declared the defendant to be guilty of, if a fresh suit had been brought against him. I pause here for a moment to remark that much of the argument which was addressed to us appears to me to be based on the fallacy of treating the acts of which the defendant was found guilty as a mere contempt of court. A contempt of court may or may not involve an ecclesiastical offence. A wilful disobedience of an order of the court made to enforce a private right, such as an order for payment of costs, is a contempt of court, but nothing more. The acts of the defendant amount to a contempt of court, inasmuch as he thereby committed a breach of the monition or injunction of the court; but they amount to much more than a contempt of court. They constitute a distinct ecclesiastical offence. They

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were done in defiance not only of a monition of the court, but in defiance of the law as declared by the court, which is the constituted authority in such cases, and would have been punishable if there had been no monition, and the sentence is admitted to be an appropriate punishment for such a breach of the law. Of course the court could not have taken cognisance of the offence without a suit; but here there is a suit which has resulted in a decree and a monition, and the argument for the defendant assumes that for some purposes at least the monition is still in force: whether it is operative to enable the court by means of it to suppress the repetition of the offence—in other words, whether the monition can be effectually enforced—is the question. Now unless it be shown that the defendant is under some disadvantage by being prosecuted for the new offence by summary proceeding on the monition, or unless such a proceeding is prohibited by statute, no reason can be assigned why a new suit, which is undoubtedly the more costly and more dilatory, and therefore the less efficacious proceeding for the purposes of justice, should be adopted in preference to the more summary proceeding. The object is the same as would be the object of a new suit, namely, to put an end to the practices which had been denounced as illegal; and the sentence is the same as would or might have been pronounced in the form of a decree in that new suit. I proceed to notice in the first place the argument based on the Church Discipline Act, because, if the proceeding complained of be either expressly or by implication forbidden by that Act, it matters not what the ancient practice of the Court of Arches was, or what construction the court might have put upon the statute itself; for it is the practice and the duty of this court to construe Acts of Parliament which affect the temporal rights of the subject, and to protect the subject in the enjoyment of those rights. The object of the Church Discipline Act is declared in the preamble to be “to amend the manner of proceeding in causes for the correction of clerks,” and this it effects by repealing the statute Hen. 7, c. 4, which gave summary powers to archbishops and bishops, and by prescribing a uniform course of proceeding for the institution of suits. Then follows the 23rd section, which enacts that “no criminal suit or proceeding against a clerk in Holy Orders, for any offence against the laws ecclesiastical, shall be instituted in any ecclesiastical court otherwise than is hereinbefore enacted or provided.” The argument is, that this is a “proceeding” for an offence against the laws ecclesiastical, and not being instituted in the manner prescribed by the Act, it is therefore a violation of the Act. This argument appears to me to be founded on a misapprehension of the scope and purpose of the Act. If it were to prevail, the consequence would be that a decree admonishing the defendant in a suit to abstain in future from practices which were thereby declared to be illegal would be nugatory; and the Act would have taken away, and that by implication only, one of the most, if not the most ancient and probably the most effective of the processes of the court. For if the acts of the defendant were treated, as it was contended they ought to have been treated, as a mere contempt of court punishable under the 58 Geo. 3, that would be equally open to the objection that it was a “proceeding”

for an offence which had not been already adjudicated on; and it would follow that no monition enjoining abstinence for the future could ever be enforced at all. It is clear to my mind that what the Act meant to abolish by the word “proceeding” was those arbitrary acts by which forfeiture or suspension was inflicted without a regular suit, of which precedents are to be found in the books, and that it no more intended to interfere with any established mode of enforcing the decrees of the court than it did with substantive law. Other sections recognise, as still existing and to continue, the ancient forms of sentence and the ancient modes of enforcing it. For example, the 11th section, speaking of the sentence to be pronounced upon hearing before the bishop and assessors, says that it shall be “according to ecclesiastical law,” and the 12th says that “all sentences by any bishop or his commissary shall be enforced by like means as a sentence pronounced by an ecclesiastical court of competent jurisdiction.” The Act leaves the kind of sentence to be awarded and the mode of enforcing it as it was before. It prescribes the mode by which criminal proceedings shall be originated against a clerk, but once commenced and carried on to judgment it leaves the suit to be worked out to execution according to the ordinary course and practice of the court. This section, therefore, appears to me to have no bearing upon the question before us. There is a proviso in the 13th section which at first sight seems to present a difficulty. It was not to my recollection noticed in the argument, but I am desirous of calling attention to it, that it might not be supposed I had overlooked it. The 15th section gives an appeal to the Privy Council. The 13th section, in anticipation of the 15th, provides that “no appeal from any interlocutory decree or order not having the force of a definite sentence, and thereby ending the suit in the Court of Appeal of the province, shall be allowed, save by the permission of the judge of such court.” At first sight the wording of the clause suggests that, when the case is ripe for appeal, it is ended for all purposes in the court below. But a moment's consideration suffices to make it clear that these words are only intended to emphasise the distinction between an interlocutory and a final judgment; and that they could not have been intended to enact that a definite sentence shall end the suit in the sense that nothing more shall be done upon it, not even to enforce the sentence, whether there is an appeal or not. That would be a contention too absurd to be accepted, and this no doubt accounts for this proviso not having been referred to in the argument. I come, therefore, to the conclusion that the mode of proceeding which was adopted in this case, and which is the subject of complaint before us, is not prohibited by the Church Discipline Act. There being no other Act of Parliament bearing on the point, the only remaining question is, whether it is in accordance with the established practice of the court. It is admitted, as I have already observed, that the court had jurisdiction over the subject-matter; and jurisdiction to pronounce, for the offence of which it has adjudged the defendant guilty, the very sentence which it has pronounced. I regret that I am compelled to differ from my learned colleagues upon this branch of the case also. I think we have no jurisdiction to inquire whether the ordinary course

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of procedure has or has not been followed in this case. The practice and procedure of every court where no Act of Parliament intervenes to regulate it, which I assume to be the case here, is within the exclusive cognisance of the court itself. If in a particular case the mode of proceeding were shown to be ever so irregular, and at variance with the ordinary practice, it would not give this court jurisdiction to interfere. Irregularity in procedure is matter of appeal, not of prohibition, and the appeal is given to the Privy Council not to this court. It is, of course, conceivable as a possibility that a system of procedure might be so vicious as to violate some fundamental principles of justice; as if, for example, it allowed a suit to be instituted and prosecuted to judgment in the absence of the party sued, and without summoning him, or giving him any opportunity of defending himself; that would entitle this court to interfere. It is quite superfluous to say that nothing of that kind is or could be suggested as regards the procedure in the Court of Arches. But neither was it, or could it be, suggested that the applicant suffered any disadvantage whatever from not having been cited to answer these charges in a fresh suit. The monition gave him full and precise notice, as full and precise as articles in a fresh suit would have given him, of what he was charged with; he had moreover an advantage which he would not have had in a fresh suit, namely, the advantage of knowing who were to be the witnesses against him, and what they were going to say. Every opportunity was given him of refuting the accusation; he might have appeared and cross-examined the witnesses, have given evidence on his own behalf, and have called witnesses to disprove the allegations. The same ground of defence and the same opportunity of putting it forward were open to him on the monition as would have been open to him on the hearing of a suit. For he could not in a second suit have contested the law as declared in the original judgment. That had become *res judicata*. Having abandoned his appeal, he could not have been heard to argue over again that the practices condemned in that suit were lawful practices. All that he could have done in a second suit would have been to dispute the facts, and that he could have done by way of answer to the monition as fully, as freely, and as advantageously as if he had been defending himself in a regular suit. The monition deprived him of no right or advantage which the Church Discipline Act intended that a defendant should have. I must therefore decline to enter into the question which was so earnestly and at length discussed at the bar, namely, whether the precedents do or do not sanction the course of proceeding which is complained of. As I have already said, I think that is a matter for the Court of Arches to decide, subject to an appeal to the Privy Council. I feel it due to the learned judge of the Court of Arches, however, to advert to the fact, that not only has no authority to the contrary been found, but that the various authorities on the subject, which are all collected in the return presented to the House of Commons in 1868, and which were the subject of so much comment in the argument, have been considered by the Privy Council on appeal, and that high tribunal has affirmed the competency of the Court of Arches to pass such a sentence as the one in question upon a similar

proceeding for contumacy: (*Hebbert v. Purchas*, (L. Rep. 4 P.C. 301.) It was strongly urged upon us, in disparagement of that decision, that the Privy Council had not the assistance of counsel on the part of the then respondent, and that, if the authorities had been examined and discussed from an opposite point of view, that court might have come to a different conclusion. That may possibly be so; but I cannot speculate upon such a contingency. The judgment of the Privy Council is binding upon the Court of Arches, and, for the reasons I have mentioned, I think it is equally binding on this court; as the judgment of the Court of Appeal in ecclesiastical causes it has the authority of law, and any clergyman of the Church of England is bound as a loyal subject to obey that in common with any other branch of the law of the land. I cannot help repeating my regret that I should stand alone in this court upon a subject of such general importance, and that circumstance makes me feel considerable diffidence; but having given my best consideration to the case, I am unable to concur with the views of my learned brethren, and am constrained to say that in my judgment no excess of jurisdiction has been committed, and that this rule ought to be discharged.

MELLOR, J.—At the close of the argument in this case I was prepared to concur with my Lord Chief Justice in making the rule absolute, but my brother Lush then expressing his dissent from that course, and requiring time to consider the matter further, we parted without appointing any time for meeting to give our judgment. As the circuits were then immediately about to take place, I did not think it likely that we should be prepared to give judgment before the next sittings, and it is only within the last three days that I became aware that we should be able to meet for the purpose of delivering judgment. I do not mention this by way of objection or complaint, as I think it is extremely desirable that the matter should not be postponed to the sittings in November. I say it merely by way of excuse for not being prepared with a judgment of my own. I have been so incessantly occupied in the performance of other judicial duties that I have found it utterly impossible to abstract the necessary time from the consideration of other pressing cases. I have had the advantage of receiving in portions during the last three days a judgment prepared by my Lord Chief Justice, with whose view of the case expressed to me at the time of the argument I entirely concurred, and with whom I was then prepared to concur in delivering judgment. I have, as far as my opportunities have enabled me, considered his judgment; and although I do not desire without further consideration to be bound by every reason which he has assigned for the conclusion at which he has arrived, yet I am perfectly satisfied to rest my judgment upon the reasons and authorities stated in his most learned and elaborate judgment. I have also had the opportunity of reading the judgment prepared by my brother Lush. I cannot do otherwise than dissent from the conclusion at which he has arrived; but I am sure he will permit me to say that, in my opinion, his judgment does not grapple with the real difficulty in the case. There are two cardinal points on which I am at issue with him. The first is, that he seems to consider that this court in the exercise of its high functions is bound by the decisions of the

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Judicial Committee of the Privy Council which were so often referred to during the argument. It is to be observed that the Privy Council have no original jurisdiction in questions of this description; their authority is simply appellate, and is merely a substitution for the former authority of the delegates. It cannot be doubted, as it appears to me, that in this matter that high court is as much subject to review by this court in the exercise of its authority as the Court of Delegates was. The judge of the Court of Arches was no doubt bound by those decisions, and could not have rightly acted contrary to their tenor, but in the exercise of our jurisdiction we are not bound to treat them as conclusive authorities on the subject, but are at liberty to consider the circumstances under which they were given, and the authorities on which they were based. My second difference from my brother Lush consists in this, that I consider that the offence upon which Lord Penzance adjudicated and passed the sentence now appealed against was a fresh and distinct offence against the laws ecclesiastical. I mean new and distinct from the offence for which he had been sentenced to suspension and payment of the costs by Sir Robert Phillimore when Dean of the Arches. It appears to me that Lord Penzance had no jurisdiction to adjudicate and condemn the defendant, Mr. Mackonochie, to a sentence of suspension applicable only to a definite and specific offence without fresh letters of request from the Bishop of London, in whose diocese the offence arose. All the offences charged against the defendant were committed within the diocese, and might have been dealt with in the Consistory Court of the Bishop of London; and without letters of request by the Bishop of London the Arches Court of Canterbury had no jurisdiction to take proceedings in the matter; when, therefore, Mr. Mackonochie had been convicted and sentenced by a definitive sentence of the then Dean of the Arches, and had suffered the punishment assigned to such offence, that suit was at an end. He might be liable to a summary proceeding by way of contempt and punished in the course prescribed by the statute of Geo. 3, by *significavit* and imprisonment; but it appears to me that in order to proceed for a fresh specific offence, which might end in a sentence of suspension or deprivation, it was essential that a new cause should be instituted, and that fresh letters of request should have been obtained from the Bishop of London. There is no analogy in the law in criminal matters by which when a new offence has been committed by a defendant he can be called upon to answer without the institution of a fresh suit conducted with the formalities which the law prescribes. It might as well be said that a man who has committed a burglary and been sentenced and suffered his punishment for such offence, and had afterwards committed a fresh burglary in the same house, could be dealt with summarily and tried and punished without any bill being preferred before a grand jury for such second offence. Possibly the monition given by Sir Robert Phillimore on the trial for the former offence might be used in aggravation of punishment on a second trial for a similar offence, but, as it appears to me, could have no other effect. That the conduct of Mr. Mackonochie is deserving of the highest censure for remaining in a church whose law and discipline he habitually disregards may

be true, but that is not *ad rem* to the present question, and it is our duty to prohibit a course of proceeding before a tribunal which has no authority by law so to proceed. Had the proceeding been simply irregular, that could have afforded no ground for the exercise of our extraordinary jurisdiction, as irregularity by a court having general jurisdiction is no ground of prohibition, but of appeal. I do not intend, and indeed am not able, to follow these differences further, but I refer to them out of respect to my brother Lush, that he may see that I consider I have grounds of difference from him which are of essential importance to our judgment in this case.

COCKBURN, C.J.—This was an application to this court for a writ of prohibition to prevent the execution of a sentence of the Dean of the Court of Arches, suspending the defendant *ab officio et beneficio*, as incumbent and perpetual curate of the parish of St. Albans, Holborn, for the term of three years, for contumacy in disobeying two monitions of the court, of the 26th July 1875, and the 29th March 1878, admonishing him to abstain from wearing certain vestments while officiating in the Communion service; from causing the prayer or hymn commonly called the "Agnus" to be sung during the reception of the elements by the communicants; from making the sign of the cross to the congregation during the administration of the Communion; and from kissing the Prayer-book during Divine worship and the communion service. The suit against the defendant in respect of this departure from the established ritual, as an offence against the ecclesiastical law, had been originally instituted under the Church Discipline Act (3 & 4 Vict. c. 86), in the Consistory Court of the Diocese of London, on the complaint of the promoter, Mr. Martin, as promoting the office of the judge, and had been sent by letters of request from the Bishop of London to the Court of Arches. On the 7th Dec. 1874 the Dean of the Court of Arches, by an interlocutory decree, having the force of a definitive sentence, pronounced the defendant guilty of the offences charged against him, and sentenced him to suspension *ab officio* for six weeks; to which sentence the learned judge superadded a monition to desist from the practices thus condemned as unlawful. On 12th June 1865 a monition was issued under the foregoing decree, admonishing the defendant, as stated, which monition was duly served on the defendant. On the 23rd March 1878 application was made by the promoter to Lord Penzance, who had succeeded Sir Robert Phillimore as Dean of the Arches, alleging disobedience on the part of the defendant to the monition of Sir Robert Phillimore, and praying that obedience thereto might be enforced. Satisfied by the affidavits adduced in support of the application, Lord Penzance declared that the defendant had disobeyed the monition of 1875, and thereupon further admonished him to abstain from the practices in question. A monition was accordingly issued on the 29th March 1878. On the 20th April ensuing a similar application was made to the learned judge, by motion, on affidavits showing continued disobedience, and asking that the monitions might be enforced in such manner as to the court should seem meet. Notice of this motion having been served, but the defendant failing to appear, Lord Penzance, on the 11th May, decreed that the de-

fendant had disobeyed the monitions of the 12th June 1875 and 29th March 1878, and for his disobedience therein declared him "to have been guilty of contumacy," and "for his conduct aforesaid" sentenced him to be suspended *ab officio et beneficio* for the term of three years, condemning him also in the costs of suit. I have been the more particular in stating the proceedings thus far in detail, because it was insisted by the learned Solicitor-General, in showing cause against the rule, that the sentence pronounced by Lord Penzance was not founded on the defendant's contumacy, but was only an enforcement of the former judgment of the court. When the language of Lord Penzance is looked at, this is obviously an error. The sentence is founded expressly and exclusively on the alleged contumacy; nor can it have been otherwise. There could not possibly have been a sentence in respect of the fresh offence as such without a fresh suit. It is against the execution of the sentence thus founded on disobedience to the monition that the present application is made to this court. For the reasons I am about to state presently, I am of opinion that the rule for a prohibition must be made absolute. In the first place, I must say I entertain the gravest doubt whether the decree of Lord Penzance on the first application to him and the monition of the 29th March were not altogether *ultra vires*. The monition of Sir Robert Phillimore formed part of the definitive sentence pronounced in the original suit. If it had not done so, and no monition had then been given, I apprehend that the suit, which had thus been brought to an end, and in which the defendant had been condemned and had undergone his punishment, and had paid the costs, could not have been resuscitated in order to append to the sentence, on a new state of facts subsequently arising—in other words, on a new offence having been committed—something which had formed no part of it as pronounced, for the purpose of reaching such new offence summarily, instead of proceeding against the offender as for a substantive offence. I do not, however, desire to base my judgment on this ground. I am disposed to think that if a monition thus appended to a sentence for a specific offence can be made the foundation of a summary proceeding for contempt on the commission of a further offence, the monition of Sir R. Phillimore was still sufficiently alive for that purpose. It seems to me that there are much stronger reasons for making this rule absolute. I must premise what I have to say in support of the view I entertain of this case by stating that, taking the original monition to have been the foundation of the decree which we are asked to prohibit, the learned judge of the Court of Arches, after the decisions of the Judicial Committee of the Privy Council in the cases of *Martin v. Mackonochie* (L. Rep. 3 P. C. 409) and *Hebbert v. Purchas* (L. Rep. 4 P. C. 301), could not have done otherwise than as he did in treating the disobedience of the defendant as contumacious. The Judicial Committee having appellate jurisdiction over his own court, it would have been inconsistent with the deference always paid to the decisions of a court of appeal to refuse to act upon the precedents which had been deliberately set—especially in the case of *Hebbert v. Purchas*—by the appellate tribunal. We, on the other hand, are not bound by the decisions in question. On the contrary, we

are called upon as matter of judicial duty, on such an application as the present, to review these decisions and, if necessary, to overrule them. For it is the province of this court to restrain all tribunals not forming part of the High Court of Justice, or having appellate jurisdiction over it, within the limits of their respective jurisdictions; and among the tribunals so within its restraining authority are the Ecclesiastical Courts, of which the Judicial Committee of the Privy Council, in its character of a court of appeal from these courts, forms a part, and is, therefore, as such—however high its position and authority in other instances—subject to our controlling jurisdiction by way of prohibition. That this is so not only results from general principle, but is established by several decisions in which it was deliberately held that a prohibition would go to Commissioners of Review, the highest court of appeal in ecclesiastical matters, as well as to the High Court of Delegates. The first is the case of *Parlor v. Buller*, in the 39th of Elizabeth (Moore 460). This was a suit for defamation before the High Commissioners. The commissioners entertained the suit, but a prohibition was granted on the ground that the words were not of ecclesiastical cognisance. The next was the case of *Halliuell v. Jervoise* (Moore 462), a suit for tithes commenced in the Consistory Court. The defeated party appealed to the Court of Audience, where the sentence was affirmed; but on further appeal to the Court of Delegates, both sentences were reversed. Thereupon an appeal was preferred to commissioners appointed on a Commission of Review under the Great Seal, under the 1 Eliz. c. 1. On an application to the Queen's Bench for a prohibition, the question turned on the validity of this commission, which was disputed on the ground that such a commission was inconsistent with the statutes of the 24th and 25th Henry 8. But on a conference of all the judges, it was held that it was within the power of the Crown to issue such a commission, as the power of appeal on review, formerly exercised by the Pope, had become vested in the Crown, and had not been taken away by the statutes of Henry 8; but it was further agreed that if the commissioners proceeded otherwise than according to the law of England, a prohibition should go to restrain them. A later case is that of *Reese v. Denny* (Latch. 85), which was an administration suit commenced in the Episcopal Court of Norwich, and carried thence to the Court of Arches, where the sentence of the former court was affirmed. An appeal having been brought in the High Court of Delegates, an application was made for a prohibition, the question being raised whether the Court of Appeal had jurisdiction to grant administration, and whether the cause must not be remitted to the court below for that purpose. After argument a prohibition was granted. Next we have the remarkable case reported by Hobart under the name of *Hutton's case* (Hob. R., 15), the facts of which were as follows: Sir Timothy Hutton had presented one Rowth, as his clerk, to the Bishop of Chester for institution to a living, who, however, refused to institute him; whereupon Sir Timothy complained to the Archbishop of York, who sent a monition to the bishop to receive the clerk, or to appear before him and answer for not doing so, but the bishop did neither; whereupon the archbishop himself in-

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stituted the clerk, who was by his warrant inducted. In the meantime one King had been presented by the Crown, and he and the bishop brought a suit in the Court of Delegates to set aside the institution and induction of Rowth. Thereupon a prohibition was applied for in the Court of Common Pleas, on the ground that induction was a temporal act, triable by temporal law, and the church being full could only be avoided by a suit of *quare impedit* or the like, at the common law, and a prohibition to the Court of Delegates was granted. This case is the more striking from the fact mentioned by Hobart, that complaint of this act of the court was made to King James, who signified his pleasure that he would have the prohibition set aside and a consultation granted. "But," says the learned reporter, "we answered his Majesty by letter that we could not do it by the law; and in the end, after many passages to and fro, it was left, and so it stands." In another case reported by Hobart (Rep. p. 288), one Searle, "Parson of Heydon German," having been indicted and convicted of manslaughter, and having been allowed his clergy without being burnt on the hand owing to his being in orders, a suit had been instituted in the Consistory Court of London to deprive him of his benefice by reason of such conviction. The suit was carried by appeal to the Court of Delegates. But while the delegates were proceeding with it, Searle moved in the Common Pleas for a prohibition, which was granted. Hobart, who was at the time Chief Justice of that court, gives the reason, namely, that, though the conviction of a clerk for felony would suffice in the spiritual court to "build a sentence of deprivation," in the present case Searle, having been allowed the benefit of clergy, had in fact been pardoned, and under the 18 Eliz. c. 7, s. 2, which prohibited in such cases the delivery of the offender to the ordinary, as had been accustomed, could not be further corrected or called upon to make purgation in the spiritual court. In Bacon's Abridgment, tit. "Prohibition," it is stated as law that the delegates may be prohibited when they exceed their authority or proceed in matters not properly within their cognisance. These authorities abundantly establish that the High Court of Delegates was subject to the prohibiting control of this court. This being so, there can be no doubt that the same rule applies to the Judicial Committee, who have in all respects taken the place of the High Court of Delegates. Having, then, this jurisdiction, we are, in my opinion, bound to exercise it *ex debito justitiæ*, and not as mere matter of discretion. For though some difference of opinion has existed on this point, as appears from Bacon's Abridgment, "Prohibition B.," yet such I take to be the effect of the answer of all the judges of England in the *Articuli Cleri*, in the 3 Jac. I., as given by Coke in the Second Institute, p. 607, where they say that "prohibitions are not to be granted of favour but of justice;" and so it was held by all the judges of the King's Bench, in the case of *Woodward v. Bonithan* (1 Haym. 3), and in that view, whatever may have been said by individual judges since, I entirely concur. So that I cannot but think that to hold that the decisions in question are not to be reviewed, but are to be taken as conclusively binding upon us, would amount to little less than a dereliction of judicial

duty. I yield to no one in respect for the authority of the Judicial Committee of the Privy Council, or for the eminent members of it who took part in the decisions I have referred to, and I say unfeignedly that I feel all the responsibility and delicacy involved in the task of reviewing and overruling the decisions of such a tribunal—more especially as, in doing so, I have to deal with a branch of law with which, as a common law judge, I am, of course—though I have taken the utmost pains to make myself master of the authorities—less familiar; but I cannot allow these sentiments to lead me to shrink from a duty which, as a judge of this high court, I feel myself bound to discharge. And I have the less hesitation in dealing with the judgments in question from the circumstance that the Judicial Committee had not the advantage of hearing counsel on behalf of the parties against whom they decided, or of having their attention specially directed to the procedure of the Ecclesiastical Courts; and it has always been considered that a decision pronounced against the side which has not been heard carries with it but little authority as compared with a case in which the arguments on both sides have been presented to the court. I shall presently give my reasons for holding the proceeding in the former cases of *Martin v. Mackonochie* and *Hebbert v. Purchas* to have been unwarranted by law, and for the conclusion at which I have arrived, that both the monition by Sir R. Phillimore, as well as that by Lord Penzance, as also the sentence of suspension founded upon them, the execution of which we are now asked to prohibit, were *ultra vires* and bad in law. But I cannot give effect to the contention of the counsel for the applicant that a suspension *a beneficio* is beyond the competency of an ecclesiastical court, as being a dealing with the freehold. There can in this respect be no difference between suspension and deprivation; and, as we know, deprivation *a beneficio* for ecclesiastical delinquency has in many instances occurred; and that the subject-matter of this suit, the wilful departure from the ritual of the church, as established by the rubric, the canons, and the Acts of Uniformity, was within the jurisdiction of the court, cannot be disputed. It is true that the common law courts have from the earliest times rigorously interdicted the Ecclesiastical Courts from exercising jurisdiction where the freehold was concerned; and there can be no doubt that the assertion of the power to deprive an incumbent of his benefice, as well as of his clerical office, was originally a usurpation on the part of the ecclesiastical authority. But the common law courts declined to interfere on the simple ground that the sentence of deprivation of the office carried with it of necessity the deprivation of the benefice, inasmuch as the clerical office gave the title to the temporal interest, and with the loss of the former all right to the latter was, as a necessary consequence, at an end. Thus Godolphin says: "Deprivation is an ecclesiastical sentence, whereby an incumbent being legally discharged from officiating in his benefice with cure, the church *pro tempore* becomes void" (ch. 27, tit. "Deprivation.") Therefore where the right of presentation to a living had been obtained by a simoniacal contract, and the party after having been instituted and inducted had been deprived by the spiritual court, it being urged, on an application for a prohibition in the Queen's Bench, that it

was not competent to a spiritual court to meddle with the freehold, it was answered: "True it is they should not meddle to alter the freehold; but they meddled only with the manner of obtaining his preferment, which by consequence divested the freehold from him by the dissolution of his estate when his admission and institution are avoided." (*Baker v. Rogers*, Cro. Eliz. 798.) The sentence of deprivation a *beneficio* was, therefore, only the expression of what followed as a necessary effect from the sentence of deprivation *ab officio*, a sentence admittedly within the jurisdiction of ecclesiastical tribunals. Passing this by, and starting with the position as incontestable that a departure from the established ritual by a clerk in holy orders when officiating in public worship is an offence against the ecclesiastical law, which if made the subject of a suit properly instituted and conducted may be punished by suspension, I come to what is the real question—namely, the efficacy of such a monition as has been issued in the present case—where the monition has been appended to a definitive sentence in a penal suit—as founding a sentence of suspension or deprivation on a summary proceeding for contumacy; which, again, as the two learned judges of the Arches Court have done no more than follow the precedents set by the Judicial Committee, involves the necessity of reviewing the decisions of the latter tribunal. Now I must begin by observing that, prior to the decision of the Judicial Committee in the case of *Martin v. Mackonochie*, no instance was brought to our attention in which this summary jurisdiction, founded on a monition appended to a sentence in a penal suit, had been exercised. In *Hebbert v. Purchas* (L. Rep. 4 P. C. 301) the Judicial Committee caused a search for precedents to be made, but none could be found. Three or four cases were brought forward; but, as was admitted in the judgment, they totally failed to satisfy the purpose for which they were adduced, and it may safely be asserted that no such instance exists. Nor, in the numerous works on ecclesiastical law and the jurisdiction and procedure of the Ecclesiastical Courts, so far as I have been able to ascertain, is any mention of such a jurisdiction or procedure to be found. I have gone carefully through, I believe, all the writers—certainly all the writers of authority—who have written on the subject of ecclesiastical jurisdiction and procedure since the Reformation, and I have not only found no authority for the exercise of such a power, but not even a trace of it. Monition, indeed, as is well known, is a frequent incident in ecclesiastical procedure. To issue a monition and then to pronounce contumacious a party who set the process of an ecclesiastical court at defiance, or refused to obey its lawful order, and then to call in aid the statutory remedy, was, after excommunication, its earlier resource, had been done away with, the only means, except so far as modern legislation had come to its assistance, by which an ecclesiastical court could enforce its authority. But there is no mention made by former writers of a monition being superadded to a penal sentence for an ecclesiastical offence, and being thus made the means of exercising a summary jurisdiction over the offender in respect of a future offence. The first reference I find to such a jurisdiction is in Sir Robert Phillimore's work on Ecclesiastical Law, published sub-

sequently to the two decisions of the Judicial Committee. Treating of admonition, the learned author says: "Disobedience to this admonition assumes the grave character of contempt or contumacy, and is visited by a graver punishment:" (vol. 2, p. 1088.) And in another place he says: "It is to be observed that when an admonition has been duly served after a trial upon the admonished person, disobedience to it entails the penalties incident to the contempt of the order of a lawful court:" (vol. 2, p. 1367.) But, for neither of these positions does the writer cite any authority; and in so laying down the law I presume he is speaking on the strength of the two decisions I have referred to; and I am the more led to think so because I find no reference to any such position in his edition of Burn's Ecclesiastical Law; and because when, in the later part of his work, he is dealing with the subject of suspension, and has occasion to refer to the cases of Mackonochie and Purchas, he uses this language: "In two recent cases the Judicial Committee of the Privy Council thought themselves warranted by the law in inflicting the punishment of suspension for disobedience of their orders;" to which he adds, "But for these decisions, it would have seemed that these contempts of court would be punished, as contempts of all courts are, by committing, or in the case of Ecclesiastical Courts, signifying, the offender:" (vol. 2, p. 1377.) It is pretty clear to my mind from this significant language that these decisions must have struck the very learned author as novel, and as going a good deal further than he had been prepared to expect. To get at the bottom of this question, as the foundation of any sound and satisfactory opinion, it becomes necessary to look a little more closely into the authority and procedure of these courts; and it is all-important to attend to certain distinctions which have frequently been lost sight of, and from inattention to which much confusion on this subject appears to me to have arisen. Ecclesiastical jurisdiction is divided into two main branches—civil and penal. Principles and rules of procedure applicable to the one will frequently be found inapplicable to the other. We are here dealing exclusively with the penal jurisdiction, except so far as the procedure in civil causes may throw light upon the subject of this inquiry. The suit in which the office of the judge is promoted against the defendant is for an offence against the ecclesiastical law. Now, the judicial authority capable of being exercised in respect of such offences was threefold—first by the bishop at his periodical visitations; secondly, by the bishop or his judge in the Episcopal Court, *ex mero officio*, if the bishop or his judge thought fit so to proceed; or, thirdly, on the office of the judge voluntarily promoted by a third party by the permission of the bishop. But between the exercise of these different forms of judicial authority an essential difference existed in respect of procedure; for, by the practice of the ecclesiastical tribunals, all causes are divided into summary and plenary. Where the jurisdiction is summary, all formality may be dispensed with. Where it is plenary, the formalities of procedure must be followed, and cannot be dispensed with. "Summary causes," says Conset (Practice, sects. 2, 3), distinguishing them from plenary, "are such as respect not the solemn and ordinary way of proceeding in judgment, but require a summary and short proceeding

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'*absque strepitu judicii et de simplici et plano.*'" Such, it is agreed, may be the proceedings at an episcopal visitation, which may be conducted according to Ayliffe (Parergon, tit. "Visitation," p. 516), *sine figura judicii*, all that is strictly required being that the party who is to be visited and punished for any offence or omission shall have an opportunity of being heard. So Comyns says (Dig. Visitor C.), "the proceedings are to be *summariè, simpliciter, et de plano, sine strepitu aut figurâ judicii.*" It will be important to bear this in mind further on. On the other hand, causes in which the office of the judge was promoted by a private individual were always plenary, and, as such, required to be conducted according to regular form. Oughton enumerates among plenary causes, "*Causæ omnes correctionum ex officio voluntariè promotæ*" (Ordo Judiciorum, tit. vii., 12). "*Negotium ex officio mero,*" he says, "*est causa summaria, ex officio voluntariè promotæ, plenaria*" (Ibid. n. 2). "*Notandum est,*" he says again, "*quod omnes causæ correctionem ex mero judicis officio institutæ sunt summariæ; saltem in iis solet summariè procedi, et ita est procedendum. Secus de officio voluntariè promotæ*" (tit. 144, s. 9). Again: "*Causa correctionis ex officio mero est causa summaria; causa vero correctionis ex officio voluntariè promotæ est causa plenaria*" (tit. 150, n. 2). For which reason he says, "*Eo modo procedendum est ut in cæteris causis plenariis*" (tit. 150, s. 3). Where the cause was plenary, it was essential that all the formalities incident to a plenary cause should be observed. "Plenary causes," says Conset (Practice, part 1, sect. 2), "are those which require a solemn order in the proceedings." There must," he says, "be a formal citation to appear in the cause; the style of the court must be observed, with the names of the parties. A time and place must be named for appearing. Articles must next be exhibited. Then comes the answer of the defendant; then the *contestatio litis*; and, if required, the oath of the defendant; then the proofs, with the opportunity for cross-examination; then the hearing, and finally judgment." Assuredly there could be no relaxation as to these requirements in a penal suit. "In all causes of deprivation," says Ayliffe, followed herein by the other text writers, "where a person is in actual possession of an ecclesiastical benefice, these things must concur—viz., first, the person must be cited or admonished to appear; secondly, a charge must be given against him by way of libel or articles to which he is to give an answer; thirdly, a competent time must be assigned for proofs and interrogatories; fourthly, the person accused shall have the liberty of counsel to defend his cause, to except against witnesses, and to bring legal proof against them; and, fifthly, there must be a solemn sentence read by the bishop after hearing the merits of the cause or pleadings on both sides; and these are the fundamentals of all judicial proceedings in the Ecclesiastical Courts in order to a deprivation; and if these things be not observed the party has a just cause of appeal, and may have a remedy in the Superior Court:" (Parergon, p. 208.) Speaking of the articles necessary in such a suit, Sir Robert Phillimore (Eccles. Law, p. 1296) says, "The court cannot go beyond the offence charged, nor the articles beyond the citation." And if these formalities are essential to a proceeding as founding a sentence of deprivation, so must they

also be necessary to found a sentence of suspension, which, on all hands, the authorities agree in treating as a deprivation *pro tempore*. Such being the former law, the Church Discipline Act (the 3 & 4 Vict. c. 86) has intervened, prescribing the mode in which proceedings against persons in holy orders for offences against the ecclesiastical law shall be initiated, but leaving the former procedure of these courts unaltered (see sect. 13). What was before a plenary cause remains so still, and in it all the formalities incidental to a plenary suit must be observed. That that procedure has not been followed in the present instance is beyond controversy. The proceedings have been altogether of a summary character. Let us next consider in what cases monitions have been used either as incidental to ecclesiastical procedure, or as matter of ecclesiastical censure and punishment in the way of definitive sentence: for in one or other of these forms alone do monitions occur as incidental to such procedure; after which we shall have to consider in what way contumacious disobedience to such monitions has been dealt with according to established law and practice. As incidental to procedure, monitions were frequently used, whether in a civil or in a penal suit, in order to compel the party proceeded against to do something necessary to the progress of the suit—as to appear; to answer to the articles; to appear to be examined on oath, or the like. Disobedience to such a monition became contumacy, and was treated as contempt of court. As incidental to a definitive sentence, where the decree of the court was not completed by the act of the court itself, but required some act to be done by the party, a monition to do the thing decreed to be done was issued; and here again disobedience rendered the party contumacious. Thus, as Sir Robert Phillimore observes (vol. 2, p. 1259), there might be a monition for alimony, or to churchwardens to hold a vestry, or to a clergyman to reside, or the like; so also to pay the costs if decreed. In short, a monition might be issued, to do anything which it was competent to the court to order the party against whom the decree was directed to do, and if disobeyed rendered the party contumacious. But then how was such contumacy to be dealt with? In one way and in one way only. It is familiar knowledge that the only coercive process or punishment for contumacy possessed by the Ecclesiastical Courts was, prior to 53 Geo. 3, c. 127, excommunication, which, when "signified" (as it was termed) to the Court of Chancery, was followed by the writ *de excommunicato capiendo*, confirmed and regulated by the statute of the 5 Eliz. c. 23, under which the party was committed to prison till he made his submission and rendered obedience. For this process, by the Act of 53 Geo. 3, was substituted the writ *de contumace capiendo*, under which a party decreed to be contumacious might be imprisoned till submission and obedience; to which was added by 2 & 3 Will. 4, c. 93, power to sequester the estates of contumacious persons privileged from arrest, and who were not, therefore, subject to the process in question. Thus the Ecclesiastical Court Commissioners say: "The execution of the sentence, in case there be no appeal interposed, is either completed by the court itself, as by granting probate or administration, or signing a sentence of separation; or remains to be completed by the act of the party,

as by exhibiting an inventory and an account, by payment of the tithes sued for, and other similar matters, in which case execution is enforced by the compulsory process of contumacy, *significavit*, and attachment." The law is fully stated in Dr. Stephen's very learned and useful treatise on the Laws relating to the Clergy under the title "Excommunication." "By the ancient practice of the Ecclesiastical Courts," he writes, "it was only by means of an excommunication that they were able to enforce their sentences in any case whatever. So here the common law stepped in to their assistance; for in case of the refusal of the party to submit to his sentence, and being thereupon excommunicated as for a contempt, a writ *de excommunicato capiendo* was issued, under which he was to be taken and committed to the county gaol till he was reconciled to the church, and such reconciliation certified by the bishop. But now, by statute 53 Geo. 3, c. 127, s. 2, excommunication in all cases of contempt is discontinued; and in lieu thereof, where a lawful citation or sentence has not been obeyed, the judge shall have power, after a certain period, to pronounce such person contumacious and in contempt, and to signify the same to the Court of Chancery. Whereupon a writ *de contumace capiendo* shall issue from that court, which shall have the same force and effect as formerly belonged in case of contempt to a writ *de excommunicato capiendo*." Thus, in *R. v. Baines* (12 A. & E. 210), it was held that in a civil suit, judgment being given that a party shall do a given thing—as, e.g., pay a given sum for church rate—a monition may issue, and a writ *de contumace capiendo* may follow upon it, where contumacy occurs, either as incidental to procedure or by disobedience to a lawful order of the court. This being so, was there anything to alter the process in the case of a clerk in orders? Could suspension be resorted to in such a case as a means of overcoming the contumacy and enforcing obedience? I apprehend assuredly not. The process is spoken of as being, and I see no reason whatever to doubt was, the same whether directed against a layman or a clerk in orders—the clerk in orders not being in this respect in a less favourable position, except when subject to the visitatorial authority of the bishop. Suspension is, not mentioned by the ecclesiastical authorities as a proceeding to which a clerk is liable by judicial sentence as a means of coercion, as distinguished from punishment, as will be seen on referring to the title "Suspension," in the standard works on Ecclesiastical Law. "The mode of enforcing all process," say the Ecclesiastical Commissioners, "in case of disobedience, is by pronouncing the party cited to be contumacious; and if the disobedience continues a *significavit* issues, upon which an attachment from Chancery is obtained to imprison the party till he obeys." The writers on Ecclesiastical Law are agreed in saying that, except where the powers of the courts have been enlarged by statute, as in the case of simony, non-residence, and the like, the only means of enforcing the decrees of the Ecclesiastical Courts, whether interlocutory or definitive, and whether in a civil or criminal suit, was by the writ *de contumace capiendo*. And here I have to observe that in the instances in which a definite decree thus requires for its completion an act to be done by the party,

and a monition to do it issues, the suit in which this occurs is, with one or two exceptions, in the nature of a civil proceeding, or has reference to some obligation or duty which it is the object of the suit to enforce, and the performance of which it is competent to the court to enjoin. Penance, to which I shall presently refer, affords such an exception. Non-residence would appear to lie on the confines of the civil and penal jurisdictions. If the suit is brought simply to enforce residence, monition would be proper, and would carry with it the statutory consequences of contumacy, and no other. If non-residence is made the subject of a suit with a view to deprivation or suspension, the suit becomes a plenary one and cannot be disposed of summarily as a case of contumacy. I find no instance of such a proceeding, by way of anticipation, in a suit *in panam* in respect of an offence committed against the ecclesiastical law. Nor could it well be otherwise. No one has a right to presume, where an offence has been committed, that the offender, having undergone his punishment, will again offend; still less could a court of justice, unless authorised by established practice or by statute, on such an assumption arrogate to itself the power, if the offence should be repeated, to withdraw it from the ordinary course and procedure of law, and to make it the subject of summary procedure as amounting to contumacy. The case is still stronger when looked at as one in which monition is resorted to, not as a means of furthering the progress of a suit—for which purpose it would be equally available in a penal as in a civil suit—or as a means of compelling the performance of a duty under a decree in a civil suit—but as a definitive sentence in a penal suit. Punishments, or, as the civilians term them, "censures"—"censuræ sive coerciones ecclesiasticæ"—according to Sir Robert Phillimore, following herein the writers who have preceded him, are, as regards those to which both clergy and laity are subject in common, as follows: 1. Admonition, otherwise called monition; 2. Penance; 3. Suspension *ab ingressu ecclesiæ*; 4. Excommunication, with the spiritual and temporal consequences incident to it. Those to which the clergy alone are subject are: 1. Suspension; 2. Sequestration; 3. Deprivation; and 4. Degradation. "Of these," says Sir Robert Phillimore, "admonition or monition is the first and lightest form of ecclesiastical censure, whether to clergymen or laymen." It is obvious that here "monition" is spoken of not as the foundation of any ulterior consequences, but as a form, however mild, of punishment—the open and public censure or rebuke of the judge for ecclesiastical misconduct—generally accompanied by the party thus censured being condemned in costs—and to be remembered, doubtless, as matter of aggravation should a repetition of the offence occur—but not capable of being used as the foundation of any future proceeding of a summary character on the score of contumacy in case of such repetition. And this for two reasons—first, that any repetition of the offence would in itself constitute a substantive and distinct offence; second, that constituting a substantive offence, the offender, where the suit was instituted by a prosecutor promoting the office of the judge, could only be proceeded against in a plenary suit—that is to say, a suit in which a formal citation must be served

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articles exhibited, and all formalities strictly observed—a summary proceeding in a penal suit, otherwise than as matter of process, being altogether unknown to and contrary to the spirit of ecclesiastical procedure. Nor has the Church Discipline Act abated anything of the formal requirements of the Ecclesiastical Courts in a penal suit. Sect. 13 leaves the procedure precisely as it was before. It introduces no abatement of its rigour in respect of the formalities previously required in a penal suit. And here an observation presents itself, which it will be important to bear in mind. It is nowhere said, nor does it appear to have occurred to any of the authorities on ecclesiastical law, that of these different forms of ecclesiastical censure or punishment, from monition to excommunication, a second can be superadded to a first; still less than when once a definitive sentence has been pronounced, and a specific punishment awarded, the judge is not *functus officio* and the judicial authority exhausted, as is the case on the trial of an indictment in the court of common law. I am strongly disposed to think that monition, as part of a definitive sentence, with the view of treating disobedience as contumacy, has been adopted in these recent instances from its use in the procedure or civil jurisdiction of the courts, the distinction between civil and penal jurisdiction not having always been kept sufficiently in view. The subject of monition, as also that of contempt or contumacy, is fully discussed by the civilians. Nowhere is it said that a monition can be superadded and appended to a definitive sentence in a penal suit, so as to enable a subsequent offence to be treated summarily as contumacious. Suspension is, as might be expected, amply dealt with. But nowhere is it said that suspension ever has been or can be inflicted as a punishment for contumacy in disobeying a monition in a penal suit in which the office of the judge has been promoted by a third party. It is possible that the notion that suspension might follow on a monition may have had its origin in the doctrine of the early canonists, that when in the exercise of the visitatorial power the bishop inquires summarily into clerical offences with a view to deprivation or suspension, a monition must precede the sentence: (see Gibson Codex, p. 1046.) Again, whatever the penalty to which a party pronounced contumacious was liable, such penalty was not treated in the way of punishment, but as a means of overcoming the contumacy and enforcing obedience, and was only imposed *quousque*. It ceased on submission and obedience. The party in contempt could not be summarily condemned to punishment for a definite period independently of future submission. A striking illustration of the position that even in a penal, as well as in a civil suit, the only means of enforcing their decrees which the Ecclesiastical Courts possessed, except where their powers had been enlarged by statute, was derived from the statutes I have been referring to, is to be found in an instance in which, in a penal suit, the decree was not completed by the act of the court, but something was required to be done by the party against whom the decree was directed in order to carry it out—namely, in the instance of penance, which, as we have seen, is a form of ecclesiastical punishment, and which, though now obsolete, was formerly much in use as a punishment for certain offences. If the party

enjoined to do penance refused to comply, the only mode of enforcing obedience mentioned in the books, whether against layman or churchman, was by excommunication, or, in later times, by the writ *de contumacia capiendo*. It is nowhere suggested that suspension or deprivation might be applied in such a case where the offender was a clerk in orders. Before I quit this portion of the subject I have also to call attention to a very important distinction taken in the Act of the 53 Geo. 3, in civil suits and as a means of enforcing interlocutory decrees, between excommunication as incident to a civil suit and excommunication as a form of punishment in a penal suit. While the Act supercedes the former, substituting for it the writ *de contumacia capiendo*, it expressly preserves it “on definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences, pronounced as spiritual censures for offences of ecclesiastical cognisance,” limiting, however, its operation in such cases to a period of six months—thus affording a statutory recognition of the difference I have been adverting to between contumacy in the course of a suit, and any act amounting to an offence under the ecclesiastical law. Thus far I have been dealing with the law as administered in a plenary penal suit in the Episcopal Courts. But where the bishop dealt with offences of the clergy of his diocese—in which would be comprehended simony, non-residence, non-performance, or irregular performance, of divine service, heresy, false doctrine, profaneness, immorality, drunkenness, and the like—in his office of a visitor at a visitation, in what has been termed his *forum domesticum*, or where a proceeding was instituted *ex mero officio*, the case was altogether different. There the formalities required in a regular suit were not deemed necessary. There the bishop in the one case, or his judge in the other, might proceed summarily, subject, however, to the condition insisted on by the canonists, that, where the offence was one of omission, a monition should precede deprivation or suspension. Not, however, that, in a matter which amounted to an offence against the law or discipline of the church, disobedience to the monition created the offence for which deprivation or suspension might afterwards be decreed. The definitive sentence was founded, not on the disobedience, but on the offence itself. The purpose and effect of the monition was practically to give a *locus penitentie* to the offender or party in default. Thus stood the law as administered by the Ecclesiastical Courts till the time when, within the last few years, the jurisdiction now exercised was for the first time assumed. I had almost said—I hope it will be understood not using the term in any offensive sense—usurped—not, indeed, by the judges of the ordinary Ecclesiastical Courts, but by judges of whom, however great and eminent, I hope I may be pardoned for saying that they may be supposed to be less familiar with the administration of ecclesiastical law, namely, by the Judicial Committee of the Privy Council sitting on appeal. In the year 1863, in a case of *Martin v. Mackonochie* (L. Rep. 3 P. C. 409), the parties being the same as are before us in the present proceedings, a suit had been instituted in the Consistory Court of London against the defendant, a clerk in holy orders, and perpetual curate of

the parish of St. Albans, Holborn, for offences against the ecclesiastical law in the manner of administering the Holy Communion, in the use of incense, the undue elevation of the paten and cup, as also the practice of excessive kneeling and prostration before the consecrated elements during the prayer of consecration, the mixing of water with the wine, and the use of lighted candles during the celebration of the Communion. The suit having been transferred by letters of request to the Court of Arches, the learned judge of that court decided that the defendant had offended in respect of the use of incense, the elevation of the paten and cup, and in mixing water with the wine used in the administration of the Communion, and admonished him not to repeat these practices; but he declined or omitted to pronounce that the defendant had offended by the alleged kneeling and prostration, or by the use of lighted candles. The promoter having appealed to the Judicial Committee of the Privy Council against this judgment in respect of the two last-mentioned particulars, the Judicial Committee held that the respondent, the defendant in the original suit, had offended against the law ecclesiastical, within the meaning of the Uniformity Acts, in the particulars relating to the kneeling and prostrating himself before the consecrated elements during the prayer of consecration, and in the using of lighted candles during the celebration of the Communion; and reported that the respondent, in addition to the admonition administered in the court below, should be admonished to abstain from the practices pronounced by them to be unlawful. An Order in Council to that effect was accordingly made, and a monition under the seal of the court was in due course issued and served on the respondent. This judgment having been pronounced at the close of 1868, two years afterwards a petition was presented to the Judicial Committee praying them to enforce obedience to the monition, on affidavits showing that the defendant still persisted in the practices against which he had been admonished. The defendant, the respondent in the cause, not appearing either by counsel or in person, their Lordships, on the application of the appellant's counsel, made an order that the respondent and the witnesses who had made affidavits in his favour should appear on a given day to be cross-examined, which was accordingly done. The evidence having been taken, their Lordships decided that the respondent had been guilty of disobedience to the monition, and sentenced him to be suspended *ab officio* for three months: (L. Rep. 3 P. C. 409.) It is to be observed that, the respondent neither appearing in person nor being represented by counsel, no question was raised as to the jurisdiction thus invoked and exercised. Two years later the case of *Hebbert v. Purchas* (L. Rep. 3 P. C. 105), a case in many respects similar to the foregoing, came before the Judicial Committee of the Privy Council, on an appeal from the decision of the Court of Arches, so far as the judgment there had been favourable to the defendant, in a suit in which he, being a clergyman in holy orders, had been charged with various breaches of ecclesiastical law in the celebration of the Communion, among other things as regarded the vestments worn by him during its performance, the position assumed by him during the prayer of consecration, as also in the use of

wafer bread, and of an admixture of water with the sacramental wine. The judge of the Court of Arches having declined to pronounce against the defendant and to admonish him in respect of these particulars, the promoter appealed to the Judicial Committee, who, after argument, decided against the respondent in respect of these charges, and advised, as in the former case, that a monition should be issued admonishing him to abstain from such practices in future; and an Order in Council having been made accordingly, a monition was issued and served on the respondent. Later in the year an application was made to the Judicial Committee, by a motion founded on affidavits showing a continued use of the practices against which the defendant had been thus admonished, for a sentence of deprivation against him for his contumacy and contempt: (L. Rep. 3 P. C. 605.) In this case, notwithstanding the precedent set in the case of *Martin v. Mackmochie*, their Lordships appear to have had some misgiving as to their power to pass sentence of deprivation or suspension for contumacy on motion, and desired to have further information regarding the exercise of such a power by the Court of Delegates, to whose powers they had succeeded under the Acts of 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41; and they accordingly directed the motion to stand over for that purpose. Their Lordships having on a subsequent occasion been referred by counsel to certain alleged precedents, the Lord Chancellor Hatherley pronounced a judgment, as to which I can only say I think there must be some error in the report, as his Lordship, having first observed that "the researches of counsel have resulted in no such precedent being found—as, indeed, their Lordships supposed would probably be the case;" and, having added that the court was of opinion that it "could not proceed to enforce compliance with the order which had been disobeyed by any summary process for contempt through the medium of a motion," is notwithstanding made to say: "On the other hand, their Lordships are quite satisfied that there exists in this tribunal, as there did exist in the High Court of Delegates—all the powers of which have been transferred to this committee—a power of suspension, not only *ab officio*, but a *beneficio* also, as a summary punishment for contumacy;" having said which, his Lordship proceeds to pass sentence of suspension for a year in respect of the contumacy. Yet the only proceeding then pending before their Lordships, and on which this summary jurisdiction was exercised, was a summary application on motion. The suit, out of which the appeal had sprung which gave jurisdiction to the Judicial Committee over the defendant, had terminated in the suspension for six weeks; and the two-fold monition, which together formed the sentence—monition being, as we have seen, a form of ecclesiastical censure; and assuming even that disobedience to a monition of this nature would amount to a substantive offence against ecclesiastical law, which might be made the subject of a substantive charge in a fresh suit, no such charge was before the Judicial Committee: the only proceeding before it was an application to deal with a further and substantive offence summarily on motion. I am unable—if I may be forgiven for saying so—to follow the reasoning in the judgment in question. Precedent and authority being altogether wanting, we are left without any ground

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being assigned for the assertion that the Court of Delegates had before possessed, and therefore the Judicial Committee, as their successors, now possess, the power of suspending a clergyman as a summary punishment for contumacy. So far as I am aware, no instance of the exercise of this power in a penal suit, prior to these judgments of the Judicial Committee, is anywhere to be found. Assuming even that the issuing of the monition was within the competency of the court—which, however, I cannot admit—and that the defendant in disobeying it had been guilty of contumacy, the recognised penalty of contumacy was not suspension, but, as I have shown, imprisonment under 53 Geo. 3. Moreover, it is not a question whether the Court of Delegates possessed such a power, but whether the courts of the first instance, the Consistory Court, and the Court of Arches, possessed it; for, the authority and power of a court of appeal, however high its position, can be no greater, except as to correcting the judgment of the court below, than those of the court appealed from. It can annul the judgment or can affirm it, or in some cases may reform it; but it can pronounce only the judgment which the court below could and should have given. What required to be established, therefore, was, that the episcopal or archiepiscopal courts possessed this power of suspending summarily for disobedience to a monition in respect of an offence against the ecclesiastical law. But for this neither authority nor precedent is to be found; nor, I venture to think, has or can any sufficient ground be given for asserting it, while there is, as I shall presently show, very sufficient ground for maintaining the contrary. The cases referred to in *Hebbert v. Purchas* were again brought forward on the argument in the present case, but they fail to furnish any precedent or authority in support of the jurisdiction now in question. The case principally relied on is that of *Harrison v. The Archbishop of Dublin*, which in the first instance came before the courts on a writ of prohibition, and eventually found its way to the House of Lords: (2 Bro. P.C. 199.) Harrison, being the rector of St. John's, Dublin, had altogether omitted to perform divine service in the parish church. Summoned by the archbishop to attend at a visitation to answer for not performing divine service, he declined to appear, upon which he was suspended by the archbishop for contumacy. Hereupon he applied to the Court of Common Pleas in Ireland for a writ of prohibition; and, having been put to declare in prohibition, set forth that the rectory of St. John's had formerly been attached to the priory of the Holy Trinity of Dublin; and that when that priory had been suppressed by King Henry VIII. and the deanery of Dublin established in its place, the rectory had by the King's gift been attached to one of the prebends of the cathedral; that, having been appointed a prebendary, he had acquired the rectory by right of his prebend; and that, so long as he continued to be a prebendary, the rectory being inseparable from the prebend, he could not be deprived of the rectory unless first deprived of his prebend; that as prebendary he was not subject to the visitation of the archbishop, and therefore was not subject to it in respect of the rectory, nor subject to be deprived of or suspended from the rectory so long as he remained prebendary of the cathedral. This contention was overruled by the

Court of Common Pleas in Ireland, as also on appeal by the Court of Queen's Bench in England, and lastly by the House of Lords. But it is to be observed that the sole question raised was as to whether under the special circumstances the living was subject to the visitatorial power of the archbishop. No question was raised as to the manner in which that power, assuming it to exist, had been exercised. The decision does not therefore in any way affect the present question. In a subsequent stage, the matter assumed a different form. Some years later, Harrison, who persisted in not performing service, was admonished by the archbishop, at a visitation, to extract, within a month of that time, a licence to serve the cure of souls, and to preach in the parish church of St. John's. Disobeying the monition, he was pronounced contumacious, and sentenced to be suspended. He appealed to the Court of Delegates, taking, in the first place, the same ground as before, as to the rectory of St. John's not being subject to the archbishop's visitation; but, in addition thereto, insisting that the proceeding had been irregular and void, because no articles had been exhibited against him or any proofs brought in. The delegates rejected the appeal, and rightly. The first point had been settled by the decision of the House of Lords in the previous case; and, as regarded the second, it was established law that proceedings instituted by the ordinary *ex mero officio*, and a *fortiori* proceedings at a visitation, might be dealt with summarily. Articles and proofs therefore in a matter within the personal knowledge of the bishop, and within his immediate jurisdiction—as non-performance of divine service undoubtedly was—would be superfluous and unnecessary, and could not be insisted on. Here, again, no question was raised, nor was any decision pronounced, as to the power of the archbishop to suspend, whether before or after monition; the only questions involved being whether the rectory was within his jurisdiction, and whether the proceedings were not void for irregularity. This case, and those which follow it, were cited from a series of cases extracted by Mr. Rothery, the Registrar of the Court of Arches, from the records of the Court of Delegates, and printed by order of the House of Commons in 1868 (No. 135). But it is to be observed that in these records neither the arguments of counsel nor the grounds of the decisions appear; and it is therefore impossible to say with certainty on what points these decisions turned. They are therefore of but little authority. The case of *Higgins v. The Archbishop of Dublin* (Ib., No. 136) was precisely the same as the foregoing, except that the appellant appeared before the archbishop, and therefore was not declared contumacious for not appearing. Having, however, been ordered to procure a licence, as Harrison had been, he was suspended for contumacy in not doing so, and the sentence was upheld on appeal. The same observations apply to this case as to the foregoing. That a complaint of non-residence or non-performance of public worship is within the visitatorial authority of the ordinary seems clear. "To whom," asks Sir Robert Phillimore, in the case of *The Bishop of Winchester v. Rugg*, L. Rep. 2 A. & E. 252 (a case of non-performance of divine service), "are the parishioners to look for redress for this wrong done to them? How are they to obtain the per-

formance of divine service in their church? Surely by an appeal to the authority of their bishop. He has the *cura curarum animarum* within his diocese. It is his bounden duty to enforce in every church in his diocese the performance of the services prescribed in the Book of Common Prayer. I see no reason to doubt," the learned author goes on to say, "the general authority of the ordinary in matters of this kind, recognised by the universal ecclesiastical law as inherent in the nature of his office and necessary for the performance of the duties which are cast upon him, is properly applied to a case of this kind." Another case referred to was that of *Boughton v. The Archbishop of York* (No. 134), which again was an appeal from the exercise of episcopal authority. Boughton, a vicar choral of the cathedral of York, having absented himself from the discharge of his duties, the dean and chapter appointed a substitute, and sequestered the revenue of the office for his use; upon which Boughton gave notice to the receiver not to pay the substitute. For this the dean and chapter called upon him to make a suitable apology, and on his refusal suspended him until he should comply. On appeal to the archbishop the sentence of the dean and chapter was confirmed. A further appeal to the Court of Delegates was attended by a like result. This, again, was an instance of visitatorial authority summarily exercised *in foro domestico*. The cases, therefore, which have arisen on the exercise of visitatorial jurisdiction are beside the present question, when we are dealing with a jurisdiction in which the formalities required by strict law have to be complied with. The case of Thomas Jones (No. 63), rector of Llandyrnook, in the county of Denbigh, differs somewhat from the foregoing, inasmuch as the suit against him, for not reading the prayers in the accustomed place, had been instituted not by the bishop *ex mero officio*, but on the presentment of the churchwardens in the consistory court of the diocese. Having been monished to read the prayers in the accustomed place, the defendant had peremptorily refused to obey the monition. For this the bishop ordered him to show cause why he should not be suspended *ab officio*. Not appearing to show cause he was suspended. On appeal the sentence was upheld by the Court of Arches, and afterwards by the Court of Delegates. But here the churchwardens were, beyond all question, the proper persons to present in respect of any irregularities in the performance of divine service, as fully appears from the statement of the law, as found under the title "Churchwardens" in Burns' Ecclesiastical Law, or in Dr. Stephen's treatise on the Laws relating to the Clergy. The proceedings may therefore have been considered as instituted *ex mero officio*, and consequently as not subject to the necessity of being strictly formal; nor does it appear that any objection was taken to the exercise of the episcopal jurisdiction in a summary form. These cases are, for the reasons I have already given, inapplicable to the question before us. I entirely concur with the Judicial Committee in thinking that none of them establish a precedent for the exercise of the summary jurisdiction in dispute. That neither precedent nor authority is to be found for the existence of this jurisdiction prior to its recent exercise is, I cannot help thinking, a very strong argument against it. Nor do I feel the force of the observation that no

instance has been found of its exercise being held to be unlawful. That no attempt has ever been made to exercise it will readily account for the fact that no instance of its rejection is to be found. I cannot help thinking that it is incumbent on those who assert and invoke a jurisdiction so unusual to give proof of its existence. But it is not only that no authority or precedent can be found to support the summary jurisdiction thus exercised; a still more formidable objection is, first, that such a jurisdiction cannot in the nature of things properly exist, and, secondly, that its exercise would be contrary to fundamental principles. As regards the first point, it is clear that the Court of Arches possesses no primary jurisdiction over offences committed within any other diocese than that of Canterbury, except so far as such jurisdiction is conferred by the letters of request from the bishop of the diocese. But the letters of request are necessarily confined to the specific offence which is the subject-matter of the suit transferred, and, as I have already stated on the authority of Sir Robert Phillimore, the suit so transferred relates to the offence expressly set forth in the articles which form the subject of the complaint, and to that alone. Being confined to the specific charge thus articulated, the letters of request, as it seems to me, do not and cannot confer jurisdiction in respect of any other offence committed beyond the sphere of the metropolitan jurisdiction, and any further offence so committed remains in that of the diocesan. It may, perhaps, be said that the bishop, having transferred the cause to the Court of Arches, transfers with it the power to issue such a monition, and to punish for contumacy in disobeying it. But this assumes that the bishop's commissary would himself have that power in the diocesan court, which remains to be proved, and which, as far as I can see my way, is not only not proved, but incapable of proof. *A fortiori* is it to be proved that the diocesan can thus, by transferring a specific cause, confer, as it were, by anticipation, on the metropolitan court jurisdiction over offences not yet committed, and which are therefore not as yet within his own—a proposition which to my mind I must say involves a legal absurdity. And what if the second offence should be committed within the limits of a different diocese? Would the transfer of the cause by the bishop of one diocese give the court power to treat as contumacy an offence committed in another, the bishop of which might possibly have refused his sanction to a prosecution on account of the second, and thus enable one bishop to invade the province of another? Finally, I ask by what authority can an ecclesiastical court—whatever may be the stage of the proceeding—by reason of a suit having been instituted in reference to a specific offence, assume to itself, without statutory authority, a power to keep the party, for all time to come, in a state of surveillance, and as subject to a summary jurisdiction hitherto unknown to the ecclesiastical law? To what extent is this jurisdiction to be carried? Over what area of episcopal jurisdiction is it to reach? To what limit in point of time is it to endure?—considerations which would be important if the matter were made the subject of legislation, but which are left wholly at large in the exercise of this novel authority. I fail altogether to see how it can be competent to a bishop to confer on

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the Court of Arches, by way of anticipation, jurisdiction over offences to be committed in the future. Be this as it may, I am of opinion that letters of request relating to a specific charge carry no such jurisdiction with them with reference to a future offence. That the exercise of such jurisdiction would, in more than one respect, be inconsistent with general principles of penal jurisprudence will, I think, readily appear. In the first place, the difference between plenary and summary jurisdiction in the matter of criminal procedure is recognised and established in every system of penal jurisprudence, including, beyond all question, the law ecclesiastical; and no court can, without legislative authority, take upon itself, *ex proprio motu*, to substitute the one for the other. Yet that is what has been done here. Every departure from the established ritual in a member of the church having the cure of souls is an offence against ecclesiastical law, and constitutes in itself a distinct and substantive offence, and not the less so because the offender may already have been guilty of the like offence. It is therefore obvious that a repetition of a first offence may be so treated. What reason can be given why it must not be so treated? But if it were so treated, the prosecutor promoting the office of the judge would in such a case have to go through all the formalities of procedure required in a plenary cause; and, as I have shown, a suit so instituted in respect of an ecclesiastical offence was, and still remains under the Church Discipline Act, a plenary cause; and, as we have seen, in a suit *in pœnam* for an ecclesiastical offence all the formalities of the criminal procedure must of necessity be observed. If a suit were thus instituted in respect of a second offence as a distinct and substantive offence, a citation with all its formalities would be necessary, and articles must be exhibited—and how much is involved in these requirements will be seen on consulting Oughton, title "Citation," or Burn's "Ecclesiastical Law," title "Practice"—the defendant must have the opportunity of answering, and of being examined on oath, of traversing the facts, of demurring in point of law; in short, all the incidents of procedure required by the established law and by the statute must be gone through, and any summary proceeding, such as treating the case as one of contumacy, would be out of the question. By what authority short of legislative enactment can a defendant be deprived of the right to insist on the observance of these formalities? Oh, but, it is said, substantial justice has been done, the facts were fully proved, and the offence was the same as that of which the defendant had before been convicted; and, though this may have been, strictly speaking, an informal and possibly irregular proceeding, full opportunity was afforded him of being heard and making his defence as much as if all the formalities required in a plenary suit had been complied with. To which, at least out of court, many persons will be disposed to add in thought, if not in words: "These Ritualists are very obstinate and troublesome, and this, being the shortest, is the best way of putting them down; there is no occasion to be over nice in dealing with them." It seems to me, I must say, a strange argument in a court of justice to say that when, as the law stands, formal proceedings are in strict law required, yet, if no substantial injustice has been done by dealing summarily with

a defendant, the proceedings should be upheld. In a court of law such an argument a *convenienti* is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings *in pœnam* are, it need scarcely be observed, *strictissimi juris*; nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are on the whole intended to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist on them as matter of right, of which he cannot be deprived against his will; and the judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the Legislature to amend it. The judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the law and to the ends of justice, is as much part of the law as the substantive law itself. I cannot, therefore concur in the view that because the defendant might have defended himself on this summary proceeding, or, if a formal suit had been instituted against him, must upon the facts necessarily have been condemned, therefore the proceeding in question was valid and ought to be upheld. Such reasoning has and can have no place in an English court of justice. It may be that this summary jurisdiction would be exceedingly useful in order to prevent erratic clergymen from setting the law at defiance, and retaining benefices in a church, the rules and ritual of which they habitually disregard, if the Legislature should think proper to create it. But its possible utility affords no justification for usurping it, and expediency is a new and, I must say, to me strange ground to assign for upholding the exercise of assumed judicial authority when it cannot be shown to exist in point of law. If the effect of our decision will be to enable Mr. Mackonochie to continue to set the law at defiance, I shall greatly regret it; but I cannot allow any such consideration to operate in deciding, not whether rough justice may not have been done, but—what, after all, when looked at judicially is a dry question of law—whether the sentence we are asked to prohibit has been according to law. At the same time let it not be for a moment supposed that the law is not quite strong enough to deal with and punish such offences, if the right course is pursued. The only question is whether that course, as prescribed by law, may be departed from, and another, unknown to the law, substituted for it. It is obviously a very different thing to treat as contumacy the refusal to do a specific thing which the court has authority to enjoin, or to treat as such a substantive offence for which the law has itself provided the appropriate treatment. Surely the latter is to make the court, as it were, supersede the law. What would be thought if the judges were to determine without legislative authority that they would in future admonish all persons convicted and sentenced for larceny not to repeat the offence, and if they did so, were to deal with them summarily as for contempt, without the for-

mality of an indictment or the verdict of a jury? Yet in principle the innovation would be no greater than is involved in the proceedings adopted in the present case. Another grievance of which a defendant so dealt with may justly complain is that the power of appealing, if not on the facts, at all events on the law, which he would have had on a second suit, is by this summary mode of proceeding taken from him. Nor let it be said that the power of appealing of which he is thus deprived may not be of material advantage to him. The facts may not be precisely the same. The sentence in the first suit may have been so light as not to make it worth his while to go to the expense of an appeal. Even if he has appealed in the first suit, that will not preclude him from renewing his appeal on the second. Or, in some cases, he may take the appeal to a superior court. Be this as it may, it is a right which ought not to be taken from him. But this is not all. Another and a very serious difficulty presents itself. Every fresh departure from the established ritual being, as I have pointed out, like the repetition of any other offence against the law, a distinct and substantive offence, other promoters may, with the concurrence of the bishop in whose diocese such second offence may have been committed, institute a distinct and separate suit in respect of it. Or, even the bishop in whose diocese the second offence has been committed may himself institute proceedings *ex mero officio* in respect of it in his own court. In the first place, I take it to be clear that the bishop, in transferring the suit in respect of the first offence to the Court of Arches, does not thereby divest himself of his jurisdiction over any other offence subsequently committed within his diocese, should he think proper to exercise it. Still less could the transfer of a suit by one bishop bind another, should a second offence be committed in a different diocese. Yet this summary jurisdiction, as here asserted, would reach the offender, so far at least as the authority of the Court of Arches extends, wherever the second offence might be committed, without affording him a ground of defence should a second suit be instituted against him in a diocesan court. This being so, how, consistently with the first principles of justice, can the defendant be made liable twice over, once for the fresh substantive offence, and again for contumacy in disobeying the monition not to repeat the offence in respect of which he had been originally condemned? In addition to the objections thus resting on general principles, technical difficulties present themselves of a no less serious character. In the first place, as I have already pointed out, a definitive sentence in a penal suit terminates the suit and exhausts the authority of the court. It is not competent therefore to a court pronouncing such a definitive sentence, in the absence of established practice or statutory power, to append to it, by means of a monition, an injunction to abstain in future from a repetition of the offence, so as to give itself summary jurisdiction over the offender in all time to come. In the second place, the letters of request, transferring only a specific charge, cannot, in my opinion, for the reasons I have already given, confer jurisdiction over an offence which has not as yet come into existence, or subject the party charged to the summary jurisdiction of the metropolitan court in respect of future offences

not arising within the area of its authority. As regards the effect of a monition, the difficulty is equally great. If taken as a definitive sentence in a penal suit, unlike a monition issued in a civil suit to enjoin performance of the thing decreed to be done, so as to subject the party admonished to the consequences of contumacy if performance is withheld, it operates, as has been shown, as a punishment by way of censure, and entails no further consequences. If issued in the course of a suit, all the authorities agree that the contumacy could only be dealt with before the statute of George III. by excommunication and its consequences; since that statute, by the writ *de contumacia capiendo*. Even if the doctrine of contumacy upon a definitive sentence could be transferred from the civil to the penal jurisdiction of the Ecclesiastical Courts, there is nothing that I can find to warrant the application of a more rigorous rule as to its consequences, or to make suspension, which it is admitted cannot be applied in a case of contumacy on a sentence in a civil proceeding enjoining a given thing to be done, applicable to a monition in a penal suit directing that a given thing shall not be done. The fact is, that monition, in the sense in which that term is used with reference to a definitive sentence in a civil suit, has no place as appended to a definitive sentence in a penal suit, and its introduction into the penal branch of ecclesiastical procedure has—I cannot help thinking, though I say it with the utmost deference—arisen from a want of attention to the essential difference which exists between these two branches of procedure. It is laid down, it is true, as a rule by the early canonists, as I have already mentioned, that monition should precede deprivation or suspension; no doubt for the purpose of preventing any too rigorous or arbitrary exercise of episcopal authority. But such a rule does not prevail in our ecclesiastical courts, as is plain from the fact that in this case no monition preceded the sentence of suspension pronounced by Sir Robert Phillimore; and though it is said that monition shall precede suspension, it is nowhere said that in a penal suit monition will suffice, without more, to found a sentence of suspension in respect of a second offence. It has indeed been suggested that contumacy in disobeying the lawful order of an ecclesiastical superior is in itself an offence, independently of any question of contempt. Conset seems to say so; but then he treats it as no longer the subject of summary jurisdiction, but as requiring formal proceedings; and he gives a form of articles applicable to such a suit: (Ecclesiastical Practice, part 2. ch. 2.) What would be the appropriate punishment is not said. Possibly, in such a case, suspension might be within the authority of the judge, or the case might come within the power to excommunicate the offender, kept alive by the 53 Geo. 3. and thus a punishment of six months' imprisonment might be imposed. But so far as relates to contumacy as matter of summary jurisdiction, the authorities are clear that the only penalty is that of imprisonment by the writ *de contumacia capiendo* under the statute of Geo. 3. Lastly, it is to be observed that, in the treatment of contumacy arising in the course of a suit, this statutory process was not designed for punishment, but for the overcoming of the contumacy; conse-

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quently as soon as the party contumacious submitted he was set free. It is therefore inapplicable to a case in which the contumacy, having arisen as to an accomplished fact, has become, so far as that fact is concerned, incurable. The result then at which I arrive, on the most careful consideration I can give to the subject, is—First, that a monition in a penal suit, while, if pronounced as a definitive sentence, it carries with it no ulterior consequences, cannot be appended to a definitive sentence awarding a specific punishment, so as to prolong and enlarge the jurisdiction of the court, and to warrant any further proceedings on a repetition of the offence as for contumacy; secondly, that even if a monition could be so pronounced, disobedience would entail no other punishment than is provided by the 53 Geo. 3. Consequently, that suspension is inapplicable to such a case. The only question which remains to be considered—and it is by no means the least important—is, whether the present case is one on which a prohibition should go. I quite agree that mere irregularity, or even mistake in point of law, though it may be sufficient to found an appeal, will not be sufficient to call for or warrant a prohibition. I agree with what was said by Lord Denman in *Ex parte Smyth* (3 A. & E. 724), namely, that “the only instances in which the temporal courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the court.” But it seems to me that we have here much more than irregularity or mistake, and that something has been done which is manifestly beyond the jurisdiction. I take it to be too clear for argument that, although an inferior court may have jurisdiction over a given subject-matter when arising within the local limits of its own jurisdiction, if it takes upon itself to deal with such a matter when arising beyond such limits, it acts without authority, and may be restrained by prohibition. Such I apprehend to have been the case here. I have given my reasons for thinking that the jurisdiction of the Court of Arches was limited to the offence handed over to it by the diocesan court, and that consequently the Court of Arches had no authority to deal with a distinct and separate offence not comprehended in the letters of request, and arising beyond the local limits of its jurisdiction. Furthermore, I apprehend that if a court takes upon itself, without authority, to alter the course of its procedure, and to create a new offence, as was here done by superadding monition to a definitive sentence and converting a second and distinct act into the offence of contumacy instead of dealing with it as a substantive offence, there arises in this respect, also, an excess of authority which we are called upon to prohibit. Blackstone, in 3 Com. c. 7, speaking of the Writ of Prohibition, says that “it may be directed to the Courts Christian, where they concern themselves with any matter not within their jurisdiction; or if, in handling matters clearly within their cognisance, they transgress the bounds prescribed to them by the laws of England, as where they require two witnesses to prove the payment of a legacy, in such cases also a prohibition will be awarded.” On the authority of the law, as laid down by

Coleridge, J., in the case of *Jones v. Jones* (17 L. J. N. S. 170, Q. B.), Mr. Lloyd, in his treatise on the Law of Prohibition, states that prohibition will lie in cases where the judge of an inferior court transgresses the rules which ought to govern the proceedings of all courts, or is guilty of an irregularity which amounts to an excess of jurisdiction, though the case may otherwise be within his authority. In this view of the law I entirely concur, and I think it is applicable here. But the strongest ground remains to be stated. Treating the second offence of the defendant as an act of contumacy, the Court of Arches has applied to it a punishment which could not, according to the ecclesiastical law, in the view I take of it, be applied to a case of contumacy, by sentencing the defendant to suspension, instead of dealing with the case under the 53 Geo. 3. The effect of this proceeding is to deprive him of his freehold during the period over which the sentence of suspension extends. Now, I take it to be clear that, where the law which a court has to administer prescribes a given punishment as applicable to an offence, to vary that punishment, or substitute another, is an usurpation of jurisdiction. No one, I think, could say that if the Court of Arches had sentenced the defendant to a fine of a thousand pounds, and on nonpayment had sentenced him to be suspended for contumacy, such a sentence would not have been properly the subject of prohibition. But the only penalty which an ecclesiastical court can impose in a case which is properly one of contumacy is that of imprisonment under the statute of George 3rd. By applying to the alleged contumacy the penalty of suspension, the sentence, if executed, will deprive, and as I think, wrongfully deprive, the defendant of his freehold interest in his benefice; and although, where a sentence of deprivation or suspension can be properly pronounced by the Ecclesiastical Court, this court will not interfere, though the effect of such sentence will be indirectly to affect the interest in the freehold, yet where the sentence is not properly within the competency of such a court or applicable to the alleged offence, this court becomes bound to protect the temporal interest by prohibiting the execution of the sentence. The result is that, in my opinion, the monition of Sir Robert Phillimore, and *a fortiori* that issued by Lord Penzance, was *ultra vires*, and, consequently, that the subsequent proceedings before Lord Penzance, which terminated in the sentence of suspension for three years, were *coram non iudice*, and the sentence of suspension inoperative and null; and that, even if this were not so, the sentence of suspension, being inapplicable to an alleged case of contumacy, was one which the Court of Arches had no authority to pronounce. I am therefore of opinion that the rule for a prohibition must be made absolute. I may observe, in conclusion, that we have not called upon the applicant to declare in prohibition, as, in consequence of the court being divided in opinion, we might otherwise have done, because, the facts not being in dispute, the question is solely one of law, and as the parties, if advised to appeal, can under the Judicature Act go direct to the Appellate Court on an appeal against our order, it is better to leave them to do so, without the expense, incon-

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venience, and delay of a proceeding by way of declaration.

Judgment for applicant; rule absolute for a prohibition.

Solicitors for applicant, the defendant, *Brookes, Tanner, and Jenkins.*

Solicitors for respondent, the promoter, *Moore and Currey.*

COMMON PLEAS DIVISION.

May 4 and June 18.

(Before DENMAN, J.)

HARRIS v. MOBBS. (a)

Highway—Obstruction—Frightening vicious horse—Causa proxima.

A house-van, with ploughing gear attached, was left for some hours on some grass at the side of a road. A mare that was being driven along the road in a cart shied at the van, bolted and kicked, throwing the driver out of the cart, and kicking him on the knee so badly as to occasion erysipelas, of which he died. In an action by his executors, under Lord Campbell's Act, the jury found that the van was left where it stood unreasonably and negligently; that there was some appreciable danger in leaving it standing there, but not more so than if it had been in motion travelling along the road with horse power; that the death of the deceased was due to the van being where it was, and to the inherent vice of the mare that he was driving; and that there was no contributory negligence in the deceased.

Held, upon these findings, that there was an unlawful obstruction of the road, which caused the accident, and that, consequently, the owner of the van was liable.

This was an action tried before Denman, J., at the Oxford Spring Assizes 1878, and reserved by him for further consideration.

May 4.—J. J. Powell, Q.C. and A. T. Lawrence moved to enter judgment for the plaintiffs. They cited

Watkins v. Reddin, 2 F. & F. 629.

H. Matthews, Q.C. and Bosanquet showed cause. They cited

Blower v. Great Western Railway Company, L. Rep. 7 C. P. 655.

Our. adv. vult.

The evidence at the trial and the arguments of counsel sufficiently appear from the following judgment:

June 18.—DENMAN, J.—This was an action brought by the plaintiffs as executors of one James Harris, under Lord Campbell's Act. The defendant was the owner of a steam plough, which travelled about the country drawn by a steam engine, and which also had attached to it a house-van. The cause of action alleged in the statement of claim was that the defendant so wrongfully and negligently obstructed the highway by placing and leaving thereon a large house-van, with ploughing gear attached, that the deceased was hindered and prevented in his user of the highway, and his mare was frightened and rendered unmanageable, and his cart damaged, and he received serious injuries in the knee, of which he died. The defendant denied that he obstructed the highway,

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

and that the injuries happened through any obstruction, or in consequence of the van being drawn up at the side of the highway, but alleged that the horse became unmanageable at a considerable distance from the house-van, and after the deceased had driven safely by the said van, and that the mare, which was vicious, kicked and upset the cart in which the deceased was driving. At the trial it appeared that the house-van in question was placed on some grass at the side of the metalled part of the line of road. It had been placed there early in the afternoon, and was still there when the accident happened between seven and eight p.m. on the 27th Sept., being engaged to work in an adjoining field on the following morning. The engine had been taken elsewhere, but the plough remained attached. The persons in charge of the van and plough had made no attempt to take them into the field, which they explained by stating that the ground was in a slippery state, not favourable for such an operation, and that from their experience they knew that it would have been impossible to get it in on that night. This view, however, did not satisfy the jury, as appears from the answers to the questions put. Several witnesses were called, who proved that on the same afternoon they had driven along the same road, and that their horses had shied and swerved considerably at the house-van, standing in the same spot, but no accident had happened in consequence. There was a strong body of evidence for the defendant, to show that the mare was a confirmed kicker, and some evidence to the effect that the deceased must have known of the habit. The finding of the jury, however, must, I think, be taken to absolve the deceased from any knowledge that the mare was a dangerous one to drive. The evidence for the defendant was also directed to an attempt to prove that the deceased was guilty of negligence in his treatment of the mare at the time she shied; but the finding of the jury disposes of this point. The house-van stood between four and five feet from the metalled part of the road. There was very little difference between the accounts given by the witnesses on both sides of the occurrence itself. The mare appears to have shied immediately opposite the van, away from the van towards the off side of the road, and to have swerved continually to the right until she got the off wheel on the footpath, and to have begun kicking while galloping on, so violently as to kick the dashboard to pieces, and finally to have got her leg over the shaft, when she fell, and the deceased rolled out of the cart, which was not itself upset, and he was kicked in the knee by the mare so badly that about seven weeks afterwards he died from erysipelas occasioned by the injury. The witnesses all agreed that the distance of the place where she fell from the van was about 140 yards. Such being the evidence so far as it was adopted by the jury, it was contended by Mr. Matthews, for the defendant, that the action would not lie on the following grounds: First, that though he admitted that the grass upon which the van and plough stood was a part of the highway, and though standing there it might constitute an obstruction so that, if a horseman or even the driver of a vehicle wishing to use that part of the highway had been obstructed and injured an action might lie, still in the present case no action would lie because there

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had been no obstruction, in fact, of the deceased, and no more danger caused by the van or plough than would have been occasioned by the same objects passing along the highway drawn by horse power as they lawfully might have been. It was also contended that the accident had happened wholly or in part by reason of inherent vice in the mare herself, and that it was not the necessary or natural result of being frightened that the mare should kick violently and destroy the vehicle it was drawing. The jury, in answer to questions put by me, found, that the van was left standing where it stood (1) unreasonably, and (2) negligently, "considering that no effort had been made to place it in the field." In answer to question (3), "was it dangerous to vehicles passing along the metalled part of the road?" they found "not more so than if the same van had been in motion travelling along the road with horse power." I requested them if possible to answer the question "aye" or "no," and after a second retirement to consider that question, they answered, "There was some appreciable danger in leaving it standing there. That is the only unanimous answer we can give." The fourth question put to the jury was as follows: "Was the death of the deceased occasioned by the van standing where it did? or was it a mere accident? or was it due to the negligence of the deceased in his management of the mare? or to inherent vice of the mare? or to any two or more of these causes, or to all combined?" The jury answered, "To all combined, except negligence of the deceased and mere accident." And, in answer to a further question, they said that they meant to find that it was due to the van being where it was, and to the inherent vice of the mare combined. Fifthly, they found that there was no contributory negligence in the deceased; and they assessed the damages at 250*l.*, one-third for the widow, and two-thirds for the children. I reserved the case for further consideration, and it was argued before me during the last sittings. The first point insisted upon was, that no action would lie for an obstruction of the highway, where the person alleged to be obstructed had been using a different part of the highway, viz., the metalled part of the road, and that there was no instance to be found in the books of an action for damage caused by an obstruction to a highway, where the obstruction consisted merely of some occupation of the ground likely to cause terror to horses passing along the highway. It is true that there is an absence of express authority upon this point; but I think that it follows from cases which have been decided, that if there be an act done upon any part of the highway which is not a part of the reasonable user of it, and which has the effect of endangering its use to others, and damage results from such act in the course of a lawful user of the highway, an action will lie for such damage. It has been held that the occupation of one side of a public street for several hours at a time, so as to prevent any carriage from passing on that side of the street, although room was left for two carriages to pass on the opposite side, is an indictable nuisance: (*Bez v. Russell* (6 East, 427); from which case, and from the case of *Reg. v. Cross* (3 Camp. 224), it appears that the real question in such cases is whether the highway has been obstructed for an unreasonable time and in an unreasonable manner, or, in other words, in such a way as to amount to

something beyond a fair and reasonable use of the way. The jury in the present case have found that the van in question was unreasonably left where it was at the time of the accident, by which I understand that it was not a fair and reasonable use of that part of the highway with reference to the rights of others. They have also found that it was appreciably dangerous, by which I understand that it was in their opinion likely to cause horses to shy or take fright in passing along the metalled part of the road. This finding was qualified by the addition, "but not more so than if the same van had been in motion travelling along the road with horse power." On consideration, I do not think this supposed qualification material. In the first place, it leaves open the question whether, even if the van in question had been travelling along the high road drawn by horses with the plough attached, it might not, in the opinion of the jury, have been deemed to be a nuisance. I am not at all sure, indeed, that in that case, upon the same findings, it would not have been the duty of a judge to enter the verdict for the plaintiffs (see *Watkins v. Beddin*, 2 F. & F. 629, *per* Erle, C.J., p. 634); but at all events, I think it clear that the question whether it would or would not have been a nuisance in that case is a totally different question from that which arises in the present case, for it might be quite reasonable to convey such machines along the road from point to point, and yet wholly unreasonable to increase the danger caused by them by leaving them all day and night on the high road or closely adjoining to it. I cannot agree with the view submitted by the defendant's counsel, that there must be an injury caused by an actual physical obstruction before an action will lie. Suppose a man were to occupy the grassy side of a highway with three or four cannon and to keep firing them from morning to night, so as to terrify the horses passing along the metalled part of the road, I cannot doubt that he would be liable for the consequences, and that he would have wrongfully hindered and prevented in the user of the highway anyone whose horse might have been frightened by such conduct. I do not think that it could in such a case be said that the right of passage had not been obstructed, or at least hindered and prevented, merely because the horse in question had not come into actual collision with the cannons, or merely because the cannons were not on that part of the highway along which the horse was travelling. It appears to me to follow, from the above considerations, that the plaintiffs are entitled to the verdict and to judgment, so far as the above point is concerned, on the ground that the jury have, in effect, found that there was an unreasonable and dangerous occupation of a part of the highway amounting to an obstruction and prevention of its free user by the public to an extent which was unreasonable. The jury also found that there was negligence in placing and leaving the van and plough where they were, on the ground that there was no attempt to place it in the field. I am not quite sure whether the jury intended to find negligence with reference to the probable danger of leaving the van where it was, owing to the fact that they were unwilling to return any verdict expressly in favour of plaintiff or defendant, and they afterwards qualified their finding as to danger by the word "appreciable," as I surmise, from an inability to agree

upon the question of negligence with reference to anything except making no attempt to get the van and plough into the field. I should therefore not feel myself justified in entering the verdict for the plaintiff upon the finding of negligence alone; and I abstain from further dealing with that part of the case. I now come to that part of the case which has appeared to me to be the most difficult. It was, I think, clearly made out at the trial that the mare which the deceased was driving was a vicious mare, in the sense that she was a kicker. It must, however, be taken that the jury negatived any knowledge in the deceased of this habit, such as would have rendered it negligent in him to drive the mare. Contributory negligence on any other ground was negatived. The immediate cause of the accident was clearly that the mare in kicking got her leg over the shaft, which caused her to fall, and in falling the deceased received the kick which ultimately caused his death. The jury found that the accident was due to the van being there (which must be taken to mean "to the van being unreasonably left on that part of the highway so as to cause some danger to vehicles passing by") combined with the vice of the mare. I understood this finding to mean that the accident would not have happened but for both these causes combined—an unreasonable and dangerous user by the defendants of that part of the road by their van and plough so as to cause danger to vehicles passing by; and an exceptionally dangerous animal shying and running away from fright at the van and plough, and then kicking the vehicle, whether from fright or vice, the kicking being an exceptional vice in the mare. This finding must also, if possible, be reconciled with the other finding that the accident was not a mere accident, which was explained to the jury as meaning one for which no one was to be fairly considered to blame. The plaintiffs' counsel argued that, inasmuch as the defendant was guilty of an unauthorised and dangerous act in derogation of the public rights by which the mare had been frightened, this must be taken to be the only material cause of the mischief, the deceased being guilty of no wrong at all, and the whole transaction being one flowing directly from the alarm caused by the defendant's unauthorised act. On the other hand, it was contended that the *causa proxima* of the injury was the kicking of the mare, which was not a necessary or natural consequence either of the shying or of the running away, so that, although it might be true that in some sense the van and plough being there led to the accident, it was not true that their being there was material to the accident, or caused it, in such a sense as to make the defendant responsible for it. Though not without considerable hesitation, I have come to the conclusion that the plaintiffs are entitled to have the verdict and judgment entered for them. Looking at the undisputed facts in the case, I think it is clear that, though the immediate cause of the accident was the kicking of the mare, still the unauthorised and dangerous appearance of the van and plough on the side of the highway was, within the meaning of the law, the proximate cause of the accident. It cannot, I think, be laid down that no one is entitled to recover damages for an injury caused by a kicking horse, in the absence of any knowledge on his part that it is such. In the present case it must

be taken that the deceased was not aware that the horse was a kicker. Then, was the kicking which caused the death a natural and necessary consequence of the act complained of? I think, upon the whole, that it was. The van was there, and it in fact frightened the deceased's mare, so that she shied and swerved to run away, and, having got one wheel on the footpath kicked violently, and within 150 yards fell and injured the deceased so that he died. The whole transaction is within a few seconds, and originated in the fright of the mare caused by the van. I think it cannot be laid down as having been the duty of the deceased to abstain from driving the mare. On the other hand, it cannot be laid down as the right of the defendant to assume that no nervous or run-away or kicking horse would come along the highway. It is only in the case of horses liable to be frightened that any danger exists, and where a horse has once been frightened by a dangerous apparition unlawfully placed on the highway, running away and kicking can hardly be considered to be unusual or unnatural consequences of the fright. The wrong doer has no right to lay down the measure of his own wrong, or to limit the free use of the highway to horses which shall only shy when frightened and do no further mischief. On the whole, I think that the finding of the jury only amounts to this, that the accident was caused by the van, but that if the horse had not been a kicker it would not have happened. Looking at the finding and the facts together, I come to the conclusion that the plaintiffs were entitled to the verdict; I therefore direct it to be entered for them for the amount assessed by the jury, and give judgment for that amount, with costs.

Judgment for the plaintiffs.

Solicitor for the plaintiffs, *Walliner*.

Solicitors for the defendant, *Field, Roscoe, and Co.*

May 15 and 16.

(Before GROVE, LINDLEY, and LOPES, JJ.)

BUDGE v. ANDREWS AND OTHERS. (a)

Election of town councillor—Nomination of candidate—Burgess roll—Jurisdiction of court to review decision of mayor—Municipal Elections Act 1875 (38 & 39 Vict. c. 40) sect. 1 sub-sect. 2—Corrupt practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60) s. 12.

The burgess roll, on which the name of a person nominated at a municipal election for the office of councillor must appear, is the burgess roll in force for the purposes of the election on the day of election, and not necessarily the burgess roll in force on the day of nomination.

The court has jurisdiction, on a petition questioning the election, to review the decision of the mayor, allowing an objection to a candidate on the ground that his name was not on such earlier burgess roll.

W. was a candidate for the office of town councillor in the borough of P. The nomination took place on the 23rd Oct. 1877, and the election on 1st Nov. 1877. The name of W. appeared on the burgess roll published on the 22nd Oct. 1877, and in force from Nov. 1, 1877, to Oct. 31, 1878; but not on the burgess roll published on the 22nd Oct. 1876, and in force from Nov. 1, 1876, to

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Oct. 31, 1877. *The mayor allowed an objection upon this ground to the nomination paper of W. Held, that the nomination of W. was good, and that the court had jurisdiction to review the decision of the mayor upon petition.*

SPECIAL case stated by order of Field, J. for the opinion of the court on a municipal election petition against the return of three of the respondents as town councillors for the borough of Poole. [Certain paragraphs irrelevant to the judgment are omitted.]

1. The petitioner is a person who was a candidate at the said election of councillors.

2. The election of councillors was holden on the 1st Nov. 1877. James Andrews, Titus Buckley, and Henry Thomas Trevanion were candidates, and were declared to be duly elected.

24. On the 22nd Oct. 1877 the burgess roll and ward lists of the said borough and ward were duly published.

25. On the 23rd Oct. 1877 six candidates were nominated in writing for the south-east ward. The names of the six candidates were and are as follows: James Andrews, Titus Buckley, Henry Thomas Trevanion, Henry Farmer, Philip Edward Lionel Budge (the petitioner), and George Frederick Wanhill. All the candidates were nominated in writing, and by separate nomination papers.

26. Among the burgesses subscribing the nomination papers of the said James Andrews, Titus Buckley, and Henry Thomas Trevanion, was the said Alfred Balston, who at the time of signing the said nomination papers was an enrolled burgess of such borough, and who at the time of the election in question was holding, as hereinbefore appears, the office of mayor in the said borough.

27. Copies of the nomination papers hereinbefore mentioned, marked B., C., and D., are appended to this case in the said schedule.

28. The said Henry Farmer and Philip Edward Lionel Budge were persons enrolled on the burgess roll and south-east ward list of the said borough and ward, and were in all other respects qualified to be elected councillors. The said George Frederick Wanhill was not enrolled on the burgess roll and ward list published on the 22nd Oct. 1876, but he was enrolled as "George F. Wanhill" on the burgess roll for the said borough published on the 22nd Oct. 1877, and was in all other respects qualified to be elected a councillor.

29. The said George Frederick Wanhill, though in all respects so entitled, was, by an omission of the overseer of the poor of the tything of Longfleet, in the said borough of Poole, not enrolled in the burgess roll published on the 22nd Oct. 1876.

30. No application has been made by the said George Frederick Wanhill, under the provisions of sect. 24 of the 7 Will. 4 & 1 Vict. c. 78, to have his name inserted on such burgess roll.

31. On the 24th Oct. 1877 the mayor attended alone, without any alderman or assessor, at the town-hall, to decide on the validity of certain objections made to the nomination papers of all the candidates.

33. An objection was made by the said Henry Thomas Trevanion, under the Municipal Elections Act 1875, sect. 1, sub-sect. 3, to the nomination paper of the said George Frederick Wanhill, on the ground that the name of the said George Frederick Wanhill was not on the burgess roll

published on the 22nd Oct. 1876 (copy of objection, schedule F.)

34. The mayor by a decision in writing allowed such objection.

35. A poll was held in the said ward on the 1st Nov. 1877, the result of which was as follows:—James Andrews, 476 votes; Titus Buckley, 458 votes; Henry Thomas Trevanion, 452 votes; Henry Farmer, 452 votes; Philip Edward Lionel Budge, 447 votes. There being only three vacancies in the body of councillors, the said Francis Timewell Rogers, who presided at the said election, gave a casting vote in favour of the said Henry Thomas Trevanion.

36. On the 1st Nov. 1877, the said Francis T. Rogers declared the said James Andrews, Titus Buckley, and Henry Thomas Trevanion duly elected, and published a list of their names as and for a list of the names of the persons so elected.

The questions for the opinion of the court, who are to pronounce judgment in such form as they shall see fit, with or without costs, as they shall see fit (subject, however, to the respondent's objections in respect of questions 3 and 4, as hereinafter appears), are:

1. Whether the said James Andrews, Titus Buckley, and Henry Thomas Trevanion were, or any of them was, duly elected to the office of councillor.

2. Whether, if they or one of them were not duly elected, their or his election is void.

3. Whether the nominations of the said James Andrews, Titus Buckley, and Henry Thomas Trevanion were illegal and void or not.

4. Whether the decision of the mayor allowing the objection to the nomination paper of the said George Frederick Wanhill was wrong or not.

5. Whether the petitioner is entitled to any and what relief.

The respondents object to questions 3 and 4 being determined by the court, on the ground that the court has no jurisdiction to entertain or determine the same.

Schedule "F." (Copy of Objection).

Borough of Poole.

Election of Councillors for the South-east Ward in the said borough, to be held on the 1st day of November 1877.

I, Henry Thomas Trevanion, of New-street, in the borough of Poole, solicitor, being a candidate duly nominated for the above election, do hereby object to the validity of the nomination paper of George F. Wanhill, a person nominated for the same election, on the ground that he is not enrolled on the burgess roll of the said borough, nor a person whose name is inserted in the separate list at the end of the burgess roll as provided by sect. 3 of the Act 32 & 33 Vict. c. 55, and that he is not otherwise qualified to be elected.

Signed, &c.

The *Solicitor-General* (Sir H. Giffard, Q.C.) (with him *Grantham*, Q.C., and *C. Bowen*), for the petitioner.—Mr. Wanhill was on the burgess roll, and the objection to his nomination was therefore void. By sect. 22 of 5 & 6 Will. 4, c. 76, the burgess roll is the roll of burgesses entitled to vote at any election which may take place in the borough between the 1st Nov. inclusive in the year wherein such burgess roll shall have been made, and the 1st Nov. in the succeeding year. By sect. 1, sub-sect. 2 of 38 & 39 Vict. c. 40, every person nominated shall be enrolled on the burgess

list of the borough, or a person whose name is inserted in the separate list at the end of the burgess roll, as provided by sect. 5 of the Act 32 & 33 Vict. c. 55. Wanhill's name, therefore, was only required by statute to be on the roll in force on that 1st day of November (1877) on which the election took place, and its omission from the burgess roll of the preceding year was unimportant. The objection having been wrongly allowed by the mayor, the election was null and void.

Pollard (*Benjamin*, Q.C. with him), for the respondents, was directed by the court to confine his arguments in the first place to the fourth question. (The arguments for the petitioners on the other points have, therefore, been omitted.) First, this court has no jurisdiction to question this election on the ground that the mayor's decision was wrong. The proper remedy is by *quo warranto* in the Queen's Bench Division. Sect. 12 of 35 & 36 Vict. c. 60 provides that a municipal election may be questioned by petition before this court on the ground that the election was wholly avoided by general bribery, treating, undue influence or personation, or on the ground that the election of the person elected was avoided by corrupt practices or offences against the Act committed at the election, or on the ground that he was at the time of the election disqualified for election to the office for which the election was held, or that he was not duly elected by a majority of lawful votes. That section defines the grounds on which a petition questioning the election may be brought in this court. By 38 & 39 Vict. c. 40, sect. 1, sub-sect. 3, the decision of the mayor if disallowing any objection to a nomination paper is final, but, if allowing the same, shall be subject to reversal "on petition questioning the election or return." But by the interpretation clause of the previous Act (35 & 36 Vict. c. 33, s. 20, sub-sect. 2), the term "petition questioning the election or return" shall mean any proceeding under which a municipal election can be questioned; and therefore the provision in 38 & 39 Vict. c. 40, sect. 1, sub-sect. 3, for reviewing the mayor's decision, must be taken as applying to a *quo warranto*, which is a proceeding questioning the election, and not to a petition in this court, which it is clear from sect. 12 of 35 & 36 Vict. c. 60 does not lie on such a ground. The provision referred to was never intended to give a remedy which is expressly excluded by a previous Act, but merely to indicate that the mayor's decision shall be subject to review by the proper legal proceeding applicable to such a case. [GROVE, J.—The ground of this petition appears to be within sect. 12 of 35 & 36 Vict. c. 60. If the mayor had not allowed the objection, another candidate could have gone to the poll, and the number of votes given for each of the present candidates would have been altered. This petition, therefore, comes within the words of sect. 12, "on the ground that the candidate was not duly elected by a majority of lawful votes."] Secondly, the decision of the mayor, allowing the objection, was right. Wanhill was not upon the burgess roll at the time when he was nominated, though he was upon the burgess roll which came in force on the day of election. By 22 Vict. c. 35, s. 6, at any election of councillors to be held for any borough or ward, any person entitled to vote may nominate himself (if duly qualified) or any other person or persons so qualified. The person nominating must there-

fore be entitled to vote at the time of his nomination. By 5 & 6 Will. 4, c. 76, s. 29, the persons "entitled to vote" shall be every burgess of the borough who shall be enrolled on the burgess roll for the time being. Sect. 10 of 35 & 36 Vict. c. 60 makes the register conclusive as to the right of any person included therein to vote at an election for the purposes whereof such register is in force. It is therefore also conclusive as to the absence of the right of any person not included therein; and by 38 & 39 Vict. c. 40, s. 5, "a person shall not be entitled to vote unless his name is on the burgess roll for the time being." Wanhill, therefore, not being on the burgess roll in force for the purposes of any election which might take place at the time of his nomination, and not being entitled to vote at such time, was improperly nominated: (*Reg. v. Harvey* 3 Q. B. 475.) The effect of 22 Vict. c. 35, s. 6, and 5 & 6 Will. 4, c. 76, s. 29, read together, is that a person nominated must be on the burgess roll in force at the time of his nomination, and also qualified to be on the burgess roll in force at the time of the election: (*Reg. v. Dixon*, 15 Q. B. 33; *Whalley v. Bramwell*, 15 Q. B. 775.) Lastly, if the case is decided upon the fourth question, the respondent Rogers, who was not a candidate, and is not affected by it, ought not to be made to pay costs.

GROVE, J. delivered the judgment of the court.—This case is the petition of Philip Edward Lionel Budge against James Andrews, Titus Buckley, Henry Thomas Trevanion, and Francis Timewell Rogers, the latter being the returning officer for one of the wards of the borough of Poole. The petition is in respect of an election of town councillors, which took place on the 1st Nov. 1877 in that borough, and the three candidates who were elected on that occasion were James Andrews, Titus Buckley, and Henry Thomas Trevanion, who have three of the respondents in this petition. By the special case which has been argued, several objections were taken to the validity of the election. One of these objections appeared during the argument of the Solicitor-General to be of great force, and, as it went to the whole question of whether the election was valid or void, we requested Mr. Pollard to address himself, in the first instance, to that objection. This objection, which, notwithstanding the able argument of Mr. Pollard, we think fatal to the election, is the one contained in the fourth question put for our decision: "Whether the decision of the Mayor allowing the objection to the nomination paper of the said George Frederick Wanhill was wrong or not?" Added to this was the further objection: "The respondents object to questions 3 and 4 being determined by the court on the ground that the court has no jurisdiction to entertain or determine the same." Perhaps it might, *prima facie*, appear to be more in order to take the question of jurisdiction first, as, before deciding on the other question, it might be well to give the reasons why we are convinced that we have jurisdiction. Looking, however, at many of the facts which it would be necessary to cite for that purpose, it has appeared more convenient to take the objection itself first, and afterwards to make such reference as may be necessary to the question of jurisdiction. The facts with regard to George Frederick Wanhill were stated in the case as follows: "On the 23rd Oct. 1877 six candidates were nominated in writing for the south-east ward." Here follow the names of the

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candidates, amongst them being that of George Frederick Wanhill. The paragraph proceeds, "All the candidates were nominated in writing, and by separate nomination papers." Paragraph 29, and this was an important statement, says as follows: "The said George Frederick Wanhill was not enrolled on the burgess roll and ward list published on the 22nd Oct. 1876, but he was enrolled as 'George F. Wanhill' in the burgess roll for the said borough published on the 22nd Oct. 1877, and was in all respects qualified to be elected as a councillor." Nothing turned upon his being styled "George F. Wanhill;" this was not insisted upon by the Solicitor-General. Paragraph 29 states: "The said George Frederick Wanhill, though in all respects so entitled, was by an omission of the overseer of the poor of the tything of Longfleet, in the said borough of Poole, not enrolled in the burgess roll published on the 22nd Oct. 1876." The question turned on this fact. Wanhill being nominated as a candidate for the election to take place on the 1st Nov. 1877, was it necessary, in order to make his nomination a valid one, that he should be upon the burgess roll made on the 22nd Oct. 1876, or upon the burgess roll made on the 22nd Oct. 1877, or on both? or, to put it as Mr. Pollard had put it, should he be on the burgess roll of the 22nd Oct. 1876, and be entitled to be on the burgess list which became the burgess roll on the 22nd Oct. 1877, and which would be the list or roll upon which the election of the 1st Nov. would proceed? It was argued by the respondents that it was necessary that he should be upon the roll published on the 22nd Oct. 1876, and should also be entitled to be upon the subsequent burgess roll, which would be made out upon the 22nd Oct. 1877, although it was said to be immaterial whether he was actually on the list, provided he was entitled to be upon it. On the other hand it was contended for the petitioners that he was rightly nominated, being not only entitled to be, but being enrolled upon the burgess roll published on the 22nd Oct. 1877, and therefore that the mayor who allowed the objection to the nomination paper was wrong in allowing it, or, to use a converse expression, in disallowing his candidature. We are of opinion that the mayor was wrong, and that Wanhill was entitled to be nominated and elected, if the electors thought fit to vote for him so as to give him a majority entitling him to be elected, he being on the burgess roll published on the 22nd Oct. 1877. I do not intend to go into all the sections of the statute that have been mentioned, but, in order to reduce what I have to say to a moderate compass, I shall only mention those particularly applying to the case before them. The first I shall cite is the 22nd section of 5 & 6 Will. 4, c. 76, which enacted as follows:—"That the burgess list so revised and signed as last aforesaid shall be delivered by the mayor to the town clerk of such borough, who shall keep the same and shall cause the said burgess list to be fairly and truly copied into one general alphabetical list in a book to be by him provided for that purpose, with every name therein numbered, beginning the numbers from the first name and continuing them in a regular series until the last name, and shall cause such books to be completed on or before the 22nd Oct. in every year, and shall deliver such books, together with the list, at the expiration of his office to the person succeeding him

in such office; and such book in which the said burgess lists shall have been copied shall be the burgess roll of the burgesses of such borough entitled to vote, after the passing of this Act, in the choice of councillors, assessors, and auditors in such borough, as hereinafter mentioned, at any election which may take place in such borough between the 1st Nov., inclusive, in the year wherein such burgess roll shall have been made, and the 1st Nov. in the succeeding year." The election took place on the 1st Nov., and it was admitted that the burgess roll which was completed by the 22nd Oct. preceding was the one upon which the election was to take place. But it was said that we must view the section in a different way with regard to the nomination of candidates, and that the nomination, both as regarded the nominator and the nominee, must be made upon the previous roll, which was not the one upon which the election would take place. No doubt, if this is so, many inconvenient consequences would follow. First of all, if the nominator must necessarily be upon the old roll and need not be upon the new, the person nominating might be a person who would not be a voter at the election for which he had nominated. This would be an inconvenience, but it would not be fatal, if the words of this and other Acts made it clear that it was right. But it would not be a thing contemplated by the Legislature that a man whose time for being a voter should expire before the election for which he had nominated a candidate should be the one selected by the Act to nominate candidates, without the necessity of his being a voter at the election. It is perhaps unnecessary to decide this, because what we have to decide here is upon which roll the person nominated, not the nominator, should be. It does appear to me, however, that with regard to the nominator the proper construction of the statute is more favourable to the view that he must be upon the new roll taking effect for the purposes of the election, on the 1st Nov. 1877. The next section which applies to this case is 7 Will. 4, and 1 Vict. c. 78, s. 6, which says: "Be it enacted that in every borough, in which, by reason of any neglect or informality, a new burgess roll of the said borough shall not have been duly made in any year within the time directed by the Act, the burgess roll which was in force before the time appointed for the revision shall continue in force until such new burgess roll shall have been duly made." Then comes section 6 of the Act 22 Vict. c. 35, which enacted as follows: "At any election of councillors to be held for any borough or ward, any person entitled to vote may nominate for the office of councillor himself (if duly qualified) or any other person or persons so qualified (not exceeding the number of persons to be elected for the borough or ward as the case may be), and every such nomination shall be in writing, and shall state the Christian names and surnames of the persons nominated, with their respective places of abode and descriptions, and shall be signed by the party nominating, and sent to the town clerk at least two whole days (Sunday excluded) before the day of election, and the town clerk shall at least one whole day (Sunday excluded), before the said day of election, cause the Christian names and surnames of the persons so nominated, with such statement of their respective places of abode,

and descriptions, and with the names of the persons nominating them respectively, to be printed and placed on the door of the town hall, and in some such conspicuous parts of the borough or ward for which such election is to be held." According to the argument of the respondents we must read thus: "At any election of councillors to be held, say on the 1st Nov. 1877, any person entitled to vote, not on the 1st Nov. 1877, but on the 1st Nov. 1876, and up to the 1st Nov. 1877, may nominate a person to be elected on the 1st Nov. 1877." Without some such words as those incorporated, the *prima facie* reasonable meaning of the statute was that the words, "any person entitled to vote," must mean at some election the period for which has not gone by. In order to give it a different construction it must mean that he must be entitled to vote, not at the general and usual election, because that has passed—the 1st Nov. 1876—but it must mean that he was entitled to vote at any bye or casual election of councillors which may accidentally become necessary before the 1st Nov. 1877. It seems to me that would be a very strained construction, and would not occur to any one in reading the section. With a contrary construction I see nothing difficult or impracticable, because although the time of the election and the time of the lists coming into force did not arrive until the 1st Nov., yet for many other purposes the burgess list was in existence. It must be duly copied and completed by the 23rd Oct. At that time it was known which would be on the burgess roll for 1877, and I see nothing against the words of the statute being read as I have stated. As to the question of convenience, that, to my mind, is in favour of the contention of the petitioners, that a roll which was completed on the 22nd Oct.—although it did not for the purposes of election come into effect till the 1st Nov.—should be in effect for enabling persons to know who would be qualified candidates, who would be qualified voters, and who would be qualified nominators for the election to take place on the 1st Nov., when the list was to come into force. If I decided on this point, I should think this was the proper reading of the statute. But we have not only to decide it on that point. There was the point whether the name of a person nominated must appear on the roll published on Oct. 22, 1876, or on the one published on Oct. 22, 1877. With regard to this, again, looking at the reason of the thing, it seems to me that many difficulties would arise, assuming that the language of the Act and its different sections is *prima facie* opposed to what we are now deciding. The inconvenience and curious results of it would be many. First of all, the person nominated would have to be either upon two rolls or to have his election qualification continued for two years, and such person alone could be a proper person to be nominated, because, by the argument of the respondents, he must be, for the purposes of being nominated, on the roll from the 1st Nov. 1876, and for the purpose of being elected he must be a person at all events qualified to be on the burgess list for the 1st Nov. 1877. There must, therefore, be virtually a two years' qualification, and no portion of the Act has been called to our attention to show that this was contemplated by the statute. Then, again, according to this view, the person nominating might be one whose qualification might cease before the time of the

election. It seems to me that we should require some very strong words before we could adopt such a supposition as this, which seems to be negatived by some other parts of the Act, particularly by the words of the 38th and 39th Vict. c. 40, sect. 5. But before going to sect. 5, perhaps I ought to call attention to sect. 1 and sub-sect. 2 of the same Act, which says: "Every person nominated shall be enrolled on the burgess roll of the borough or a person whose name is inserted in the separate list at the end of the burgess roll, as provided by sect. 5 of the Act 32 & 33 Vict. c. 55, and shall be otherwise qualified to be elected." This was read by the respondents as meaning that every person nominated should be enrolled on the burgess roll of the borough, not the burgess list upon which the election shall take place on the 1st Nov. 1877, but on the burgess roll upon which the election of the 1st Nov. 1876, took place. I think it would be a somewhat forced construction to read the section in this way. But when we come to sect. 5, it appears that the language used is much stronger in favour of the construction we are adopting. That section says: "That at any municipal election a person shall not be entitled to sign or subscribe any nomination paper or to vote unless his name is on the burgess roll for the time being in force in the borough." It was admitted that a person was not entitled to vote unless his name was on the later roll, or what I have called the new roll, and that the roll for the purpose of voting for the time being in force was the one which was to be used for the election of the 1st Nov. 1877. In order to construe this in favour of the respondent, it was said that we are to read the word "or" as disjunctive: "and he shall not be entitled to sign any nomination paper or to vote;" that he was not to sign any nomination paper unless he was on the previous roll, or to vote unless he was on the subsequent. It would be a strange thing for the Legislature to couple these two things together and treat as different these two qualifications and incidents—the subscribing to a nomination paper and voting at an election. It seems to me to require a great many added words to arrive at such a construction as was sought to be put upon the section by the respondents. But it requires no forced or strained manner to read it as though no person was entitled to sign a nomination paper, or to vote unless he was on one roll. And if on one roll, which was this? On the burgess roll for the time being in force. The burgess roll in force for both objects mentioned could not be that published on the 22nd Oct. 1876, as this one could not apply to the voting on the 1st Nov. 1877. Therefore, if there was only one roll contemplated, it must be the one which came into force for election purposes on the 1st Nov. 1877. But the section goes on further to demonstrate this, as it says, "And every person whose name is on such burgess roll or ward list, as the case may be, shall be entitled to sign or subscribe any nomination paper and to demand and receive a ballot paper and to vote." What could the words "in such burgess roll" mean? If the burgess roll was different for the person nominated or nominating and the person voting, how could such person be entitled "to sign a nomination paper, to demand and receive a ballot paper, and to vote?" Does not this demonstrate that the nomination and voting were both done with respect to the same roll? With-

out straining the section extravagantly, I cannot put any other construction on it than that it meant there was one Burgess roll and one only. And if the words apply to the same roll it appears to me conclusive that they mean the roll coming into effect for election purposes—in this case—on the 1st Nov. 1877. It is contended that this conclusion is repugnant to the decision in *Reg. v. Harvey* (*ubi sup.*); but it does not appear to me that we are at all departing from that decision. In giving judgment in that case Lord Denman used words which were not inconsistent with this case, but which would probably have been more explicit than they were if the case now under consideration had been in the minds of the court. But this could not have been so, as nomination papers had not at that time come into existence; therefore the court, not having contemplated the particular questions which they were now deciding, did not use words to contradict such a case as that now under consideration from the one then before them. I now come to the other point, on the question whether the court has jurisdiction to entertain this matter, and whether it comes within the powers vested in it by the Act of Parliament to decide whether this election was valid or void, as the case might be. The first section which was cited as applying to this point was sect. 12 of 35 & 36 Vict. c. 60: "The election of any person at the election for the borough or ward may be questioned by a petition before an election court, constituted as hereinafter in this Act provided, and hereinafter in this Act referred to as the court, on the ground that the election was, as to the borough or ward, wholly void by general bribery, treating, undue influence, or personation, or on the ground that the election of such person was avoided by corrupt practices or offences against this Act committed at the election, or on the ground that he was at the time of the election disqualified for election to the office for which the election was held, or on the ground that he was not elected by a majority of lawful votes." It was contended upon that section that we have no powers to decide this case, because it was said that neither of the contingencies enumerated in that section had occurred. I cannot agree with this contention. I think the section does apply; and, in holding the respondents disqualified, we are doing so on the ground that they were not duly elected by a majority of lawful votes, because the voting might have been entirely different, had Wanhill's nomination not been disallowed. If we were not to read the section in this way, our jurisdiction would be very limited indeed, because none of those inquiries that shake elections by showing that some wrong has been done, which diverts, or might divert the course of voting, would be within the jurisdiction. But even if this section is not regarded as sufficient to found our jurisdiction here, there is another statute, which, whether it be read as explanatory and confirmatory of the former enactment, or as adding something to it, seems quite explicit and clear on this point. By 38 & 39 Vict. c. 40, sect. 1, sub-sect. 3, the decision of the mayor, which shall be given in writing, shall, if disallowing any objection to a nomination paper, be final; but if allowing the same shall be subject to reversal on petition questioning the election or return. Nothing can be clearer than this. This is a petition questioning an election or return,

and the mayor has allowed an objection to a nomination paper, which is one of the very things said by this statute to be subject to reversal on petition questioning the election or return. But it was argued that in the previous Act (35 & 36 Vict. c. 33, s. 20, sub-sect. 2) there was an interpretation clause, giving to these words a different effect from what is their obvious, clear, and direct meaning. It said: "The term petition questioning the election or return shall mean any proceeding under which a municipal election can be questioned." As I understand this, it means that the term petition applies not only to what were ordinary petitions against an election, but to every proceeding, such as a *quo warranto* and others, and therefore that it had a larger meaning than an ordinary petition. But if so, it does not negative or limit the words in the subsequent section, but enlarges them. Nor do I see how it can affect the interpretation of the words of the 38 & 39 Vict. c. 40. I am not aware of any case in which an interpretation clause of a previous Act has been given such an application. From every point of view, it appears clear that the Legislature intended the court to have jurisdiction in such a case as this; and I am also of opinion that the objection raised by the petitioner is a valid one, and that the election is therefore void. If the nomination of Wanhill had been allowed, the whole election might have been different. Two of the candidates had an equality of votes, and it is impossible for the court to say what might have been the consequence of another person being a candidate. Votes might have drifted away from some of the candidates, and a very different result might have taken place had Mr. Wanhill's qualification not been disallowed. With regard to the question of costs, it has been contended that certain objections having been made to Mr. Rogers, the returning officer, if we decided on a point that does not apply individually or peculiarly to him he should be allowed his costs, and so should stand on a different ground from the other respondents. I cannot say that if the special case had been so framed as to separate and, so to speak, to make different cases, one case dealing with Rogers and another with the other respondents, that might not have been a proper argument, and one upon which the court could act. But here the respondents have all acted together; they were bracketed together, and they each joined, apparently, in all the reasons put forward for the validity of the election. They are throughout the case termed "the respondents;" there were questions submitted for the opinion of the court subject to "the respondents' objections," &c. Rogers himself objected to the jurisdiction of the court on the ground stated in the case; he joined for his own purposes in the objections raised, thus taking advantage of the arguments used on behalf of the other three respondents. I therefore see no reason why he should be distinguished, and am of opinion that the election should be declared void, and that the respondents must pay costs.

LINDLEY, J.—I quite agree with the judgment that has been pronounced, and wish only to add a few words. Upon the question of jurisdiction I will say nothing, as the Act of Parliament is abundantly plain. With respect to the main question, whether this election is void or not, I think the key of all the statutes is to be found by examining 5 & 6 Will. 4, c. 76. From that Act it

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will be seen that there have always been two burgess rolls existing between the 22nd Oct. and the 1st Nov., one of which regulates elections taking place before the 1st Nov., and the other elections taking place on and after that day. When we come to the Act (22 Vict. c. 35, s. 6), it appears plain that the words "entitled to vote" refer to the election for which candidates are to be nominated, as a necessary sequel of the words used. It also appears that the words "burgess roll for the time being in force" means the roll upon which the election is to take place. It is contrary to the Act that the old roll should to any extent regulate the proceedings.

LOPES, J. concurred.

Election declared void.

Solicitors for the petitioner, *Ellis, Munday, and Co.*

Solicitors for the respondent, *Peacock and Goddard.*

Friday, June 28, 1878.

GUARDIANS OF ST. LEONARD, SHOREDITCH, v. FRANKLIN. (a)

Corporation—"Person," meaning of word—Penalties, action for—Common informer.

A corporation cannot, except where expressly authorised by statute, sue for penalties as a common informer.

By a private Act (1 & 2 Will. 4, c. lxxvi. s. 45) a penalty was imposed upon all sellers of coal who knowingly sold one sort of coal for another, within twenty-five miles from the General Post Office; and sect. 85 made this penalty recoverable by the person or persons who should inform and sue for the same.

Held, that the plaintiffs, a board of guardians, incorporated, could not sue for the same.

ACTION for damages for breach of contract to sell and deliver to the plaintiffs certain coal of a specified quality and description, and further, suing in the form *qui tam*, for 1780*l.*, half of certain statutory penalties incurred by knowingly selling certain coals for and as a sort which they really were not, within the distance of twenty-five miles of the General Post Office.

Demurrer to the last part of the claim, on the ground that the plaintiffs, being a corporation, were not entitled to sue for penalties as a common informer, and were not specially entitled to sue by the Act which imposed the penalty.

By 1 & 2 Will. 4, c. lxxvi. s. 45, it is enacted that, if any seller or dealer in coals shall knowingly sell one sort of coal as and for a sort which they really are not, within the distance of twenty-five miles from the General Post Office, every such seller or dealer shall forfeit and pay for every such offence 10*l.* per ton for every ton of coals so sold.

By sect. 85 of the same Act, the penalties imposed by the Act, when exceeding 25*l.*, were made recoverable by action in any of the courts of record at Westminster, "by the person or persons who shall inform and sue for the same within three calendar months after the offence or offences shall have been committed;" one moiety of such penalties to go to the Crown, the other "to and for the use of the person or persons who shall inform or sue for the same."

Raymond in support of the demurrer.—A corporation cannot sue as a common informer. In a marginal note to *The Weavers' Company v. Forrest* (2 St. 1241), cited in Chitty's Arch. Practice, 12th edit. p. 1145, it is said by the reporter: "It was held in the C. B. (where other like actions were brought) that the words of 7 Geo. 2—the statute imposing the penalty in that case—being 'any person or persons,' a corporation could not sue as a common informer." The word 'person' or 'persons' does not include corporations, as appears from the numerous Acts of Parliament in which the interpretation clause provides that it shall include them. With regard to actions brought by the Apothecaries' Company, the master and wardens are expressly authorised to sue by sect. 26 of the Apothecaries Act (55 Geo. 3, c. 194). And an ecclesiastical corporation has been held not to be within the words "person or persons" in the Mortmain Act (9 Geo. 2, c. 36), s. 1. He also cited

Walker v. Richardson, 2 M. & W. 882.

J. V. Austin for the plaintiffs.—The tendency of modern legislation has been to make the word "person" include corporations (7 & 8 Geo. 4, c. 28, 1 Will. 4, c. 66, s. 28); though in *Harrison's case* (2 East P. C. 988; 1 Leach, 180) the word "person" was held not to include corporation in a statute relating to forgery. *Walker v. Richardson* (*ubi sup.*) is not applicable, inasmuch as the Mortmain Act, on which it was decided, is shown by its preamble to be directed to conveyances by natural persons only. He also referred to

Coke, 2 Inst. 722;

Grant on Corporations, p. 66.

Raymond replied.

LORD COLERIDGE, C.J.—This is, I believe, a case of the first impression, though not wanting authority which bears indirectly on the question involved. The plaintiffs are a corporation, and that part of the statement of claim which is demurred to claims penalties for the breach of a statutory duty imposed by the statute 1 & 2 Will. 4, c. lxxvi. The penalties sued for largely exceed the sum of 25*l.*, and it is provided by sect. 65 of the statute that penalties, when in excess of that sum, may be sued for and recovered by the person or persons who shall inform and sue for the same. The question therefore is whether the plaintiffs are within the words "person or persons;" that is, whether a corporation can sue as a common informer. The word "person" may, no doubt, in many cases, be taken as including a corporation. It is necessary, however, to construe this Act *secundum subjectam materiam*, and to consider whether it would be reasonable to hold that in this Act it should be given so wide a meaning. There are no doubt certain old penal statutes, as to which the contention would have been impossible, there being certain conditions precedent to any action for the penalties imposed which no artificial person, such as a corporation, could possibly perform. In those cases it would have made nonsense of the statutes to hold that the word "person" included corporation; though in this case I admit that it would not have that effect. I think, nevertheless, that it would be against the general current of authorities, which tend to show that a corporation cannot sue as a common informer; and this is rather illustrated by the argument that corporations are expressly included, and empowered to

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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sue, by many statutes. That tends to show that the word "person" would not have included them without express mention. There are many statutes, no doubt, which place corporations on an equality with natural persons; but this is not by enabling them to do things contrary to their nature, but by enacting that these things, if done by certain natural persons, shall be regarded as if done by the corporation. The statutory provisions as to discovery and inspection, and the administering of interrogatories, are examples of what I mean, and show that there are many acts which it is not in the nature of corporations to do. I think that they cannot, where not expressly authorised to do so, sue as common informers. That was so under the earlier statutes, and I must hold that it is so in this case. *Demurrer allowed.*

Solicitors for plaintiffs, *Carey, Warburton, and De Paula.*

Solicitors for defendant, *Ley and Mould.*

COURT OF ARCHES.

Monday, Nov. 4, 1878.

(Before Lord PENZANCE, Dean of Arches.)

COOMBE v. EDWARDS. (a)

Jurisdiction—Practice of the Ecclesiastical Courts—Prohibition by the Queen's Bench Division—Monition—Summary proceeding for disobedience.

In a suit instituted under the Church Discipline Act 1840, and sent by letters of request to the Court of Arches, the Dean of that court had, on the 7th Dec. 1874, pronounced the defendant, the vicar of a parish, guilty of certain ecclesiastical offences, and sentenced him to suspension ab officio for six weeks. On the 28th June 1875 a monition to desist from the practices thus condemned as unlawful was served on the defendant. On the 23rd March 1878, upon application to the court by affidavits, the Dean was satisfied that the defendant was continuously disobeying the said monition, and on the 29th March a further monition to desist from the said practices was served on the defendant. An application to enforce these monitions was made, and, upon the defendant's failure to appear after notice, the Dean, on the 11th May (following decisions of the Judicial Committee of the Privy Council), decreed that the defendant had disobeyed the monition, and been guilty of contumacy, and sentenced him to be suspended ab officio et beneficio for the term of three years, the defendant to pay the costs of suit. The Queen's Bench Division of the High Court of Justice made absolute a rule for a prohibition to the Dean of Arches, restraining him from executing the above sentence, on the ground that it was beyond his jurisdiction.

Held, that, the facts of the present case being similar, the judgment must be followed, but (per Curiam) that the authority of decided cases and the established practice of the court showed that the sentence, the execution of which the Queen's Bench Division had prohibited, was within the jurisdiction of the court; that the Queen's Bench Division had exceeded their jurisdiction in reviewing decisions of the Judicial Committee of the Privy Council; that the Queen's Bench

Division had no power to interfere with the Court of Arches by way of prohibition in a matter over which the Court of Arches had jurisdiction, and that the ancient practice of the Ecclesiastical Courts showed that a monition did prolong the jurisdiction of the court so as to warrant punishment for a repetition of the offence as for contumacy.

THIS was a suit commenced under the Public Worship Regulation Act, in which a monition had been pronounced. The present proceedings were instituted for disobedience to the monition.

Dr. Deane, Q.C. and *Blakesley* for the promoter. Mr. Edwards did not appear.

LORD PENZANCE.—The court reserved its judgment in this case until the rule for a prohibition in the case of Mr. Mackonochie had been decided; for, although the cases are not identical, a prohibition granted in the one would hardly leave room for this court to take compulsory measures in the other. That decision has now been made, and I venture to think that the result has caused a very general surprise. It has been a surprise, I imagine, to the learned members of the Judicial Committee of the Privy Council to learn that the court of Her Majesty in Council is an "inferior court," and, as such, subjected to the control and supervision of the common law courts, and still more so to find that this supervision, by a sweeping use of the word "jurisdiction," extends to the regulation of their own procedure and practice. Nor will the reason given for this asserted authority be, perhaps, wholly satisfactory. That the common law courts have been used to issue writs of prohibition to the Court of Delegates when they handled matters not within their jurisdiction is undoubted. And that the Sovereign in Council now exercises, among many other functions, the functions which the Delegates used to discharge in ecclesiastical suits is also beyond dispute. But does it follow from these premises that, when this ecclesiastical jurisdiction was transferred by Act of Parliament to a tribunal of the highest dignity, in which the Sovereign (herself signing the judgment) takes a part, this tribunal became at once an "inferior court," and subject as such to the writ of prohibition, simply because some of the duties which it discharges are those which an inferior court had previously been used to discharge? In a word, is it the character and position of the court itself, or is it the character of the jurisdiction which it exercises, which makes it liable to be controlled by prohibition? It occurs to one to ask what, before the Judicature Act, was the position of the Courts of Probate and Matrimonial Causes? The entire jurisdiction of these courts was one which had previously belonged to the Ecclesiastical Courts, and in respect of which prohibitions had been very freely and constantly granted. Did the right and power to grant such prohibitions continue after this jurisdiction had been handed over by the Legislature to new courts, created Courts of Record, and intended to take rank and position on a level with that of the Superior Courts at Westminster? These are matters which will deserve and require to be considered before the somewhat hasty assertion, without authority and without argument at the bar of a right which has I believe, never yet been exercised, and which could not, as it seems to me, be exercised in the case of a definitive sentence passed by the Queen

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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in Council, without directing the writ of prohibition personally to the Sovereign herself, is likely to command a very general acceptance or respect. The judgment in question must also be a surprise to Sir Robert Phillimore, my very learned and highly respected predecessor. After the very unusual compliment paid to him, a living author, of quoting his valuable book on Ecclesiastical Law as a legal authority, he must be surprised to find that it is laid to his charge that he has deviated from the practice of his own court, and has acted *ultra vires* in issuing a monition to Mr. Mackonochie ordering him to abstain in the future, in addition to a sentence punishing him for offending in the past, the only reason given why this proceeding was *ultra vires* being that it was contrary to the practice of the court over which he with so much distinction presided. Nor is he able to take refuge in the excuse offered for him that in so acting he was only following what the Judicial Committee of the Privy Council had done in two previous cases, inasmuch as that tribunal has never done anything of the sort; and the suggestion that it has done so is at once refuted upon carefully reading the report of the two cases in question. But to no one, I imagine, would this decision be more surprising than to the learned counsel who represent Mr. Mackonochie. The ground on which they asked for a prohibition was this—that Mr. Mackonochie's disobedience to the monitions which had been served upon him could only be punished in one way—namely, by imprisonment for contumacy; and, consequently, that to punish him by suspension was contrary to ecclesiastical law and practice. But it never occurred to them to assert that the issuing of the monition itself was a departure from the established procedure of the court in which they had been accustomed to practise, or to put forth the doctrine, which I will venture to call startling, that a monition or order to refrain in future from definite illegal practices in the conduct of divine service, even when lawfully issued by an ecclesiastical court, is nothing more than a piece of waste paper which the defendant is at liberty to treat with contempt and the court is powerless to enforce. How this can be asserted in the face of the statute of 53 Geo. 3, c. 127, which invests the Ecclesiastical Courts with the power of pronouncing in contempt "any person neglecting or refusing to pay obedience to the lawful orders or decrees as well final as interlocutory of such court," and by means of a *significavit* imprisoning such persons, I am at a loss to discover. But that these two propositions, if in any decree warranted by the practice of the Ecclesiastical Courts, or even arguable in connection with that practice, should have escaped the vigilance or exceeded the hardihood of the very acute and learned, and, I may add, sufficiently bold, ecclesiastical lawyers who had Mr. Mackonochie's interests in charge, I am still more at a loss to imagine. And lastly, the public must, I think, have been surprised to discover that a system of judicature should exist in this country so anomalous and so repugnant to common sense as that which this judgment affirms, and which I will in a few words proceed to explain. In this country there have been, time out of mind, different groups of courts exercising different jurisdictions and administering different laws—the courts of common law, the Courts of Equity, the Court of Admiralty, the

Courts Ecclesiastical, part of whose jurisdiction has been in modern times transferred to the Courts of Probate and Matrimonial Causes, and many other inferior courts. All these courts (I am speaking of matters as they stood before the Judicature Act) dealt with different subjects and administered different laws. They proceeded by different methods, and had a special practice all their own, which they amended from time to time and regulated for themselves. A proper Court of Appeal from each court, or set of courts, reviewed their decisions in point of law and controlled their procedure. So matters stood before the Judicature Act, which did not affect the Ecclesiastical Courts nor confer any powers on the High Court of Justice for interference with them. In this state of things the novel claim now made by the Queen's Bench Division is this—that the judges of that court, who are wholly unskilled and uninformed (officially speaking) in the practice of the Ecclesiastical Courts who have not even the means of knowing what that practice has been by access to the records of those courts, are empowered by law to sit in judgment upon the question whether a particular proceeding is in accordance with usual practice or not, and, deciding in the negative, to suddenly put a stop to the suit altogether, leaving justice wholly unadministered, and both parties to pay the costs of a fruitless litigation. If this result had been the fault of the parties in addressing themselves to the wrong jurisdiction, it might be said that they had themselves to blame. But if the thing complained of is no more than a wrong step in a rightful suit, one would have thought it impossible but that the court which reviewed that step and pronounced it wrong should have power to put matters right, and let the suit proceed. And this is the power which resides in a court of appeal. But the Queen's Bench Division is not a court of appeal from the Ecclesiastical Courts and has no such powers, and that they should thus summarily intervene, and, pronouncing a judgment upon what is or is not the practice of this court (which I will presently show is absolutely mistaken in point of fact), should thus put a summary end to the suit, to the great loss and prejudice of the suitors, is, I repeat, an anomaly in judicature for which the public was, I think, hardly prepared. But what must have been thus a surprise to others becomes little less than consternation to those who have to administer the ecclesiastical laws of the realm in future. They can only regulate their proceedings by previous decisions in their own courts, subject to the review of their courts of appeal; and if, when following the decisions of those courts of appeal, as in the present case, they are liable at any moment to have their proceedings stultified and brought to a sudden stop by an extraneous tribunal which has no official experience in these proceedings or knowledge of their requirements, they are placed in the difficulty of either ignoring the decisions of the appeal courts or inviting a writ of prohibition. In this dilemma their authority cannot fail to be impaired, if not destroyed, and I do not hesitate to affirm that the efficiency of this court will be wholly arrested in future if the principle acted upon in Mr. Mackonochie's case be applied to its future proceedings. It is for this reason that I have felt it my duty to examine

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freely this decision, together with the reasoning upon which it is based, and, having done so, to publicly make my protest against this new interpretation of the word "jurisdiction" and the paralyzing influence over this court which has been "usurped" by the Queen's Bench Division under colour of it. I propose to show that the judgment of the Lord Chief Justice is based upon serious misconceptions of fact and equally grave misinterpretations of the law; but, before doing so, I will state exactly what it is which that judgment has decided. Sir Robert Phillimore, when presiding in this Court, punished Mr. Mackonochie for certain illegal practices by a six weeks' suspension and in addition admonished him to abstain in future from these practices. Mr. Mackonochie repeated them, notwithstanding the monition which had forbidden him to do so, and for this conduct, which was both a repetition of the original offence and a contempt of the monition, I suspended him from his office and benefice for a period of three years. The judgment of the Lord Chief Justice pronounces the whole of these proceedings, subsequent to the first punishment of six weeks' suspension, to be either *ultra vires* or *coram non iudice*—I think those are his expressions—because they are, he says, contrary to the practice of the Ecclesiastical Courts. For, treating the matter as if it was a case in the common law courts or the criminal courts of the country, he conceives that the Ecclesiastical Courts have never done, and have no power to do, more than punish for the particular offences which were charged in the suit, and that, having done so, the suit is at an end, any fresh departures from the law being punishable only in a fresh suit. In this view of the case it will be difficult to account for the existence in ecclesiastical law of such a thing as a monition, which is a process or order wholly unknown to the common or criminal law of the land. But this difficulty is got over by the assertion that a monition in a criminal suit is nothing more than a mild punishment, a species of rebuke, or condemnatory shake of the head, which the defendant is at liberty to disregard if he pleases, and for disobedience of which no punishment of any kind can be inflicted by the court. Such is the view taken by the Lord Chief Justice of the practice and procedure of this and the other Ecclesiastical Courts of the kingdom up to the time when, as he asserts, the Judicial Committee, in a previous suit against Mr. Mackonochie, and in a suit against Mr. Purchas, "usurped the jurisdiction now exercised." The Ecclesiastical Courts can punish, the Lord Chief Justice contends, like the criminal courts, any offence within their jurisdiction; but, like the criminal courts, they can only do so by means of a suit commenced after the offence was committed. So that, if a clergyman systematically sets the law at defiance, and insists Sunday after Sunday on performing divine service in an illegal manner, the practice and procedure of the Ecclesiastical Courts does not, says the Lord Chief Justice, permit them to do more than award a punishment for the past, and does not empower them to make any order upon the defendant to desist from the same illegal practices in future. It is upon this reasoning that the Lord Chief Justice declares that the monition issued by Sir Robert Phillimore in this case of Mr. Mackonochie's was a departure from the proper

practice of the court, because that learned judge, dealing first with the past, sentenced the defendant to a suspension of six weeks; and then, dealing with the future, issued a monition to him to desist from the practices which had been condemned. The second point upon which the Lord Chief Justice has declared these proceedings to be illegal and void is that to which I have above alluded. While admitting that there is such a thing in ecclesiastical practice as the issuing of a monition to abstain from illegal practices, he declares that such a monition can only be issued as the substantive punishment awarded by the court for the past offences which the defendant may have committed; so that, if the defendant is charged with any departure from the rubrics of the Prayer-book, and the court finds the offence to be proved in fact and in law, it is then at liberty to pass a sentence of punishment, and among the punishments which the court may inflict is this "admonishing" or issuing of a "monition" to the defendant ordering him not to do so again, which monition when issued puts an end to the suit, leaving the defendant to obey it or not as he pleases and the court in the not very dignified position of having issued an order for which it cannot enforce respect. I believe I have thus correctly expressed the Lord Chief Justice's meaning, but I will quote his own words: "The result, then, at which I arrive on the most careful consideration I can give to the subject is, that a monition in a penal suit, while, if pronounced as a definitive sentence, it carries with it no ulterior consequences, cannot be appended to a definitive sentence awarding a specific punishment, so as to prolong and enlarge the jurisdiction of the court and to warrant any further proceedings on a repetition of the offence as for contumacy." I shall presently show that the Lord Chief Justice is wholly mistaken in point of fact, and that for want of acquaintance with what has been usual in the Ecclesiastical Courts he has been led to denounce as a modern usurpation by the Judicial Committee of the Privy Council a practice which has the authority of the most learned judges who have ever presided in the Ecclesiastical Courts, including the distinguished names of Dr. Lushington, Sir John Nicoll, and Lord Stowell. But before doing so I must deal with what is a far more vital question. Let it be assumed, for the moment, that this court did in Mr. Mackonochie's case deviate from its ancient practice; does that constitute an excess of jurisdiction, and does the law permit a court of common law to sit in judgment upon such a question, first determining what is and what is not the ancient and proper practice of the Ecclesiastical Courts, and then, because it considers a particular method of proceeding to be at variance with that practice, declare that the court has exceeded its jurisdiction, and must be stopped by a writ of prohibition? Now, I venture to affirm that no such power has ever been claimed or exercised before. In all the old text books—books of the highest authority—the "Abridgments" of Viner and Bacon, and the "Digest" of Comyns, the subject of prohibition is treated at large. In Comyns's Digest alone there are no less than forty pages devoted to it, and from first to last in these books there is not a trace of the courts of law ever having interfered by way of prohibition, unless either the subject of the suit was not within the

jurisdiction of the inferior court, or that court in the course of dealing with the matter which was within its jurisdiction had incidentally dealt with some other matter the determination of which properly belonged to some other jurisdiction. To these definitions may be added general statements—that the courts of common law would interfere if the inferior courts did anything contrary to the law of the land. No authority has been cited by the Lord Chief Justice for any extension of the writ of prohibition beyond these limits. On the other hand, it is not easy to prove a negative and cite authorities to disprove a right or power which has never before been asserted. The natural course in such a case is to consult such definitions as may be found in the older authorities of the writ of prohibition, its objects and its application. At the head of the title "Prohibition" in Bacon's Abridgment is the following: "And for this purpose the writ of prohibition was framed, which issues out of the superior courts of common law to restrain inferior courts, whether such courts be temporal, ecclesiastical, maritime, or military, &c., upon a suggestion that the cognisance of the matter belongs not to such courts," &c. So that prohibitions do not import that the Ecclesiastical or other inferior temporal courts are *alia* than the King's courts, but signify that the cause is drawn *ad aliud examen* that it ought to be; and therefore it is always said in all prohibitions (be the court ecclesiastical or temporal to which they be awarded) that the case is drawn *ad aliud examen contra coronam et dignitatem regiam*. In Viner's Abridgment, title "Court," letter D, it is said, "The court ought to take notice of, and give credit and faith to, the proceedings and sentences of the spiritual courts, and to think that their proceedings are consonant to the law of Holy Church, for *cuiuslibet in arte sua perito est credendum*, though what they do there be against the reason of our law," and for this is cited 4 Coke's Reports, f. 29, pl. 18. The definition given of a prohibition in Viner's Abridgment is cited from Wood's Institute, another book of high authority, as follows: A prohibition issues "to forbid a judge to proceed in a cause that belongs to the common law courts, or that belongs not to his jurisdiction, though the courts of law can give no remedy." Again, in Viner's Abridgment, title "Prohibition," 2, is the following: "The probate of wills is a matter purely spiritual, and so they may proceed in their own manner, although different from ours;" and again, "Agreed (Shower, p. 172, in the case of *Shotter v. Friend*) if the spiritual court proceeds in a matter purely spiritual, and pertaining to those courts, according to the civil law, though their proceedings are against the rules of the common law, yet prohibition does not lie." In Comyn's Digest, "Prohibition," F. (1), under the heading, "For what cause granted" is the following: "A prohibition should be granted to the spiritual court in all cases where the ecclesiastical judge proceeds in a matter out of their jurisdiction; though the temporal court has not cognisance of the matter for which the libel is in the spiritual court, for it is sufficient cause for a prohibition that the Ecclesiastical Court exceeds its jurisdiction." In none of these descriptive passages, it is to be observed, is anything said of a prohibition to an inferior court because it dealt in this way or that with a matter

over which its jurisdiction could not be questioned. But I will proceed to other authorities. In *Braddon v. Hill* (Lord Raymond, p. 221) Holt, C.J. expressed himself as follows: "When the Ecclesiastical Courts are possessed of a cause which is merely of spiritual cognisance, the courts of common law allow them to pursue their own method in the determination of it, but where in such a cause collateral matter arises which is not of their cognisance properly, there the courts of common law enforce them to admit such evidence as the common law would allow." In the 13th part of Lord Coke's Reports, f. 44, there is a long case *de modo decimandi*, the main question being whether a custom should be tried in the Ecclesiastical Court or a prohibition should issue. But to the fourth objection made, that the Ecclesiastical Court had refused a plea *de modo decimandi*, the judges resolved that "If the spiritual court ought to have the trial *de modo decimandi*, then the refusal of acceptance of such a plea should give cause of appeal, not of prohibition, as if excommunication, divorce, heresy, simony, &c., be pleaded there, and the plea refused, that gives no ground of prohibition; as if they deny any plea a mere spiritual appeal and no prohibition lieth." The expressions used in these authorities make sufficiently clear the line which has always hitherto been drawn between entertaining a suit, or incidental matter, which lies out of the jurisdiction of the court, and proceeding in a faulty or improper way in a matter which lies wholly within it. The first is ground of prohibition, and the last is ground of appeal. This line of distinction has, unfortunately, been overlooked by the Lord Chief Justice, which is the more surprising, as it has been firmly upheld by one of the most able and distinguished members of his own court. Lush, J., in giving judgment in this very case of Mr. Mackonochie, expressed this distinction in language admirably clear and unambiguous: "It is admitted that the Ecclesiastical Court had jurisdiction over the subject-matter, and jurisdiction to pronounce for the offence of which it has found the defendant guilty the very sentence which it has pronounced. I think we have no jurisdiction to inquire whether the ordinary course of procedure has or has not been followed in this case. The practice and procedure of every court when no Act of Parliament intervenes to regulate it (which I assume to be the case here) is within the exclusive cognisance of the court itself. If in a particular case the mode of proceeding were shown to be ever so irregular and at variance with the ordinary practice, it would not give this court jurisdiction to interfere. Irregularity in procedure is matter of appeal and not of prohibition, and the appeal is to the Privy Council and not to this court." But I will now advert to a decision the great weight of which will not be denied in Westminster Hall. In the year 1835 a Mr. Smyth was engaged in a suit with his wife, which, after passing through the Ecclesiastical Court, came to the King in Council by way of appeal. The Judicial Committee retained the cause and ordered Mr. Smyth to appear absolutely. Conceiving himself aggrieved by this order, and maintaining that on a former appeal to the Court of Delegates the matter had been otherwise decided, Mr. Smyth applied to the Court of Queen's Bench for a prohibition. The case was heard by Littledale, J., Patteson, J., and Cole-

ridge, J., and the judgment of the court was determined by Littledale, J. He said: "Whether the Judicial Committee were right in decreeing Mr. Smyth to appear absolutely or not is a question of practice, not of jurisdiction. The temporal courts cannot take notice of the practice of the Ecclesiastical Courts, or entertain a question whether in any particular cause, admitted to be of ecclesiastical cognisance, the practice has been regular. The only instances in which the temporal courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the court:" (see 3 Adol. & Ell. p. 724.) Not satisfied with this decision, Mr. Smyth made a similar application to the Court of Exchequer. The case is reported in 1 Tyrrwhit & Granger, p. 226. Lord Abinger said that he would give no opinion as to whether prohibition would lie to the Judicial Committee, and went on as follows: "It is alleged that the Judicial Committee have come to a wrong decision upon a matter in which they have jurisdiction. They have the power to remove the suit into their own court, and to take cognisance of it and to make decrees and orders respecting it. That being so, if they have fallen into any error, whether in some interlocutory matter or in their final judgment, we cannot remedy it or entertain an appeal from their decision. We cannot afford any redress, for if there be any mistake in the proceedings it is in a point of practice, which cannot be the ground of a prohibition." In the same case Parke, B. expressed himself thus: "The Judicial Committee had jurisdiction in this case, which is all we are bound to watch over in inferior courts. The Judicial Committee retained the cause, and thus obtained what may be termed an original jurisdiction, and then they ordered Mr. Smyth to appear absolutely. I give no opinion on that order, but, whether right or wrong, it was a step taken in the cause by a court having competent jurisdiction." Alderson, B. added: "If they have done wrong it is in a matter over which they had jurisdiction, and which regards the practice of their own court, and which cannot, therefore, be the subject of a prohibition." To this judgment Gurney, B. assented, and we have, therefore, the deliberate opinion of no less than seven judges to add to that of Lush J. in support of the proposition that the temporal courts have no right or power to inquire into and review the procedure or the practice of the Ecclesiastical Courts, but only to restrain them from entertaining matters which, by reason of their nature, are not within their proper jurisdiction. But I must cite yet another and still more modern authority. The case *Ex parte Story* occurred in A.D. 1852, and is reported in 8 Exch. 195. It was an application, on Mr. Story's behalf, for a writ of prohibition to the Consistorial Court of London. His complaint was that in a matrimonial suit two decrees, ordering him to receive his wife and to pay alimony, had been made in his absence and without previous notice to him. The application was refused. Alderson, B. said: "The Ecclesiastical Court had jurisdiction over the subject-matter of the suit, and we cannot assume that it has acted in this instance without jurisdiction. Every court must necessarily be intrusted with

the control over its own rules of practice. If that were not so, the proceedings in the courts would continually be subject to be stayed by prohibitions supported by the rash oaths of the suitors." And Parke, B. said: "The case is strictly analogous to the *Marshalsea* case, and falls within the principle of law which is there expounded, namely, that when a court has jurisdiction over the suit, and proceeds *inverso ordine*, or erroneously, neither the party suing nor the officer is liable to an action at the suit of the party affected by the proceeding. There is no doubt that here the Ecclesiastical Court has jurisdiction over the suit, but if any proceeding of an irregular nature has taken place in that suit, it does not take away the jurisdiction of the court, but merely gives the party a remedy by application to the court itself, or by appeal. *Ex parte Smyth* is in principle expressly in point." Nor could an opposite opinion be for a moment entertained unless an extension and significance were given to the word "jurisdiction" at variance with its natural and proper meaning. That any given court should have power to correct and punish a particular offence, in a particular person, it is necessary that the offence itself should be of a nature to fall within its jurisdiction; that the person should be subject to its jurisdiction; and that the punishment awarded to him should be one which the court is competent to inflict for that offence. These things constitute "jurisdiction." But where they exist the method of bringing the defendant into court; the form in which the offence is charged against him; the particular forms in which facilities are provided for his defence; the specific rules under which each step in the suit is taken—these things, which are but the machinery by which justice is administered, lie widely apart from the right and jurisdiction to administer it, and to confound them together in the common use of the word "jurisdiction" is, I think, a misapplication of terms sufficiently obvious. For these reasons and on these authorities it appears to me that the Queen's Bench Division has wrongfully "usurped" (to use the expression of the Lord Chief Justice) in this case of Mr. Mackonochie a right to inquire into and decide upon the practice of this court. But I will now proceed to show that the view of that practice taken in the judgment of the Lord Chief Justice is utterly unfounded in fact. I will not quote that learned judgment at large. It is enough to point attention to the specific propositions which it asserts. The first proposition is that which I have before stated—namely, that a monition not to offend in like manner again cannot, according to the practice of the Ecclesiastical Court, be appended to a sentence awarding punishment for an offence already committed. Now, in dealing with this proposition, the Lord Chief Justice has, in the very outset, fallen into a signal and unaccountable error of fact. He is clearly under the impression that the Judicial Committee, in deciding the former suit against Mr. Mackonochie and the suit against Mr. Purchas, had done this very thing—that is to say, had appended a monition to a sentence of punishment; for he says that Sir Robert Phillimore, in taking that course in this suit against Mr. Mackonochie, had "done no more than follow the precedents set by the Judicial Committee." But the contrary is the fact, as indeed will be perceived from the Lord Chief Justice's own state-

ment in a latter part of his judgment of the proceedings taken in these cases, from which it appears that the Judicial Committee did not pass any sentence of punishment for the offences charged in the articles, but only admonished the defendant. The punishment of suspension afterwards awarded by them was awarded for not obeying that monition, and repeating the original offence. This remarkable mistake, however, only shifts the burden of having "usurped" this method of proceeding (now denounced as novel) from the Judicial Committee to the shoulders of Sir Robert Phillimore. But it cannot rest there, because, if the case of *Fendall v. Wilson*, which was decided on the 15th Dec. 1862, by Dr. Lushington, is referred to, it will be found that he (who during a long life had almost an exceptional acquaintance with ecclesiastical practice) did the very same thing. The suit arose in the Arches Court by letters of request, and was instituted for false doctrine. Dr. Lushington found the charge proved, and sentenced Mr. Wilson by a suspension for one year *ab officio et beneficio*, and in addition "admonished" him not to repeat his offence. In a similar case of the *Bishop of Salisbury v. Williams*, arising in like manner upon letters of request, and which was argued and dealt with by the court about the same time, Dr. Lushington did precisely the same thing. These cases will be found in the Privy Council Appeals. I will now go back thirty years, to a time when the Arches Court was presided over by Sir John Nicoll. In the year 1830 the suit of *Field v. Cozens* was decided. It is reported in 3 Hagg. p. 178. It was a criminal suit, brought by letters of request from the Consistorial Court of Chichester, and the offence charged was that of brawling. An affirmative issue having been given, Sir John Nicoll suspended the defendant *ab ingressu ecclesie* for one month, "admonished" him and condemned him in costs. Again, in the year 1826, in a criminal suit promoted by the Rev. Henry Turmine against George Clarkson for brawling, Sir John Nicoll suspended the defendant *ab ingressu ecclesie* "for the space of one fortnight," and admonished him "to refrain in future from offending in like manner under pain of the law and contempt thereof." The sentence of the court is set out at full length in Mr. Coote's book on the practice of the Ecclesiastical Courts, at p. 253, as an ordinary precedent in cases of that character. I will take another instance in Sir John Nicoll's time; it occurred as early as the year 1816. The name of the case is *Blakemore v. Bridger*, and it will be found reported in 2 Phil. p. 302. The suit came by letters of request from the Commissary of Chichester, and it was a criminal suit charging the defendant with having married and cohabited with the daughter of his former wife by a former husband. Sir John Nicoll held the charges to be proved, declared the marriage void, sentenced the defendant to do penance as a punishment, and "admonished" him to live separate from the woman in question for the future. The sentence is set out at length in the notes to the case. The judge pronounced that "William Bridger and Mary Walter ought to be strictly and under pain of the law 'admonished' to separate from each other, and to abstain for the future from all pretended matrimonial, incestuous, and unlawful cohabitation with each other, and we do

by these presents so admonish them." Here, therefore, again was a sentence of punishment, and in addition an admonition to "abstain" from the offence in future "under pain of the law." What these latter words "under pain of the law" meant is apparent from the next case which I am about to cite—a case which has the great authority of Lord Stowell—*Burgess v. Burgess*, reported in the Consistory Reports, vol. 1, p. 384, which occurred in the year 1804. It was, like the last case, a criminal suit, charging incestuous cohabitation. Lord Stowell held the articles proved. In consideration of the age and infirmity of the party, he forbore to pass the sentence of penance, which, he said, was the usual punishment, but condemned him in costs, and "admonished" him not to continue the intercourse. The parties, he said, must live in future separate and apart, and if obedience be not given to this order, excommunication and other consequences will necessarily follow. I will conclude this continuous line of modern authorities with one more case taken also from the Reports of Lord Stowell's decisions. The case of *Cox v. Goodday* is to be found in the Consistory Reports, vol. 2, p. 138. It occurred in 1810, and was a criminal suit in which articles were exhibited against the Rev. William Goodday for brawling. The defendant having given an affirmative issue to the articles, he was sentenced by the court to a suspension *ab officio* for a fortnight, and was also "admonished" not to offend in future. Here, then, is a series of cases, beginning as early as 1804, in which the practice of passing a sentence of punishment and adding thereto a "monition" or injunction to abstain from the like offence in future has been adopted and acted upon throughout this century, and by the most eminent judges who have presided in the Arches Court during that period of time. This period of time, it is to be observed, covers the whole time during which any reports of ecclesiastical cases are in existence, excepting, perhaps, the notes of Sir George Lee in the middle of the last century; but if any previous reports existed, can any doubt be entertained that the same thing would constantly appear to have happened? The cases collected by Mr. Rothery, and published in the form of a return to the House of Commons, carry this same practice further back by the space of another century. The case No. 98 occurred in the year 1692. It was a suit commenced in the Consistory Court of Gloucester for an incestuous marriage and cohabitation by Richard Orchard with his father's widow. There was an appeal to the Court of Arches and thence to the Delegates. The Delegates pronounced sentence against the appeal, and "declared that the said pretended marriage was *ab initio* null and void, and separated, divorced, and absolved the appellants therefrom, and further sentenced them to be canonically corrected and to perform salutary and condign penance. They also condemned the appellants in costs in all the courts. A monition was also decreed forbidding the appellants to consort together except in public." Indeed so completely an established practice has it been to admonish for the future as well as correct and punish for the past, that a prayer by the promoter that the court would so deal with the defendant is to be found in the common form of articles used in this court in criminal suits. In Mr. Coote's Book of Practice, p. 222, is

a form of articles given as a precedent against a layman for brawling, which concludes in this manner: "And that you be duly and according to the exigency of the law corrected and punished for the same, and admonished to refrain from the like behaviour for the future." And accordingly, in the articles exhibited in this very suit against Mr. Mackonochie, the prayer of the promoter is that the defendant be "duly and canonically punished according to the gravity of his offence, and likewise 'admonished' against so offending in future, and condemned in the costs," &c. The articles exhibited in the former suit against Mr. Mackonochie concluded with a prayer in identically the same form. And yet this is the mode of procedure which the Lord Chief Justice asserts to have been "assumed" or "usurped" within the last few years by the Judicial Committee, "not indeed," he says, "by the judges of the ordinary Ecclesiastical Courts, but by judges of whom, however great and eminent, I hope I may be pardoned for saying that they may be supposed to be less familiar with the administration of the ecclesiastical law." I might perhaps stop here, for this erroneous theory which the Lord Chief Justice has invented of ecclesiastical practice underlies (with one exception which I will presently mention) the whole of his judgment, and forms the entire basis of it; so much so, that I will venture to hazard the opinion that, had these cases and this practice been known to him, his decision would hardly have been what it was. But the other proposition which he has asserted relating to the practice of this court is equally without foundation, and is likely to be so misleading to suitors, and mischievous to the efficiency of the court, that I cannot do otherwise than mention it. An "admonition," he says, in a criminal suit, save where it is issued to compel appearance or "as a means of furthering the progress of a suit," can only be resorted to as a definitive sentence of punishment for a past offence. And when thus used it cannot be, he contends, "the foundation of any ulterior consequences, but is only a form, however mild, of punishment; the open and public censure, or rebuke of the judge, for ecclesiastical misconduct, generally accompanied by the party thus censured being condemned in costs, and to be remembered, doubtless, as a matter of aggravation should a repetition of the offence occur, but not capable of being used as the foundation of any future proceedings of a summary character on the score of contumacy in case of such repetition." Now, it is undoubted that, in many instances, the Ecclesiastical Courts have satisfied themselves in criminal suits with admonishing the defendant to abstain in future from the conduct or neglect which may have been charged against him as an ecclesiastical offence, without adding thereto any specific punishment for the past. The reason of this becomes apparent when the nature of these so-called criminal suits is adverted to and properly understood. The powers and office of the spiritual courts are correctional and disciplinary. The primary and professed object of these criminal suits is not to deter others, but to enforce upon the defendant himself *pro salute animae* a course of conduct no longer open to ecclesiastical censure. The reformation of the defendant being the avowed object, it is quite as much, or more, the purpose of the suit, from the ecclesiastical point of view, to provide against

future misconduct as to punish for past excesses. The language of the citations and of the sentences in use in the Ecclesiastical Courts fully bears out this statement; nor will it be denied by anyone conversant with the ecclesiastical law. Such a comparison, therefore, as the Lord Chief Justice institutes between an indictment for larceny, where the prisoner is charged with an offence against the Crown and dignity of the Queen, and is punished for the sake of example, and a suit in this court against a clergyman for enforcing upon him a due observance of ecclesiastical law in the performance of divine service, is a comparison between two things which at the very foundation have no analogy whatever, and have little or nothing in common but the common name of "criminal." Is it, then, possible to accept the proposition of the Lord Chief Justice that a "monition," or order of the court to abstain in future from particular conduct or practice, is an order which the court may make, but cannot enforce? Let me glance at some of the cases in which, without any punishment for the past, the court has thus ordered the defendant to abstain or desist in future. In *Barnes v. Shore* (1 Robertson, 399) the suit, which was a criminal one, came to this court by letters of request from Exeter. The defendant, a clergyman, was charged with reading services and preaching without a licence in an unconsecrated chapel. Dr. Lushington held the charge proved, did not sentence him to any punishment, but admonished him "to refrain from offending in like manner in future," adding, "should he be guilty of a repetition of this offence it will be not only an offence against his diocesan, but against the authority of this court;" that is, not only an offence against ecclesiastical law, but a contempt of the authority which commanded him to refrain from committing it. Again, in the case of *Hodgson v. Dillon* (2 Curteis, 388), a criminal suit was instituted in the Consistory Court of London against a clergyman for officiating in an unconsecrated chapel without the licence of the bishop. The promoter prayed "that the defendant should be admonished to refrain" from so officiating in future, and the judge "admonished" him accordingly. A similar case occurred in A.D. 1789. *Burton v. Wells* (1 Consistory Reps. p. 34) was a criminal suit against Dr. Wells for officiating in Ely-place Chapel without a licence. Lord Stowell said, "I must therefore pronounce for the jurisdiction of the Bishop of London by decreeing that Dr. Wells has officiated without authority, and direct a 'monition' to issue to him to desist." Now, does the Lord Chief Justice really mean to contend that the monitions issued in these cases were mere rebukes for the past, and that if the clergymen in question had wholly disregarded the orders of the court they might have done so with impunity? What authority, I may ask, is there for such a doctrine? The language of the learned judges—of Lord Stowell, who, in the case above quoted, spoke of "excommunication following" upon disobedience; and of Dr. Lushington, who spoke of disobedience being an offence "against the authority of the court"—nay the very language of the monition itself, which commands the defendant to abstain for the future "under pain of the law and contempt thereof," are distinctly at variance with any such proposition. It is not to be expected that the modern reports would afford

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instances in which disobedience to those monitions was followed by punishment for contempt. Such a matter, involving the mere exercise by the court of its ordinary powers for enforcing obedience to its decrees, would not furnish matter for a report. But it happens (again referring to Mr. Rothery's collection of cases in the Delegates) that the older records of the courts do furnish such instances. The case No. 100, which was a suit by one Mary Hewetson against a woman named Chamberlayne for adultery with Thomas Hewetson, her husband, was promoted in the Arches Court by letters of request from the Bishop of London. "The court had previously issued a monition forbidding Thomas Hewetson and Chamberlayne to consort together except in public, and a decree of excommunication was issued against them for not obeying the monition." The Delegates rejected the appeal and issued a similar monition. The statute, moreover, of the 53 Geo. 3, c. 127, which was "an Act for the better regulation of the Ecclesiastical Courts in England," &c., is distinctly opposed to the contention that a monition cannot be enforced. For it provides that in all cases in the Ecclesiastical Courts, "where any person required to comply with the lawful orders or decrees, as well final as interlocutory, of any such court shall neglect or refuse to pay obedience to such lawful orders or decrees, it shall be lawful for the judge to pronounce such person contumacious and in contempt," and to signify the contempt to the Court of Chancery with the consequence of imprisonment. But the most singular aspect of the Lord Chief Justice's proposition remains to be stated. He admits that a monition is a common process in constant use in the Ecclesiastical Courts, both in civil and criminal proceedings, "as incidental to procedure," and as a means of "furthering the progress of a suit," and he does not deny that such monitions may be and are universally enforced by the court, if not obeyed; while he asserts that a "monition" forming the definitive sentence of the court need not be obeyed and cannot be enforced by the court. So that there are two kinds of admonitions—one of a peremptory character, not to be disregarded without the liability to punishment, and another of a harmless, and I might add useless character, and which may be set at naught with safety. And yet the "monitions" in all cases are the same, and are formal documents issued under the seal of the court in precisely similar language, and in all cases they command a particular thing to be done or abstained from "under pain of the law and contempt thereof." I have thought it right thus to refute this proposition of the Lord Chief Justice—viz., that the monitions of the court may be disobeyed with impunity, because, if it should go forth to the public with his high sanction and uncontradicted, it would undermine the authority of this court in some of its most useful functions. But I have not lost sight of the fact that in this suit against Mr. Mackonochie the further question arises whether the power of this court to punish the defendant for disobeying the monition and repeating his original offence is limited to the imprisonment authorised by the statute of George III., or whether it extends to punishing him by suspension. Having expressed myself very fully upon this subject on a former occasion, I forbear to recur to it. The only remark I have

to make upon it is that the sentence of suspension in Mr. Mackonochie's case was intended to be passed upon him, not only for his contempt in disobeying the monition, but also for his breach of the ecclesiastical laws in the repetition of his original offence. And some pains were taken in drawing up the order of this court (which I may add was not in existence until after the rule nisi for a prohibition had been granted) to make this intention clear and unambiguous, with what success it remains for others to decide. One point, and one point only, remains, and I notice it the more particularly because from the report which I have seen of the judgment in the Queen's Bench Division it appears to have been the one particular point upon which (subject to a general agreement with the Lord Chief Justice) Mellor, J. rested his judgment. This court, it is argued, has no original jurisdiction, and its jurisdiction in the present case arises solely under the letters of request from the Bishop of London. The bishop, it is said, could only request this court to deal with offences committed before the letters of request were issued, and, consequently, could only confer upon this court a jurisdiction to punish those offences without regard to the future. I pass by the question whether the archbishop has or has not an original jurisdiction within his province subject to the bill of citations; and, assuming the jurisdiction of this court to be conferred by the letters of request, I will answer the above objection in a few words, both on principle and on authority. The bishop, if this suit had been commenced in the Consistory Court, would have had authority not only to punish for the past, but to admonish for the future, such being the practice of the Ecclesiastical Courts; and when the bishop requested the judge of the Court of Arches to institute the suit in this court, where the same practice prevails, he invoked the exercise in the Court of Arches of the same powers and jurisdiction that he himself would have exercised if the suit had been instituted in his own court. And with regard to authority I am satisfied with pointing out that the two cases of *Fendall v. Wilson* and the *Bishop of Salisbury v. Williams*, in which Dr. Lushington admonished the defendant not to offend in future, were both cases coming to him by letters of request, as also were the two cases above quoted of *Blakemore v. Brider* and *Field v. Cosens*, in both of which Sir John Nicoll did the same thing, while the practice of the Bishop's Court in this matter is evidenced by the case above quoted of *Oos v. Goodday*, where Lord Stowell did the same thing in the Consistory Court of London. Having thus vindicated the practice of the Ecclesiastical Courts, and proved the existence during the whole time over which any reports of ecclesiastical cases extend, and even a century earlier, of the very procedure which the Lord Chief Justice has denounced as a modern invention, I may very properly, I think, pass by without comment the following exhortations to judicial duty. A judge "cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion;" "it may be that this summary jurisdiction would be exceedingly useful in order to prevent erratic clergymen from setting the law at defiance, and retaining benefices in a church the rules and ritual of which they habitually disregard, if the Legislature should think proper to create it. But its

possible utility affords no justification for usurping it, and expediency is a new—and I must say to me strange—ground to assign for upholding the exercise of assumed judicial authority when it cannot be shown to exist in point of law." The imputation here apparently conveyed is that the Ecclesiastical Courts have wilfully overstepped their legal authority and adopted a novel procedure because it was "exceedingly useful." I say apparently, for I should be as little willing to believe that this was the real meaning of the Lord Chief Justice as I should be to suppose that in the novel power which he has himself "usurped" he contemplated a useful means of extinguishing the Ecclesiastical Courts. But I must be permitted to draw one practical lesson from the Lord Chief Justice's misconception of ecclesiastical practice. Speaking of himself, he says, "I have to deal with a branch of law with which, as a common law judge, I am, of course, though I have taken the utmost pains to make myself master of the authorities, less familiar;" and again, he says: "I have gone carefully through all the writers, certainly all the writers of authority, who have written on the subject of ecclesiastical jurisdiction since the Reformation, and have not only found no authority for the exercise of such a power, but not even a trace of it." That, after a search so laborious, a practice which has all along been familiar in these courts should have escaped attention, and that it should have been possible to compare, as analogous to one another, these disciplinary suits in the Ecclesiastical Courts with indictments for breaches of criminal law must afford matter for surprise. But what a light does it not shed upon the system newly asserted of a court whose function it is to administer one branch of the law sitting in judgment upon the practice and procedure of another court which administers a wholly different branch of the law! And if the highest ability, the most extended industry, and what all must know to be the most earnest desire and intention to arrive at a right conclusion, can only produce a result so much to be deplored, what hope will there be in future for the Ecclesiastical Courts when their practice may come to be handled by ability less exceptional and with industry less marked? I cannot close these observations without a word upon what has been called the "summary" nature of the proceeding under which Mr. Mackonochie has been punished. For my own part, I should be loth to adopt any procedure unless absolutely forced upon me by the law, even though it were exceedingly useful, if it bore unjustly on the defendant or diminished in any degree his means or opportunities of legitimate defence. "Though a murderer should be taken red handed in the act," says the Lord Chief Justice, "if there is a flaw in the indictment the criminal must have the benefit of it." Alas that this should be so! For this species of defence I have, I confess, no sympathy. The picture of law triumphant and justice prostrate is not, I am aware, without admirers. To me it is a sorry spectacle. The spirit of justice does not reside in formalities or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be, but the handmaid of justice; and inflexibility, which is the most becoming robe of the latter,

often serves to render the former grotesque. But any real inroad upon the rights and opportunities for a defence of a person charged with a breach of the law whereby the certainty of justice might be imperilled I conceive to be a matter of the highest moment. I am, therefore, not contented with having shown these proceedings to be sanctioned by ecclesiastical law without pointing out, in addition, that they are wholly consonant with justice. The word "summary" is apt to convey a false impression. In the criminal courts of the country to convict by a summary proceeding is to withdraw from the defendant the advantage of a jury. In the common law courts to deal with a matter "summarily on motion" implies the substitution of affidavits for witnesses, and very often the exclusion of an appeal. But the so-called "summary" proceeding against Mr. Mackonochie in this court has excluded nothing, it has deprived him of no advantage, and placed him in no respect in a different position from that which he would have occupied had his offences been adjudicated upon under a fresh set of articles in a fresh suit. Had Mr. Mackonochie chosen to appear he would have had the same opportunity of calling witnesses, the same opportunity of arguing any points of law, and the same means of defending himself in all respects as the proceedings in a fresh suit would have given him. The Lord Chief Justice, indeed, says he would have had no appeal; but this, again, is surely an error, for all orders of this court, however trifling, were by the old ecclesiastical law matters of "grievance" and appeal, and the Church Discipline Act gives an absolute right of appeal against all definitive sentences, and an appeal with leave of the judge (which is never refused unless purely vexatious) against all interlocutory orders. The whole difference, then, between the procedure which has been adopted and that which the Lord Chief Justice says should have been adopted lies in this, that if a fresh suit had been instituted Mr. Mackonochie's offences would have been charged against him in the formal language of a paper headed "Articles," whereas in the present suit the same offences were charged against him in language equally precise and definite in a paper headed "Notice of motion," this latter being accompanied by an advantage which fresh articles would not have given him—namely, the affidavits of the witnesses who were to prove the case against him. On the other hand the additional expense and delay which a fresh suit necessarily to some extent involves are avoided. The designation, therefore, of "summary," the meaning of which in these cases is thus reduced to: "speedy and inexpensive," instead of being a reproach to this form of proceeding, is very much to its credit. The further objections which have been ingeniously suggested against it—namely, that the defendant might have removed to another benefice out of the original diocese, or, what would be a more formidable consideration, out of the province, may be properly dealt with when such a case arises. In such a case, as also in case of a great lapse of time after the issuing of the monition before it was disobeyed, it would be quite competent to the court to require a fresh suit before taking compulsory or penal measures. These considerations make it abundantly clear, I think, that this form of proceeding by "mo-

tion," which is analogous to the procedure by injunction, or perpetual injunction in the Courts of Equity, is conformable to justice, while it is not opposed to the security or even the interests of a defendant. This, though it forms no reason for adopting such a proceeding without the sanction of the law, is a very good reason for upholding it when it has, as I have already shown it has, that sanction. Regarding the criminal aspect of these suits against clergymen, it is not out of place to remark that the nature of the punishments inflicted in them, even in extreme cases, does not extend beyond a deprivation of their preferment in a church the constitutions and laws of which they may have violated, and in the case of *significavit* an imprisonment which terminates as soon as they declare themselves willing to conform to those laws. I have dwelt thus at large upon the judgment pronounced in Mr. Mackonochie's case, because I conceive that the independence of this tribunal in matters regarding its own procedure demanded an adequate protest against the invasion thereby made upon it. But the Queen's writ of prohibition, however unadvisedly issued, must command both obedience and respect. And, as I cannot proceed to punish Mr. Edwards, the defendant in this case, by imprisonment without the chance of running counter to the principles which have been acted upon in the case of Mr. Mackonochie, and possibly, if not probably, inviting another prohibition, I think it best for all parties to hold my hand and decline to proceed to compulsory measures at present.

CROWN CASES RESERVED.

Saturday, Nov. 16, 1878.

(Before KELLY, C.B., DENMAN, LINDLEY, MANISTY, and HAWKINS, J.J.)

REG. v. TREADGOLD. (a)

Jurisdiction—Venue—Embezzlement.

It was the duty of the prisoner, a commercial traveller, to remit daily to his employers, who resided in London, the moneys which he collected, without reduction. The prisoner, on the 1st and 2nd March 1878, collected at Newark two sums of money which he did not remit or account for till the first week in April, when one of his employers went to Grantham where the prisoner resided, saw him, and taxed him with receiving moneys and not accounting to them for them. The prisoner then and there handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. There was no evidence that the prisoner returned to Grantham on either of the days, or at what time of the respective days he received the two sums of money. He was indicted and convicted at the borough of Grantham Quarter Sessions for embezzling the above two sums of money.

Held that the conviction was bad, as there was no evidence of any embezzlement within the borough of Grantham.

CASE reserved for the opinion of this Court by the Recorder of the borough of Grantham, Notts.

The prisoner was tried before me at the sessions held for the borough of Grantham, on the 23rd July 1878, on an indictment charging him with

having in the borough of Grantham embezzled the several sums of 2*l.* 5*s.* and 6*l.* 11*s.* 6*d.* respectively, the property of Nathan Defries and another, his masters.

The prisoner was employed by the prosecutors as a commercial traveller under a written agreement, by which he was bound to remit daily, without any reduction whatsoever, any moneys collected by him on their account.

On the 1st and 2nd March 1878 the prisoner being then at Newark, in the course of his occupation as commercial traveller, received on account of his masters the sum of 2*l.* 5*s.* from one H. Slater, and the sum of 6*l.* 11*s.* 6*d.* from Thomas Edwards respectively. He never accounted to them for the money, or informed them that he had received it except as hereafter stated.

It was proved that the prisoner resided at Grantham, but there was no evidence to show that he returned to Grantham on either of the days, or at what time on the respective days he received the said several sums of money.

It was within the knowledge of the jury that Newark was fourteen and three-quarter miles from Grantham, and within easy access of it by train, although no formal proof was given of the fact.

In the first week in April 1878 Nathan Defries, one of the prisoner's employers, proceeded to Grantham and had an interview with the prisoner there; and, on taxing him with receiving money on account of his employers which he had not accounted for to them, the prisoner handed to the said Nathan Defries a list of amounts he had received and not accounted for, in which list the two items of 2*l.* 5*s.* and 6*l.* 11*s.* 6*d.* appeared.

Upon the above facts it was contended, on behalf of the prisoner, that the indictment failed of proof, the embezzlement, if embezzlement there was, having been committed at Newark, in the county of Nottingham, where the money was received and appropriated by him, and not at Grantham, in the county of Lincoln.

On the part of the prosecution it was contended that the venue was well laid at Grantham, the offence having been commenced at Newark and completed at Grantham; and that, by virtue of the statute 7 & 8 Geo. 4, c. 64, s. 12, a person may be tried either in the county in which he began or that in which he completed the offence.

I overruled the objection, holding that, as the prisoner lived at Grantham, but a short distance from Newark, there was evidence from which the jury might infer that the prisoner would return home from Newark on the day he received the money; and that, as it was his duty to remit daily the money he collected, the failure to do so was sufficient evidence of embezzlement, and I declined to withdraw the case from the jury.

The prisoner was found guilty, and I passed sentence upon him, reserving the point as to the venue, and admitting him to bail pending the decision of it by the court.

The question reserved is whether, under the circumstances above disclosed, the venue was well laid in Grantham. If the court should be of opinion that it was, the conviction to stand; or, if of the contrary opinion, to be quashed.

WM. JOHN EWINS BENNETT.

W. J. Smith for the prisoner.—There was no evidence that the prisoner returned to Grantham

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before the first week in April, and the receipt of the moneys was a month previously at Newark. The alleged embezzlement consisted in the fact of non-accounting, but at Grantham he did account for the receipt of the moneys. It is true that it was his duty to have remitted daily the moneys he had collected without any reduction, and it does not appear that he was ever at Grantham between the time of receiving the money and the first week in April. [HAWKINS, J.—The only statement in the case bearing on this is, that the prisoner lived at Grantham. DENMAN, J.—Where did the prisoner feloniously appropriate the moneys to his own use?] From the case it is impossible to say, but it does not appear that he did so appropriate them at Grantham. [KELLY, U.B.—It lies on the prosecution to show that the embezzlement took place at Grantham.] He then cited the recent case of *Reg. v. Rogers* (14 Cox C. C. 22; 47 L.J. 11, M.C.), and the case of *Reg. v. Murdoch* (2 Den. C. C. 298; 5 Cox C. C. 360). In the present case the evidence pointed to an embezzlement at Newark, if there was any embezzlement at all, but there was no evidence of any embezzlement at Grantham.

No counsel appeared to argue for the prosecution.

KELLY, C.B.—This conviction must be quashed. There was no evidence at all which showed the completion of the offence of embezzlement at Grantham. It is quite consistent with the facts stated in the case that there was probably an act of embezzlement at Newark, but even that is not clear. The case states that the prisoner resided at Grantham, and that there was no evidence to show that he returned to Grantham on either of the days he received the several sums of money. It further states that in the first week of April one of the prisoner's employers proceeded to Grantham and had an interview with the prisoner and taxed him with receiving moneys which he had not accounted for to them, and that the prisoner handed to him a list of amounts he had received and not accounted for, in which list the two items charged in the indictment appeared, and there the evidence stops. It is impossible to say upon these facts that there was any evidence of embezzlement at Grantham, and therefore under the circumstances the conviction must be quashed.

DENMAN, LINDLEY, MANISTY, and HAWKINS, JJ., concurred.

Conviction quashed.

Saturday, Nov. 16, 1878.

(Before KELLY, C.B., DENMAN, LINDLEY, MANISTY, and HAWKINS, JJ.)

REG. v. THOMAS HUGHES. (a)

Larceny—Recent possession—Evidence for the jury.

A bag was left by the owner on a Saturday night near to a place where the prisoner and two other persons were at the time. The prisoner passed by the place on his way home, and shortly afterwards one of the other persons followed in the same direction. That person and the prosecutor then met the prisoner coming back to his home from the opposite direction, and being questioned he denied all knowledge of the bag, and said that he had been into the neighbouring wood for firewood. The wood, the prisoner's

cottage, and some disused farm buildings near it were then searched, without success. On the Monday morning the bag was found in a hay-loft in one of the disused farm buildings near to the highway. There was no door to it, and passers-by had easy access to it. The prisoner was then taken into custody for stealing the bag, and said to the constable, after previously denying he had taken the bag, "I suppose I shall get a month for this," and made use of some other words of no more definite meaning.

The Chairman left all the facts to the jury as evidence from which they might infer that the prisoner had had possession of the bag, and directed them, if they found so, to treat the case as one of recent possession.

Held, that the Chairman's ruling was wrong, and that he ought to have directed an acquittal.

At the General Quarter Sessions of the peace for the county of Denbigh, holden at Denbigh on the 11th day of April 1878, the prisoner was indicted for stealing a bag containing a number of articles, the property of one David Vaughan.

It was proved at the trial that a few minutes before the bag was missed, which was about 10 p.m. on Saturday the 12th Jan, the prisoner and two other men, named Thomas Bagnall and William Bagnall, were near a wall by the road side on which it had been placed by the prosecutor's wife while she went into a shop close by, but none of the three men were seen in possession of the bag at that or any other time.

The prisoner passed the wall, where the bag was placed, on his way home, and shortly afterwards William Bagnall followed him in the same direction.

After passing the prisoner's cottage, William Bagnall, and the prosecutor, David Vaughan, met the prisoner coming back to his cottage from the opposite direction. When questioned, the prisoner denied all knowledge of the bag, and stated that he had been into a neighbouring wood to fetch firewood.

It was proved on cross-examination that the owner of this wood allowed his workpeople to collect firewood for their own use there, and also that the prisoner had formerly worked for him, but was not doing so at the time in question.

William Bagnall and the prosecutor David Vaughan, in company with the prisoner, searched the wood, the prisoner's cottage, and some disused farm buildings at the back of his cottage for the bag, which could not be found.

On the Monday following the bag was, however, found by the police constable in an old hayloft, one of the disused farm buildings mentioned above.

These disused buildings, including the hayloft, belonged to an adjoining farm in the occupation of a person of the name of Griffith, and were not connected with the prisoner's cottage or garden otherwise than that he, as well as others, had access to them. The hayloft had no door, and was near the high road.

The prisoner was a farm labourer, and had worked in the neighbourhood all his life, but there was no evidence of his having worked for the aforesaid Griffith or on his farm.

When the bag was found the constable took the prisoner to the police station at Ruabon, a distance of between four and five miles. On their way there

the prisoner, having previously denied to the constable that he had committed the robbery, said, "Well, it's no use, I suppose. I suppose I shall get a month for this. What do you think?" He added, "Some people get more than others," and afterwards said, "It's very odd; people get transported, and when they come back they begin the same things again."

I told the jury that in a case of larceny, after proving that the goods were stolen, proof that they were found in the possession, or under the control of the prisoner shortly afterwards, and that he did not give a satisfactory account of the manner in which he came by them, is good presumptive evidence of the prisoner having stolen them. I directed the jury to apply this rule to the present case, and to take the evidence and the whole of the circumstances, together with the prisoner's statements into their consideration, and say whether he was guilty or not guilty of the offence charged against him.

The counsel for the prisoner took exception to this direction on the ground that there was no evidence to go to the jury to show that the bag was ever in the possession or under the control of the prisoner, so as to raise a presumption of his guilt from his not giving any account of it.

I declined to alter my direction to the jury, being of opinion that, under all the circumstances, there was evidence sufficient to justify my direction, and the application of the above rule so as to raise a presumption of the prisoner's guilt.

The jury found him guilty, and he was admitted to bail to appear to receive judgment at the quarter sessions of the peace to be holden for the county of Denbigh when called upon.

The opinion of the Court for the Consideration of Crown Cases Reserved is requested whether there was any evidence which ought to have been left to the jury that the bag had been in the possession or under the control of the prisoner, so as to make the aforesaid rule applicable to this case.

If the Court should be of opinion that there was any such evidence for the jury, the conviction to stand; if of a contrary opinion, to be quashed.

THOMAS HUGHES, Chairman.

No counsel appeared to argue on either side.

KELLY, C.B.—The question reserved for our decision is whether there was any evidence which ought to have been left to the jury that the bag had been in the possession of the prisoner, or under the control of the prisoner, so as to make the rule alluded to applicable to this case. We can find no evidence that the bag had been in the possession of the prisoner or under his control; and therefore the conviction must be quashed.

DENMAN, J.—I am of the same opinion. If the case had been left in a different way to the jury there might have been something for them to consider, viz., the statements made by the prisoner to the police constable. But with respect to the direction of the chairman, that the jury might proceed to consider the case on the basis of the doctrine of recent possession, there was no evidence at all of any possession by the prisoner. The jury must, therefore, have been misled, and the conviction cannot be sustained.

MANISTY, LINDLEY, and HAWKINS, JJ. concurred.

Conviction quashed.

Saturday, Nov. 16, 1878.

(Before KELLY, C.B., DENMAN, LINDLEY, MANISTY, and HAWKINS, JJ.)

REG. v. ORTON AND OTHERS. (a)

Prize fight—Combatants with gloves on—Sparring match.

Divers persons assembled in a room, entrance money being paid, to witness a fight between two persons. The combatants fought in a ring with gloves, each being attended by a second, who acted in the same way as at prize fights. The combatants fought for about forty minutes with great ferocity, and severely punished each other. The police interfered and arrested the defendants, who were among the spectators.

Upon the trial of an indictment against them for unlawfully assembling together for the purpose of a prize fight, the chairman directed the jury that, if it was a mere exhibition of skill in sparring, it was not illegal; but, if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize fight, whether the combatants fought in gloves or not, and left it to the jury to say whether it was a prize fight or not.

Held, that the jury were properly directed.

The following case was reserved by Sir Frederick Thomas Fowke, Bart., Chairman of the General Quarter Sessions of the peace for the county of Leicester:

John Orton, William Burrows, Alfred Greenfield, Henry Wilkinson, Charles Orton, George Orton, James Westerman, Edward Bodycott, William Cave, Thomas Hall, George Hardy, Henry Stokes, Joseph Collins (*alias* Tug Wilson), and William Henry Neale were tried before me at the General Quarter Sessions of the peace for the county of Leicester, held on the 15th Oct. 1878, for assembling together for the purpose of a prize fight.

The indictment contained six other counts, three of them for assaulting police constables in the execution of their duty, and three other counts for common assaults on the same constables.

It was given in evidence that the defendants had assembled, together with others to the number of a hundred and upwards, in a room in a vacant building which they had taken possession of without the consent of the owner; that one shilling entrance was charged to each person; that then the door was barricaded to prevent access by the police or any other person; that the two defendants Orton and Burrows were the combatants, each was stripped to the waist, a space roped in for a ring, and each combatant was attended by his second, on whose knee he sat in the intervals during the fight, and was sponged and fanned by him after the usual custom in prize fights.

It was proved by an eye-witness that the men fought with great ferocity, in the words of this witness, "like bulldogs;" that each was severely punished, and that the fight had lasted for nearly forty minutes when the police came up, brought there by information of what was going on, and by a large and disorderly crowd who had assembled on the road outside the building attracted by what was going forward.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The police, after great resistance, during which the assaults before mentioned were committed, forced an entrance into the room through the windows, when those present attempted to escape in any way they could, by door or window. The two combatants and the other twelve defendants were, however, arrested.

It was found that each combatant was severely punished, and one of them had his ear bitten through. They were highly exasperated with each other, each calling the other a coward, and taunting each other with unfair fighting so much that even after they were arrested and in the custody of the police, they were with difficulty prevented from closing with each other and renewing the fight.

The fight was for money, and one of the defendants told the policeman who had him in charge, "You have done me out of 7l."

The learned counsel for the defence contended that this was a sparring match fought in gloves, according to well-known rules, and, on the authority of the case of *Reg. v. Young* (10 Cox Crim. Cas. 371) (a) was no offence at law.

I directed the jury that this was a correct definition of the law, if it were a mere exhibition of skill in sparring; but that, if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize fight, whether the combatants fought in gloves or not, and I left this question to the jury: "Was this a sparring match or a prize fight?"

The jury had the gloves used in the fight before them, and retired to consider their verdict, and on their return they found that it was a prize fight, and that the prisoners were guilty.

They also found the defendants Collins, Westerman, and Bodycott guilty of assaulting the police in the execution of their duty.

The learned counsel contended that I was wrong in leaving the question to the jury whether or not it was a prize fight; that, as the men fought in gloves, I ought to have directed the jury that it was therefore a mere sparring match, and no indictable offence.

I respited the sentence, releasing the defendants on bail for their appearance to receive and abide by the sentence of the Court at the next Epiphany sessions if the Court be of opinion that I was right in thus leaving the case to the jury.

The case is, whether the question "Was this a prize fight or not?" was rightly left to the jury; or was the fact that the fight was with gloves sufficient to prevent the same being an indictable offence?

FREDK. THOS. FOWKE, Chairman.

No counsel appeared to argue on either side.

KELLY, C.B.—The question in this case is, whether the prisoners were guilty of the offence of unlawfully assembling together for the purpose of prize fighting. The jury found that this was a prize fight. No doubt the combatants wore gloves; but that did not prevent them from

(a) *Reg. v. Young* was tried before Bramwell, B. at the Central Criminal Court, and the marginal note is this: "There is nothing unlawful in a sparring exhibition unless the men fight on until they are so weak that a dangerous fall is likely to be the result of the continuance of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match does not amount to manslaughter."

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severely punishing each other. There can be no doubt that, upon the facts, the conviction ought to be affirmed.

DENMAN, J.—I am of the same opinion. The jury examined the gloves in their private room, and, having the fact proved that the combatants severely mauled each other, they found rightly that this was a prize fight. The question was entirely one for the jury.

LINDLEY, MANISTY, and HAWKINS, J.J. concurred.

Conviction affirmed.

COURT OF APPEALS OF KENTUCKY.

Wednesday, April 17, 1878.

COMMONWEALTH v. HAWES.

Extradition—Trial for another offence.

Under the extradition treaty of 1842 with Great Britain, a person surrendered to the United States by virtue of its provisions cannot be tried upon a charge different from that for which he was extradited; and for which his surrender could not have been demanded.

EXTRADITION.

Smith N. Hawes stood indicted in the Kenton Criminal Court for uttering forged paper, for embezzlement, and upon four several charges of forgery. He was found to be a resident of London, Canada, and in Feb. 1877 was demanded by the United States and surrendered by the Canadian authorities, to answer three of the said charges of forgery. He was tried upon two of the indictments for forgery, the other two being dismissed, and was acquitted. He was held in custody, however, to answer the charges of embezzlement, &c., and in August 1877, he moved upon affidavit to be released from custody.

The Court (Jackson, J.) ordered that the cases of *The Commonwealth* against *Hawes* for embezzlement, &c., be continued, and the prisoner released from custody. The Commonwealth appealed.

Moss (Attorney-General) and *W. W. Cleary*, for appellant.

J. O. Carlisle and *J. W. Stevenson*, for appellee.

LINDSAY, C.J. (after stating the facts).—It was the opinion of the learned judge who presided in the court below, that the tenth article of the treaty of 1842 impliedly prohibited the Government of the United States and the Commonwealth of Kentucky from proceeding to try Hawes for any other offence than one of those for which he had been extradited, without first affording him an opportunity to return to Canada, and that he could not be lawfully held in custody to answer a charge for which he could not be put upon trial. A public treaty is not merely a compact or bargain to be carried out by the executive and legislative departments of the general government, but a living law, operating upon and binding the judicial tribunals, state and federal, and these tribunals are under the same obligation to notice and give it effect as they are to notice and enforce the Constitution, and the laws of Congress made in pursuance thereof: (Fed. Cons. sect. 2 Art. 6; 2 Pet. 253, per Marshall, C.J.) When it is provided by treaty that certain Acts shall not be done, or that certain limitations or restrictions shall not be dis-

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regarded or exceeded by the contracting parties the compact does not need to be supplemented by legislative or executive action, to authorise the courts of justice to decline to override these limitations, or to exceed the prescribed restrictions, for the palpable and all sufficient reason, that to do so would be, not only to violate the public faith, but to transgress the "supreme law of the land." The tenth article of the treaty of 1842 is as follows: "It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed," &c. Public treaties are to be fairly interpreted, and the intention of the contracting parties to be ascertained by the application of the same rules of construction and the same course of reasoning which we apply to the interpretation of private contracts. By the enumeration of seven well-defined crimes for which extradition may be had, the parties plainly excluded the idea that demand might be made as matter of right for the surrender of a fugitive charged with an offence not named in the enumeration, no matter how revolting or wicked it may be. By providing the terms and conditions upon which a warrant for the arrest of the alleged fugitive may be issued, and confining the duty of making the surrender to cases in which the evidence of criminality is sufficient, according to the laws of the place where such fugitive is found, to justify his commitment for trial, the right of the demanding government to decide finally as to the propriety of the demand, and as to the evidences of guilt, is as plainly excluded as if that right had been denied by express language. The precise purpose for which the fugitive is to be surrendered is set out in exact and apt language, and the Act negatives, by necessary implication, the right here claimed, that the person surrendered may be tried for an offence different from that for which he was extradited, and one for which his surrender could not have been demanded. The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express and implied, of the treaty. The rule as stated by Mr. Lawrence is: "All the right which a power asking an extradition can possibly derive from the surrender must be what is expressed in the treaty, and all rules of interpretation require the treaty to be strictly construed; and, consequently, when the treaty prescribes the offences for which extradition can be made, and the particular testimony to be required, the sufficiency of which must be certified to the executive authority of the extraditing country, the state receiving the fugitive has no jurisdiction

whatever over him, except for the specified crime to which the testimony applies." This is the philosophy of the rule prevailing in France. The French Minister of Justice, in his circular of April 15, 1841, said: "The extradition declares the offence which leads to it, and this offence alone ought to be inquired into." The rule as stated by the German author Heffter is, that "The individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes or misdemeanors, would be to violate the mutual principle of asylum, and the silent clause contained by implication in every extradition." And when President Tyler expressed the opinion that the treaty of 1842 could not be used to secure the trial and punishment of persons charged with treason, libels, desertion from military service, and other like offences, and when the British Parliament in 1843, and the American Congress in 1848, assumed to provide that the persons extradited by their respective Governments should be surrendered "to be tried for the crime of which such person shall be so accused," this dominant principle of modern extradition was both recognised and acted upon. This construction of the tenth article of the treaty is consistent with its language and provisions, and is not only in harmony with the opinions and modern practice of the most enlightened nations of Europe, and just and proper in its application, but necessary to render it absolutely certain that the treaty cannot be converted into an instrument by which to obtain the custody and secure the punishment of political offenders. Hawes placed himself under the guardianship of the British laws by becoming an inhabitant of Canada. We took him from the protection of those laws under a special agreement, and for certain named and designated purposes. To continue him in custody after the accomplishment of those purposes, and with the object of extending the criminal jurisdiction of our courts beyond the terms of the special agreement, would be a plain violation of the faith of the transaction, and a manifest disregard of the conditions of the extradition. He is not entitled to personal immunity in consequence of his flight. We may yet try him under each and all of the indictments for embezzlement, and for uttering forged paper, if he comes voluntarily within the jurisdiction of our laws, or if we can reach him through the extradition clause of the Federal Constitution, or through the comity of a foreign Government. But we had no right to add to, or enlarge the conditions and lawful consequences of his extradition, nor to extend our special and limited right to hold him in custody to answer the three charges of forgery, for the purpose of trying him for offences other than those for which he was extradited. We conclude that the court below correctly refused to try Hawes for any of the offences for which he stood indicted, except for the three charges of forgery mentioned in the warrant of extradition, and that it properly discharged him from custody.

Order affirmed.

Q.B. Div.]

SANDYS (app.) v. SMALL (resp.)

[Q.B. Div.]

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Wednesday, June 26, 1878.

(Before COCKBURN, C.J. and MELLOR, J.)

SANDYS (app.) v. SMALL (resp.) (a)

*Adulteration—Mixture of water with spirit—
Notice—38 & 39 Vict. c. 63, ss. 6 and 8.*

The appellant, an inspector under the Sale of Food and Drugs Act 1875, by an agent purchased from the respondent, a licensed victualler, a half-pint of whisky, which was found, when analysed, to be thirty degrees under proof. A notice, printed in large characters, to the effect that all spirits sold there were mixed, and citing this statute, was conspicuous where this whisky was sold, although it was not found as a fact that the appellant's agent saw it before he made the purchase. No label was affixed to the bottle in which the spirit was received, nor was there anything said about the mixture of water with the spirit. The justices refused to convict the respondent under sects. 6 and 8 of the Act.

Held, upon a case stated, that the respondent had sufficiently supplied to the person receiving this article, which was not intended fraudulently to conceal its inferior quality, a notice by a label distinctly and legibly written or printed on or with the article, to the effect that the same was mixed, within the meaning of sect. 8; and that the justices were right.

This was a case stated by justices under 20 & 21 Vict. c. 43, the parts of which, material to the judgment of the court, were as follows:

The appellant was an inspector of weights and measures of the county of Derby, charged with the execution of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), and in such capacity had laid an information against the respondent for an offence under the 6th section of that Act. The justices dismissed the information.

The respondent was a licensed victualler at Langley Mill, in the township of Heanor, in the county of Derby. The appellant and one Samuel Slack, his assistant, were together in the performance of their duties under the Act near the house of the respondent on the 13th March last. Slack, acting under the appellant's directions, went into the house and stood at the bar window, and there asked the respondent's wife for half a pint of whisky. The respondent's wife gave him half a pint of whisky, for which he paid, placing it in a bottle, which was produced by Slack, without making any observation as to its quality or putting a label on the bottle. It was admitted by the appellant that, on subsequently going into the house, he saw posted in the smoke-room a notice as follows: "All spirits sold here are mixed—38 & 39 Vict. c. 63, ss. 8 and 9." The said Samuel Slack denied seeing any notice at the moment when he bought the whisky, although it was proved that a similar notice was posted in full view of persons purchasing at the bar window.

It was proved on behalf of the respondent that the notice referred to was printed in large capital letters, and was placed in a conspicuous position in the smoke-room; and it was also proved that similar notices were conspicuously placed in the bar and in every other room in the house ordinarily used by the respondent for the purpose of his business. The whisky when analysed proved to be mixed with water, and thirty degrees under proof.

It was contended, on behalf of the respondent, that the posting of the notice referred to in the smoke-room and bar, and within view of persons purchasing at the bar window, was equivalent to a declaration on the part of the respondent to the purchaser that the whisky sold was not of the nature, substance, and quality demanded by the purchaser.

The appellant contended that the respondent should have placed a label on the bottle in which the whisky was put, in accordance with sect. 8 of the Act.

The question for the opinion of the court was, whether the posting of the notice as aforesaid was equivalent to a declaration by the respondent that the whisky sold was not of the nature, substance, and quality of the article demanded by the purchaser, and relieved him from the penalty.

By the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63),

Sect. 6. No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds, provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say,

1. Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof.

2. Where the drug or food is a proprietary medicine, or is the subject of a patent in force, and is supplied in the state required by the specification of the patent.

3. Where the food or drug is compounded as in this Act mentioned.

4. Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation.

By sect. 8:

Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice by a label distinctly and legibly written or printed on or with the article or drug to the effect that the same is mixed.

A. Wills, Q.C. argued for the appellant.—These provisions of the Act might be rendered of no effect if an exemption be granted in any case besides that of a label supplied in the terms of the 8th section. The case does not even find that the purchaser had seen the notice at the time he made the purchase.

Mellor, Q.C. for the respondent.—From the facts stated the purchaser must be presumed to have knowledge that the article he bought was mixed. The Act could only have been pointed against fraud, of which there is no evidence here.

Wills, Q.C. in reply.

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BEW (app.) v. HARSTON (resp.)

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COCKBURN, C.J.—I am of opinion that our judgment must be for the respondent. I should be very sorry to diminish the efficacy of a very useful Act of Parliament which was intended to protect the public from frauds committed by the sellers of the articles to which the Act relates; but we ought, if possible, to construe the words of the Act so as not to interfere with due freedom of dealing between the seller and the purchaser, and not unfairly to prejudice either party. I think we should be doing this if we held that its provisions apply to cases such as the present, where both parties perfectly well knew what they are dealing with. The provisions of the Act were intended to apply to adulterations of a clandestine character, which operate to the prejudice of the purchaser. The provisions of the 6th section seem to me to apply to cases where a seller professes to sell to the purchaser an article as being of a certain denomination, whereas the article has been altered by an admixture of some other ingredients, and it seems that when the article is so altered, this must be considered to have been done "to the prejudice of the purchaser," unless it is duly and sufficiently brought to his knowledge; but if the alteration of the article, as of spirits by the admixture of water, is brought to the knowledge of the purchaser, and he chooses to purchase it notwithstanding, it can never be intended that such a transaction should be interfered with. But, on the other hand, if the seller chooses to sell an article of a certain denomination, and the article is really mixed with foreign ingredients, it lies on him to show that the purchaser knew what he was purchasing. The statute in the 8th section provides a mode by which the seller may insure himself protection against the possibility of the enactment operating to his prejudice. If he delivers the label as provided by that section, he protects himself against all possibility of being charged with an offence under the Act. If he does not, then I think it incumbent on him to prove that by some other means (with regard to which he will be subject to be met by counter-proof) that the purchaser had notice what he was purchasing. If the seller can show that he had such notice, then I think no offence will be committed, because the sale will not be "to the prejudice of the purchaser." I do not think that the statute means that the affixing of the label is to be the only mode of bringing knowledge home to the purchaser. I think, for instance, if a man put up in a conspicuous position a notice in large letters, as was done here, and it is clear that it must have come under the observation of the customer, that the 6th section would not apply. It has been suggested that it was not clear in the present case that the purchaser had seen the notice when he had purchased the whisky, and that the case should go back that the facts may be stated more distinctly as to this. It is found that notices were posted up in all the rooms of the house in conspicuous places, so that customers could not fail to see them. We are clear that under the circumstances there was no real offence against the provisions of the 6th section, and, that being so, it seems to us that we should deal with the case as it stands, and that we ought not to send the case back for the purpose of giving an opportunity of proving that the particular individual who bought the whisky for the purpose of this prosecution had not seen the notice. On

the case as it stands, we think that our judgment must be for the respondent.

MELLOR, J.—I am of the same opinion. The statement of the facts is not very distinct as to whether the purchaser had an intimation by means of the notice that he was purchasing a mixture. It is left to us to draw the inference whether that was so or not, and, from the facts stated, I should rather infer that, though the purchaser may not have seen the notice at the exact moment when he asked for the whisky, yet that he might well have seen it directly afterwards, and before the transaction was completed by the payment of the money and his receipt of the article. With regard to the construction of the statute, I agree with my Lord that no offence was committed under the 6th section.

Judgment for the respondent, the defendant.

Solicitor for appellant, *Greenfield*.

Solicitor for respondent, *Warriner*.

June 1 and July 2, 1878.

(Before COCKBURN, C.J., and MELLOR, J.)

BEW (app.) v. HARSTON (resp.) (a)

Gaming—Play for money's worth—Licensed premises—35 & 36 Vict. c. 94, s. 17.

The appellant, a licensed person, bought some rabbits as prizes for a game called puff and dart, in which the players attempted to hit a target by blowing a dart through a tube. Each player subscribed for the value of the rabbits and the winner was the person who made the best hits. The appellant was convicted under sect. 17 of the Licensing Act 1872 of suffering gaming or an unlawful game to be carried on on his premises. Held, upon a case stated (Cockburn, C.J. doubting), that the conviction was right.

THIS was a case stated by the stipendiary magistrate for the district of the borough of Stoke-on-Trent, under 20 & 21 Vict. c. 43.

The appellant was convicted upon the hearing of an information preferred by the respondent, the superintendent of police at Tunstall, in the county of Stafford, under sect. 17 of the Licensing Act 1872 (35 & 36 Vict. c. 94), "that on the 1st March 1878, at the parish of Wolverstan in the said county, the appellant did unlawfully suffer gaming to be carried on on his licensed premises contrary to the statute."

The following facts were proved and admitted:

That on the said 1st March 1878, a policeman entered the licensed premises of the appellant at Tunstall in the evening, and there found a number of men, one of whom, named Joseph Simpson, was in the act of loading an instrument used in playing at a game called "puff and dart," Simpson at the same time saying, "It takes so many to win." The constable saw Simpson blow twice, and the latter then said, "I have won;" the appellant thereupon handed him a dead rabbit from behind the counter, which Simpson put into his pocket. The appellant said he had bought two rabbits, and nine had entered for each rabbit upon paying an entrance fee of 2d. each, and it had never been considered gambling. He also then and there produced a paper containing the names of the parties who had entered for the contest, the object

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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in the game being to hit a mark on a target with a small dart blown through a tube.

The question for the court was, whether the appellant was rightly convicted.

J. F. Clerk argued for the appellant. — The "gaming" which is forbidden in the Licensing Act 1872 is not defined in that or any of the other Licensing Acts. This appears to be a game of skill as much as billiards or pool; and, not being dependant upon chance, is no more forbidden to be played for money than either of those games. The previous statutes are pointed only at games of chance, and if it were intended to render licensed victuallers liable to conviction for anything beyond the earlier legislation, the Licensing Acts should more particularly describe the forbidden games. 33 Hen. 8, c. 9, s. 11, relates only to a "common house, alley, or place of dicing table or carding, or any other manner of game prohibited by any estatute heretofore made, or any unlawful new game hereafter to be invented, found, had, or made;" and the subsequent enactments do not touch games of skill: (16 Car. 2, c. 7; 9 Anne, c. 14; 13 Geo. 2, c. 34; 8 & 9 Vict. c. 109.) *Foot v. Baker* (5 M. & G. 335) leaves this question undecided with respect to skittles. And the game of dominoes was held to be not unlawful in *Reg. v. Ashton* (1 E. & B. 286).

The respondent did not appear.

Our. adv. vult.

July 2.—MELLOR, J.—The statute makes it a penal offence if any licensed person suffers gaming to be carried on on the licensed premises, and the question for us is, whether the appellant was guilty of this offence. I think myself that he was rightly convicted. It seems to me that the case falls within the authority of *Reg. v. Ashton* (1 E. & B. 286). Lord Campbell there says: "The object of the statute was to prevent the contracting of bad habits by the practice of games where money was staked in public-houses. If money were staked, that would be gaming; and then there might be a lawful conviction for allowing gaming in the house." Here money was not in one sense staked on the game, but each man paid his 2d. for the chance of winning the rabbit. It comes to the same thing in principle. I think it was gaming within the meaning of the Act, which seems to me to have been intended to prevent the contracting of bad habits by the practice of such games in public-houses.

COCKBURN, C.J.—I entertain serious doubts whether the view taken by the magistrate, and with which my learned brother Mellor agrees, is correct. The Act speaks of gaming and unlawful games. Now this game does not come within the expression "unlawful games," for the expression refers to the games from time to time made unlawful by statute, of which this is not one. I am inclined to think that the term "gaming" implies something which in its nature depends on chance, or in which chance is an element. This game does not appear to be one of chance, but of skill, though the skill may not be of a very lofty character. The result of my differing from the conclusion of my brother Mellor would be that the conviction would stand. I do not wish to be taken as expressing a very decided opinion as to whether a game of this description comes within the term "gaming." All I desire to say is, that I very much doubt whether it does. I do not regret the

result, for I think that the game was within the mischief the statute meant to guard against. In the result, therefore, the conviction must stand.

Conviction affirmed.

Solicitor for appellant, *Montague*, for *Tennant*.

Monday, Nov. 11, 1878.

(Before COCKBURN, C.J. and MELLOR, J.)

Re TURMINE, (a)

School board—Six months' absence—Disqualification—Re-election—33 & 34 Vict. c. 75, 2nd schedule, 1st part, ss. 12 and 14.

A member of a school board absented himself during six successive months from all meetings of the board, and the cause assigned by him was not approved by the board. He ceased, therefore, to be a member of the board, in pursuance of the Elementary Education Act 1870, second schedule, first part, s. 14. He was, however, re-elected a member at the next election of the whole board.

Held, upon a rule for quo warranto, that he was not, by having so ceased to be a member of the previous board, disqualified from sitting in the new board, under sect. 12 of the said schedule.

ON the 8th June a rule nisi was obtained on behalf of Mr. Henry Jacobs, calling upon Mr. Edward Charles Turmine to show cause why an information in the nature of a *quo warranto* should not be exhibited against him to show by what authority he claimed to exercise the office of a member of the school board for the parish of Minster, in the Isle of Sheppy, in the county of Kent, upon the grounds that he was on the 29th Dec. 1877, and ever since had been and then was, disqualified for election to the said office, and was not eligible for election thereto by reason of his having, therefore, ceased to be a member of the said school board in consequence of having absented himself during six successive months from all meetings of the said school board, he not being prevented by temporary illness, nor any other lawful cause approved by the said board.

It appeared from the affidavits that in Dec. 1874, by the authority of the Education Department, nine persons—one of whom was the defendant Edward Charles Turmine—were duly elected members of the first school board for the said parish of Minster.

After attending the first three meetings, the last of which was on the 24th Feb. 1875, the defendant absented himself for some time because he considered that the majority of the board had appointed a clerk in contravention of the law on the subject. He however announced his intention of being present at a meeting once in six months, for the purpose of retaining his seat; and he attended at the board-room on the 7th July of that year, in order to take part in the meeting of which notice had been given for that day. He was, however, detained about some other business outside the door until the meeting in his absence was adjourned until the 1st Sept. following.

At the meeting on the 1st Sept. attention was called to the defendant's absence for six months from the board meetings; and on the 15th Sept. it was resolved by the board (pursuant to notice) that the reasons assigned by him for his absence, viz., his being accidentally shut out on the 7th

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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July, and (as he alleged) the improper adjournment without a meeting during August, be not approved by the board.

No steps were taken by the defendant to reverse this decision of the board; and on the 3rd Jan. 1877 the board proceeded to elect, and did elect, another member to fill the position which they considered the defendant's absence had rendered him disqualified to hold.

On the election of a new board in Dec. 1877, the first board having completed its term of three years, the defendant was returned as a member at the top of the poll of all the candidates. Since that time he had attended all the meetings of the board.

It was resolved, however, by a majority of the board to take these proceedings in order to test the validity of the defendant's election to the second board in Dec. 1877.

By the Elementary Education Act 1870 (33 & 34 Vict. c. 75), 2nd schedule, part 1,

Clause 12. Any person who ceases to be a member of the school board shall, unless disqualified as hereinafter mentioned, be re-eligible.

Clause 14. If a member of the school board absent himself during six successive months from all meetings of the board, except from temporary illness or other cause to be approved by the board, or is punished with imprisonment for any crime, or is adjudged bankrupt, or enters into a composition or arrangement with his creditors, such person shall cease to be a member of the school board, and his office shall thereupon be vacant.

Provision is made in clause 15 for an election to any casual vacancy in office occurring "by death, resignation, disqualification, or otherwise."

Clause 17. The member chosen to fill up a casual vacancy shall retain his office so long only as the vacating member would have retained the same if no vacancy had occurred.

By the 3rd schedule, clause 1 (b),

Not less than one ordinary meeting shall be held in each month; one meeting shall be held as soon as possible after every triennial election of members.

By the Elementary Education Act 1873 (36 & 37 Vict. c. 86) 3rd schedule,

The following regulations shall be construed as part of the conditions mentioned in rule 1 in the 3rd schedule to the principal Act, that is to say, (b) Not less than one ordinary meeting shall be held in each month; but where the board ordinarily meet more than once in every month, they may by resolution passed by a majority of not less than two-thirds of the members present, and voting on the question, resolve not to have an ordinary meeting in the months of August and September, or one of such months.

Winch, for defendant, showed cause against the rule.—As there is nothing in the affidavits to show that the adjournment over August, without a meeting in that month, was by a two-thirds majority, nor that the board had ordinarily met more than once a month, it must be taken that the board had disobeyed the rules by not holding a meeting in August. The defendant's absence, therefore, cannot be properly ascribed to any fault of his, and is not sufficient to establish a breach of the 14th clause, even if the cause thereof were not approved by the board. Moreover, it never could have been intended to disqualify a person for ever from sitting at a school board, notwithstanding re-election, because he once absented himself for six months. The words of clauses 12 and 14 do not bear out any such construction: the exception "unless disqualified as hereinafter mentioned" seems to apply to nothing there mentioned, but certainly

not to the mere creation of a vacancy. Clause 17 seems to point to the possible ineligibility of a person being re-appointed to his own vacancy; but there is nothing which can be interpreted to annul a subsequent election on the ground of the elected person having vacated his office in a previous board.

Kemp, Q.C. and *Scott* supported the rule.—The words "unless disqualified as hereinafter mentioned" in clause 12 must have some meaning, and they can only apply to the various grounds in clause 14 for vacating an office. All other persons are re-eligible; and it must follow that those who are thus disqualified cannot be subsequently elected. The remedy provided for this disqualification is an approval of the cause of absence by the board: the hardship thereupon is not so great as if the disqualification were absolute, which is the case with the other matters mentioned in clause 14.

COCKBURN, C.J.—I think this rule must be discharged. The language of these clauses is ambiguous, but the applicants here are on the horns of a dilemma. Clause 12 intends to allude to some disqualification, or there is none to which it can allude. Even if some disqualification exist, it cannot possibly be one of those matters which merely create a vacancy. It cannot be that six months' absence from board meetings, even without acceptance of the excuse by the board, should disqualify a man for life from being re-elected. It may be, as suggested, that a man cannot be immediately re-appointed to the vacancy he himself has made. But the fact of a vacancy having been so made cannot interfere with the future proceedings of the electors after the termination of that board's existence. This seems to me the true and rational construction. If it be not the right one, the alternative is that the exception to clause 12 is a defective piece of legislation without any meaning or effect at all.

MELLOR, J.—I also think upon the whole that there can be no other conclusion. The suggested remedy by approval of the board is cumbersome, and we ought to hesitate before disqualifying a man for life because he fails to obtain it. The words in clause 12, "Any person who ceases to be a member," are exactly satisfied by the words in clause 14, and may imply that the person must so cease for the residue of his elected term: unless disqualified, such a person is re-eligible. Whether the disqualification may be found elsewhere or not, the words of clause 14 are not sufficient to create one. I have felt some hesitation about the matter, but I agree with my Lord.

Rule discharged.

Solicitor for applicant, *J. J. Peddell*.

Solicitor for defendant, *Thos. Simey*.

Saturday, Nov. 9.

(Before *MELLOR* and *FIELD*, JJ.)

GUARDIANS OF THE WOODSTOCK POOR LAW UNION (apps.) v. THE CHURCHWARDENS, &c., OF THE PARISH OF ST. PANCRAZ (resps.). (a)

Poor law—Settlement—Child under sixteen—Derivative settlement of father—Divided Parishes Act 1876 (39 & 40 Vict. c. 61), s. 35.

Where the father of a pauper, who has acquired no

(a) Reported by *ARTHUR H. POYSEN*, Esq., Barrister-at-Law.

Q.B. Div.]

GUARDIANS OF WOODSTOCK UNION v. CHURCHWARDENS OF ST. PANCRAS.

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settlement of her own, has himself only a derivative settlement, the pauper has a settlement at her own and not her father's birthplace.

E. T., a pauper, who had acquired no settlement of her own after attaining the age of sixteen, was adjudged to be settled in the respondents' parish, in which she was born. Her father had a derivative settlement at M., but was born at D.

Held, that, in accordance with sect. 35 of the Divided Parishes Act 1876, the pauper's settlement was rightly adjudged to be in respondents' parish.

THIS was an appeal against the following order of Quarter Sessions :

'At the General Quarter Sessions of the Peace, holden in and for the county of Middlesex, on the 19th Jan. 1878, an appeal against an order, dated the 12th June 1877, under the hands and seals of two of Her Majesty's justices of the peace for the said county of Middlesex, adjudging the last legal settlement of Emily Taylor, aged eighteen, to be in the parish of Deddington, in the Woodstock Poor Law Union, in the county of Oxford, and ordering the removal of the said Emily Taylor from the parish of St. Pancras to the said union, came on to be heard. . . . And the said Court of Quarter Sessions allowed the said appeal, and quashed the said order of justices subject to the opinion of the Queen's Bench Division of the High Court of Justice.

The question now came before the court on the following

SPECIAL CASE.

1. Emily Taylor, the pauper, became chargeable to the said parish of St. Pancras, and was, on the 12th June 1877, by an order of removal in due form, adjudged to be legally settled in the parish of Deddington, in the Woodstock Poor Law Union.

2. The said Emily Taylor, the pauper, was born in the said parish of St. Pancras on the 16th April 1859, and has acquired no settlement in her own right.

3. The said Emily Taylor, the pauper, is the lawful daughter of George Taylor, and Temperance, his wife.

4. The pauper's father, George Taylor, was born in the said parish of Deddington on the 1st Jan. 1815, and acquired no settlement in his own right.

5. The pauper's father, the said George Taylor, was the lawful son of William and Martha Taylor, both deceased.

6. In the year 1829 the said William Taylor, the pauper's grandfather, acquired a settlement by serving the office of parish constable in the parish of Melton, a parish comprised in the Banbury Poor Law Union, the said George Taylor being then under the age of sixteen and unemancipated.

7. The appellants, on the hearing of the appeal, contended that this case came within the last part of sect. 35 of 39 & 40 Vict. c. 61; that the pauper's settlement could not be ascertained without inquiring into her father's derivative settlement, and that she must, therefore, be deemed to be settled in the parish of St. Pancras, where she was born.

8. The respondents, on the other hand, contended that the pauper derived a settlement from her father, and that, as he was born in the said parish of Deddington, that was her settlement;

and that it could therefore be shown that the said parish of Deddington was her settlement, without inquiring into the derivative settlement of her parent.

9. The court of quarter sessions was of opinion that the appellants' contention was correct, and therefore quashed the said order of removal.

10. The question for the opinion of this honourable court is, therefore, whether the settlement of the pauper is in the parish of Deddington.

11. If this court shall answer the question in the affirmative, the order of sessions is to be quashed and the order of removal confirmed; but if in the negative, the said order of sessions is to be confirmed.

P. H. EDLIN.

It is enacted by sect. 35 of the Divided Parishes Act 1876, that

No person shall be deemed to have derived a settlement from any other person whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother as the case may be up to that age, and shall retain the settlement so taken until it shall acquire another. . . . If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

Bealey for the appellants.—Up to the passing of the Act of 1876 birth settlement was only a presumptive one. If it was possible to discover any other settlement, that presumption was at once destroyed. Here the father had no settlement in his own right, but he derived one from his father who was settled in Melton. If this Act had not been passed Emily Taylor would have had a settlement in Melton. When we inquire into her father's settlement we find it a derivative one, the exact state of things contemplated by sect. 35. The order of sessions was therefore right.

Poland and Lumley for the respondents.—The Legislature has now for the first time given a child a different settlement to her father; it is conceded that the child is not settled in Melton—she must be settled either at her own or her father's birthplace. The object of the section was to prevent going back more than one generation. Here the father has a *prima facie* settlement in Deddington; to negative that it would be necessary to inquire into the father's derivative settlement, the difficulty the Legislature has sought to avoid; true, a man cannot have two settlements, but a birth-settlement always exists potentially:

Reg. v. All Saints, Derby, 14 Q.B. 207; 14 L. T. Rep. O. S. 152.

The pauper's settlement is therefore in Deddington where her father was born.

MELLOR, J.—As the case is stated, Mr. Poland and Mr. Lumley cannot get a decision in their favour unless we are of opinion that the pauper's settlement was in Deddington. But we cannot say that she was settled in Deddington. Her father, it is true, had a *prima facie* birth settlement there; but the case finds that he had an actual settlement in Melton derived from his father, and when I look at the words of this section of the Act of Parliament, I am clearly of opinion that the pauper's settlement is not in

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Deddington, but is in St. Pancras. The object of the statute probably was to do as little violence as possible to the ties of relationship by separating father from child; but though that may be so, I think there can be no doubt in this case, and under the circumstances here stated, that the pauper's settlement is at the place of her birth.

FIELD, J.—The judgment of the court of quarter sessions is right, and must be affirmed. The object of the statute was to get rid of derivative settlements altogether. The words are, "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise." But to that general rule it makes two exceptions, "except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father . . . and shall retain the settlement so taken until it shall acquire another." Therefore, if the statute had stopped there, the pauper in this case would have taken her father's settlement. In ascertaining that, you find that his birth settlement would be in Deddington, but a birth settlement is only a *prima facie* one, and he may have acquired a settlement elsewhere, and how is that settlement to be ascertained except by making inquiries? and if, in making such inquiries, "it cannot be shown what settlement such child derived from her parent without inquiring into the derivative settlement of such parent," then it is enacted, not that she is to take her father's birth settlement, which might have been more in accordance with the policy of the Act, but she is to be "deemed to be settled in the parish in which she was born." The contention of the respondents cannot hold good against the plain words of the statute, so we are bound to hold that the sessions were right.

Order of sessions affirmed.

Solicitors for the appellants, *White and Sons*, for *Hawkins*, Woodstock.

Solicitor for the respondents, *Rezworthy*.

Tuesday, Nov. 12, 1878.

(Before COCKBURN, L.C.J. and MELLOR, J.)

EARL MANVERS AND ANOTHER v. BARTHOLOMEW. (a)

Highways—Surveyor—Repairs—Licence to get materials from private property—Duration of licence—Highway Act (5 & 6 Will. 4, c. 50), ss. 53 and 54.

The licence granted by justices to the surveyor to get materials from inclosed lands for the repair of the highways, in accordance with sect. 54 of 5 & 6 Will. 4, c. 50, is limited to the necessities of that particular occasion in respect of which the application for the licence is made.

Justices in special sessions, under 5 & 6 Will. 4, c. 50, s. 54, granted in 1866 to the then surveyor of highways a licence to take materials for the repairs of the highways from certain lands in the parish of which plaintiffs were the owner and occupier respectively. Materials had been got under that licence down to 1877, when the plaintiffs gave notice to the defendant, the present surveyor, not to get any more. The defendant continued to do so nevertheless, and plaintiffs now brought an action of trespass against him.

(a) Reported by A. H. POTTER, Esq., Barrister-at-Law.

Held, that defendant had no right to enter upon plaintiffs' land, inasmuch as the licence granted by the justices only extended to the necessities of the particular occasion in respect of which it was granted.

THIS was a special case stated pursuant to the provisions of Order XXXIV., r. 1, as follows:

1. The plaintiff Browne was, at the times hereinafter referred to, and is, a farmer, possessed of and occupying a farm in the parish of Langton-by-Wragby, in the county of Lincoln, as tenant thereof to the plaintiff Lord Manvers, who then was and is the owner thereof; and the defendant was, during the year 1877, and now is, the surveyor of highways for the said parish.

2. In 1866, materials being required for the repair of the highways in the said parish, the then surveyor of highways (not the defendant), pursuant to the provisions of the General Highway Act (5 & 6 Will. 4, c. 50), s. 53, gave notice to the plaintiffs, as the owner and occupier respectively of the said farm, requiring them to appear before justices at special sessions to show cause why materials for the repair of the said highways should not be had from a field forming part of the said farm, and which field was then and is inclosed land within the meaning of the said Act and of the 4 & 5 Vict. c. 51.

3. No opposition being offered to the application made in pursuance of such notice, the justices in special sessions assembled granted their licence, under sect. 54 of the 5 & 6 Will. 4, c. 50, to the said surveyor, authorising him to dig, get, take, and carry from the said field materials for the purposes aforesaid, making satisfaction for the same and for damage done to such field in the manner directed by the said Act, and this licence was never appealed against, pursuant to the power in that behalf conferred by the 105th section of the Act. A copy of the said licence, marked "A," accompanies and forms part of this case.

4. The said surveyor accordingly dug in and carried away from the said field such materials as aforesaid, and with them repaired the highways in the said parish. The amount of satisfaction payable in respect thereof was not settled or ascertained by the justices, but the surveyor paid the plaintiffs a sum which was agreed upon between them as the amount to be paid for such materials as aforesaid.

5. In subsequent years the different surveyors of highways appointed each year for the said parish got materials for the repair of the highways in the said parish from the said field, and paid the plaintiffs from time to time sums agreed upon as the price of such materials.

6. During the years 1876-7 the plaintiff Browne was the surveyor of highways for the said parish, and he then got all the gravel which was required for the repair of the highways from the plaintiffs' field, and paid himself compensation at the same rate which had been allowed in previous years, and in fact gravel for the repair of the highways of the parish has been continuously got from the plaintiffs' land and paid for by successive surveyors since the date of the said licence up to the present time, without any objection by the plaintiffs until the year 1877, when the plaintiffs objected to any more gravel being got or taken from the said lands. The defendant contends that the said gravel has been rightly got in exercise of the

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powers given by the said licence; but the plaintiffs deny that the said licence had any force after the year in which it was granted.

7. In 1877, in consequence of the said objections raised by the plaintiffs, the defendant applied to the justices in special sessions to grant him a new licence to get materials from the said field, and the plaintiffs subsequently applied to the justices to revoke the licence hereinbefore referred to in paragraph 3. The justices declined to entertain either application—the former one on the ground that the said licence was still in force, and the latter on the ground that, as the plaintiffs had not appealed, the said licence was irrevocable.

8. Notice was therefore served by the plaintiffs upon the defendant requiring him not to trespass on or dig or carry away materials from the said field, notwithstanding which the defendant, claiming to act under the licence hereinbefore referred to, has during the year 1877 entered upon the said field, and has dug and carried away stone and other materials therefrom for the repair of the said highways, and has thereby injured the reversion of the plaintiff Earl Manvers.

9. It is contended on behalf of the plaintiffs that the licence granted to the surveyor in 1866 did not confer upon the defendant any right to enter upon the lands in question in 1877, and it is contended on behalf of the defendant that it did.

The question for the opinion of the court is whether, under the circumstances above stated, the defendant was justified in entering upon and digging and carrying away from the said land of the plaintiffs stone and other materials for the repair of the highways of the said parish.

If the court shall answer the question in the negative, judgment is to be entered for the plaintiffs for 40s. damages.

If the court shall answer the said question in the affirmative, judgment is to be entered for the defendant.

In either case judgment is to be entered for such costs as the court shall direct, including the costs of and incidental to settling this case.

The licence referred to in paragraph 3 was in the form given in the schedule of the Act, and was signed by two justices. It recited that, whereas by the Highway Act the surveyor "is authorised to dig, get, take, and carry away materials lying upon any lands or grounds within the parish for which he is appointed, for the use and benefit of the highways . . . and whereas it appears to us that the said materials are necessary, and ought to be got, dug, taken, and carried away for the purposes aforesaid, therefore we do hereby give our licence to the said surveyor to dig, take, and carry away the same accordingly, the said surveyor making satisfaction for the same, and also for the damage done to such lands, in the manner directed by the said Act."

Sections 53 and 54 of 5 & 6 Will. 4, c. 50, are as follows:

53. And be it further enacted, that it shall not be lawful for any surveyor, or any other person acting under the authority of this Act, to dig, gather, get, take, or carry away any materials for making or repairing any highway out of or from any inclosed land or ground, until one calendar month's notice in writing, signed by the surveyor, shall have been given to the owner of the premises from which such materials are intended to be taken . . . and to the occupier . . . to appear before the justices at a special sessions for the highways, to show cause why such materials should not be had therefrom;

and, in case such owner, agent, or occupier shall attend pursuant to such notice, but shall not show sufficient cause to the contrary, such justices shall, if they think proper, authorise such surveyor or other person to dig, get, gather, take, and carry away such materials, at such time or times as to such justices shall seem proper; and, if such owner, agent, or occupier shall neglect or refuse to appear . . . the said justices shall and may . . . make such order therein as they shall think fit, as fully and effectually to all intents and purposes as if such owner, agent, or occupier had attended.

54. And be it further enacted, that it shall be lawful for every such surveyor, for the use aforesaid, by licence in writing from the justices at a special sessions for the highways, to search for, dig, and get materials, if sufficient cannot be had conveniently within such waste lands, common grounds, rivers, or brooks in or through any of the several or inclosed lands or grounds of any person whomsoever . . . in the parish where the same shall be wanted . . . and to take and carry away so much of the said materials as, by the discretion of the said surveyor, shall be thought necessary to be employed in the amendment of the said highways, the said surveyor making such satisfaction for the materials which may be got or taken away, and also for the damage done to such lands or grounds by the getting and carrying away the same, as shall be settled and ascertained by order of the justices at a special sessions for the highways.

Graham for plaintiffs.—The question here really is, whether a licence granted by justices under 5 & 6 Will. 4, c. 50, to the surveyor of a parish to get materials from inclosed lands is perpetual or not. The justices say they have no power to revoke such a licence; but a reasonable construction must be put upon the Act. The justices may authorise the surveyor to take materials "at such time or times as to them shall seem proper." [He was stopped by the Court.]

Lumley for defendant.—The reasonable construction of the Act is, that surveyors should be at liberty to go to one source for materials until that source is exhausted. If the words of the section are ambiguous as they appear to be here, convenience must be looked at. Someone's rights must be invaded each time materials are wanted, and fresh injury done, if my construction is not right. The Act provides compensation for damage done, and this may include prospective damage. The justices might have limited the time during which the licence should be in force, but they have not done so. The licence here is, therefore, indefinite as to time, and is in force as long as the materials upon the land in question are not exhausted.

COCKBURN, C.J.—Our decision must be in favour of Earl Manvers. The authority to get materials given by the Highway Act involves important considerations, for, beyond all question, it sanctions an interference with the rights of the subject. The Act authorises the surveyor to obtain stone, but that stone is not to be obtained at the expense of the parish, but to the loss and detriment of the individual from whom the stone is obtained. It is necessary therefore to inquire very carefully what the extent of this authority is. By the words of the section I find it is expressly stated that the justices may give the surveyor authority to take and carry away materials "at such time or times as to such justices shall seem proper." But when we turn to the form of licence given in the schedule we find that all mention of time is omitted. The section shows that it is not intended that this authority should be given once and for all, but only for such time or times as to the justices may seem proper; and I think there

is abundant reason for saying that that is so. If taking stone from one man's land is a burden cast upon him for the good of the parish, he may rightly say that his neighbours should be common sufferers with himself. Mr. Lumley points out that there are clauses for compensating for damage done to the land; but it appears to me that the proper construction of the Act is that, when materials are necessary for the repair of the highways, the surveyor is to go to the justices and ask for an order authorising him to take materials from such land as he shall think fit for whatever repairs are in contemplation at the time, and the order of the justices is co-extensive with that present necessity. But their order is not applicable to a different time, when a totally different state of things may present themselves. This interpretation of the licence, that it must be *pro re nata*, is consistent with the full meaning and intention of the statute.

MELLOR, J.—I am of the same opinion. Mr. Lumley has ingeniously raised several questions as to the construction of this Act, and he has presented matters of some difficulty, but those difficulties are overcome by the balance of convenience. The words of the 54th section apply not only to streams and waste lands, but they point out the duty of the surveyor as to inclosed lands also; he is "to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary." Is that clause applicable solely to waste lands and streams? I think not. I think it applies also to private grounds. He is to get the amount of materials he considers necessary for the repair of the highways, and the justices' order is applicable to repairs contemplated at the time it was granted—the order extends to the necessities of the occasion. As soon as the force of that order is spent the surveyor must apply for a further order, and in the case of a private owner the justices should consider whether it is reasonable to get the amount of material required from that particular place. I cannot say it would be necessary to get a new order year by year, but I am of opinion that each order must be limited by the necessities of the repairs in prospect when the order is granted. The particular question submitted to us in the special case must be answered in favour of the plaintiffs.

Judgment for plaintiffs without costs.

Solicitor for plaintiffs, *Toynbee*, agent for *Toynbee and Larken*.

Solicitors for defendant, *Taylor, Hoare*, and *Taylor*, agents for *Burtens* and *Scorer*.

Nov. 25 and 28, 1878.

(Before COCKBURN, C.J., MELLOR, J., and HUDDLESTON, B.)

REG. v. JUSTICES OF OVER DARWEN. (a)

Intoxicating liquors—Certificate for a licence—Sufficient notice—Beer to be consumed off the premises—32 & 33 Vict. c. 27, ss. 7, 8.

An applicant to licensing justices for a certificate under the Wine and Beerhouse Act 1869, authorising the grant to him of a licence to sell by retail beer to be consumed off his premises, under 3 & 4 Vict. c. 61, was already the holder of a certificate and additional licence for the same

(a) Reported by M. W. McKellar, Esq., Barrister-at-Law.

purpose under 26 & 27 Vict. c. 33. In the notice required by sect. 7 of the first-mentioned Act, he had set forth his name and address, and the situation of his shop, but merely stated his intention to apply for a certificate to sell by retail beer to be consumed off the premises.

The justices refused a certificate, on the ground that the notice was insufficient.

Held, upon a rule for mandamus, that the applicant under the circumstances was entitled to the certificate he applied for.

Ex parte SLATER.

THIS was a rule calling upon the licensing justices for the Over Darwen division of the hundred of Blackburn, in the county of Lancaster, to show cause why a writ of *mandamus* should not issue, commanding them to hold an adjournment of their general annual licensing meeting, and to hear and determine the matter of an application by Thomas Slater for a certificate authorising him to apply to the Excise for a licence to sell beer by retail not to be consumed on the premises.

It appeared from the affidavit of Slater, the applicant, that he applied to the licensing justices on the 29th Aug. last, at their general annual meeting, for a certificate under the 5th and 6th sections of the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27).

The notice, which had been duly served and published under the 7th section, was a printed form, with the name, address, and date filled in, as follows:

To the Overseers of the poor of the township of Over Darwen, in the county of Lancaster, the Superintendent of Police for the district, and to all whom it may concern.

I, _____, shopkeeper, now residing at _____, do hereby give notice that it is my intention to apply at the general annual licensing meeting, to be holden at the police court, Over Darwen, in the Over Darwen division of the hundred of Blackburn, in the said county, on the _____ day of _____ inst., for a certificate to sell by retail beer to be consumed off the premises, at my said house and premises, situate at _____ Given, &c.

No objection was made to the grant of this certificate to the applicant; but the justices considered that this notice did not sufficiently fulfil the requirements of the Act, and on that ground refused the application.

By sect. 8, previous licensing provisions are incorporated into the Act, "subject to this qualification, that no application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine, not to be consumed on the premises, shall be refused, except upon one or more of the following grounds, viz."

The first three grounds relate to the character of the applicant and the house; and the other, No. 4, is "That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required."

The rule was moved for and granted for the reason that the certificate was refused on a different ground from those provided by the qualification in this section.

McKellar showed cause on behalf of the justices.—There are two objections to the form of this notice: the first is, that there can be no "certificate to sell by retail beer to be consumed off the premises," as is mentioned therein. The applicant should have given notice, in the words of the rule,

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"for a certificate authorising him to apply to the Excise for a licence to sell beer by retail not to be consumed on the premises." A certificate and a licence are distinctly provided for in the Act, and the notice ought not to confound the two. The second objection is less technical and more important, viz., the omission to state the statute granting the licence for which this certificate is required. In this case probably the licence required is that under 3 & 4 Vict. c. 61; but a licence enabling the holder to sell beer in the same way might be granted under at least one other Act, viz., 26 & 27 Vict. c. 33. Sect. 6 of the Act of 1869 says, "A certificate under this Act shall specify the name and address of the person thereby authorised to receive a licence, the description of licence or licences authorised to be granted to him, and whether such licence or licences is or are to be granted for the sale of beer, cider, or wine to be consumed on or off the premises, and the situation of the house or shop in respect of which such grant is authorised. It shall be in force for one year from the date of its being granted, and shall be in the form given in the first schedule hereto, or as near thereto as circumstances admit." The schedule referred to requires to be described "the situation, and the particular Act or Acts under which the licence is to be taken out." Now sect. 7, which relates to the notice, seems to require as much particularity as the certificate; and, considering that the notice is for the information of the general public and not merely for the justices, nor for the Excise (as the certificate is), there is greater cause for certainty in the notice than in any of the other documents required. The only remedy for insufficiency of notice is a refusal of the certificate and the justices must have some discretion in accepting a notice. This court, on *mandamus*, will not hastily interfere with that discretion.

J. Paterson supported the rule.—The first objection can have no weight in a matter which is not open to special demurrer, and it is quite early enough to mention the particular statute when the certificate is about to be handed to the applicant. No one could be misled by the form of the notice, and it was never intended that justices should refuse a certificate upon a ground so frivolous as this. It has often been held that *mandamus* is the only remedy when justices allow an excessive effect to a preliminary objection. This really does not amount to an objection, for the justices have distinctly disobeyed the 8th section, and have refused this application for a certificate on other than the authorised grounds.

COCKBURN, C.J.—We think that this notice, although drawn up in a loose and unsatisfactory form, is sufficient to convey to the justices information of what the applicant desired. The words of the 8th section are very definite, and licensing justices must not be too fastidious as to the verbal accuracy of a notice. The rule will be made absolute.

MELLOR, J.—I am of the same opinion.

Rule absolute.

Solicitor for the appellant, *E. T. Tadman*.

Solicitors for justices, *Pritchard, Englefield, and Co.*, for *C. Costeker*, Over Darwen.

Ex parte GIBSON.

This was a similar rule to the same justices on

behalf of John Gibson, who applied for the same certificate as in *Slater's* case.

The same form of notice had been used, and it had been held insufficient by the justices, not only on the grounds applicable to the previous case, but on the further ground, which was shown upon affidavit, that Gibson had at the same licensing meeting continued his previous certificate for an additional licence, under 26 & 27 Vict. c. 33, whereby, having "an Excise licence to sell strong beer in casks containing not less than four and a half gallons, or in not less than two dozen reputed quart bottles at one time, to be drunk or consumed elsewhere than on his premises," he was entitled "to sell beer in any less quantity and in any other manner than as aforesaid, but not to be drunk or consumed on the premises where sold."

Poland showed cause on behalf of the justices.—Here the applicant having already a certificate for a licence such as he required, there was nothing in the notice to show the justices what he was applying for. Moreover, the licensing justices surely cannot be compelled to grant any number of certificates for the same purpose to the same applicant. If these two certificates are to be held by the same person, he will have a facility in defeating the object of the Legislature, requiring a conviction to be indorsed on a certificate, which could never have been intended.

J. Paterson supported the rule.—The applicant might desire to give up his licence to sell strong beer in large quantities during the year, in which case he would require this different kind of certificate for a licence under 3 & 4 Vict. c. 61, in order to continue his retail trade. [*HUDDLESTON, B.*—Then why cannot he apply for the new certificate after he has given up the old one? The object of this application now can only be to put himself on velvet for the next licensing day.] Whatever be the ulterior object, there is nothing in the statute to justify the justices' refusal of the certificate.

MELLOR, J.—I have considerable doubt about this rule; for the notice on the face of it certainly does not give any information concerning the applicant's peculiar position and requirement. I cannot, however, hold that he has not put himself in the position which enables him to claim a certificate under the 8th section. There is nothing there to prevent his having one because he already holds something similar; and the defeat of the statute upon a conviction is not likely to occur as suggested. All that the 7th section requires is set out in the notice; and the rule I think must go.

HUDDLESTON, B.—I am of the same opinion.

Rule absolute.

Solicitors for applicant, *J. Raven and Co.*

Solicitors for justices, *Pritchard, Englefield, and Co.*, for *C. Costeker*, Over Darwen.

Wednesday, Dec. 11, 1878.

(Before *MELLOR* and *MANISTY, JJ.*)

BARTON REGIS UNION v. BERKSHIRE CLERK OF THE PEACE. (a)

Pauper criminal lunatic—Order of maintenance—Settlement at time of making the order.

In 1862 a female criminal lunatic, after living

(a) Reported by *M. W. McKellar, Esq.*, Barrister-at-Law.

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with her husband, without pauper relief, for more than three years in the appellants' union, was acquitted on the ground of insanity on a charge of attempting to murder her child. Her husband's last legal settlement was then elsewhere, but he continued to live in the appellants' union; and in 1877 an order for her maintenance, under the authority of Reg. v. Stepney Union (L. Rep. 9 Q. B. 383), was made upon the appellants.

Held, upon a case stated, that the order was rightly made, not on the husband's last legal settlement at the time of her detention, but upon the appellants' union, in which was the husband's then settlement under 39 & 40 Vict. c. 61, s. 34.

This was a special case, stated by consent of the parties, and by order under 12 & 13 Vict. c. 45 s. 11.

1. On the 9th July 1867, Mary Coleman, being then charged with the offence of having attempted to murder her child, was removed from the parish of Westbury-upon-Trym in the appellants' union, where she was then residing, to the county gaol at Gloucester. On the 12th of August following she was indicted for the said offence at the Gloucester assizes, and upon the trial being acquitted by the jury on the ground of her insanity, she was ordered to be kept in prison in the county of Gloucester until Her Majesty's pleasure should be known.

2. By a warrant dated the 30th Sept. 1867, under the hand of one of Her Majesty's principal Secretaries of State, the said Mary Coleman was ordered to be removed to the Broadmoor Criminal Lunatic Asylum, and she was thereupon duly removed upon such warrant.

3. By an order dated the 21st Sept. 1867, two justices of the peace for the county of Gloucester ordered the guardians of the poor of the appellants' union to pay out of the common fund of their union weekly, from the time the said Mary Coleman should be received, and during such time as she should be detained in the Asylum for Criminal Lunatics at Broadmoor, the sum of 14s. to the superintendent of the said asylum, for the maintenance of the said Mary Coleman. The above order of the 21st Sept. recited, as the ground upon which it was made, the fact that Samuel Coleman, the husband of the said Mary Coleman, was at the date of her imprisonment as aforesaid residing, and had resided for one year and upwards thence immediately preceding, within the appellants' union, and had continually resided therein from the date of such imprisonment down to the date of the said order, and was irremovable therefrom, and that upon due inquiry he was found to be unable to pay the expense of the maintenance of his said wife in a lunatic asylum. The above order did not recite or in any wise purport to be made on the ground that the said Samuel Coleman was at the date of such order legally settled in the appellants' union.

4. Against this order there was no appeal, and the appellants regularly paid the sum of 14s. per week to the superintendent of the Broadmoor Asylum as ordered down to the month of May 1874, when they discovered that the order was void, there being no provisions in the Acts of Parliament relating to criminal lunatics, empowering justices of the peace to charge the maintenance of a criminal lunatic upon the guardians

of the union wherein such lunatic shall have acquired an exemption from removal, but only the guardians of the union wherein such lunatic shall be adjudged to be legally settled. From the date of such discovery the appellants have refused to make any further payments for the maintenance of the said Mary Coleman at the Broadmoor Asylum. The superintendent of the said asylum, however, acting on behalf of Her Majesty's Government, has continued to maintain her in the asylum, and has sent to the appellants quarterly, up to the 29th Sept. 1877, an account, debiting them with the expense of such maintenance.

5. By an order dated the 4th Dec. 1877 two justices of the peace for the county of Berks adjudged the said Mary Coleman to be legally settled in the said parish of Westbury-upon-Trym, in the appellants' union, and directed the appellants to pay thenceforth, from the date thereof, to the superintendent for the time being of the criminal lunatic asylum at Broadmoor, weekly the sum of 14s., for the maintenance of the said Mary Coleman during her confinement therein. This order was obtained by the superintendent when he found that the order of the 21st Sept. 1867 was null and void.

Against this order of the 4th Dec. 1877 notice of appeal was duly given to the respondent, and it is upon the validity of such order that the opinion of this honourable court is now sought.

6. The said Samuel Coleman has continuously resided within the said parish of Westbury-upon-Trym without any break of residence from the year 1862 up to the present time, and during such residence had always supported himself by his labour, and had never received any parochial relief, unless the maintenance of his wife in the Broadmoor Lunatic Asylum as aforesaid can be considered in law as parochial relief received by him. From the year 1862 until her arrest on the 9th July 1867 the said Mary Coleman resided with her husband, who maintained her in such parish as part of his family, and, although he was unable to pay 14s. a week for her maintenance in a lunatic asylum, he could have maintained her in his own house as a sane person.

7. It was contended on behalf of the respondent that the said Mary Coleman was at the date of the order now appealed against legally settled in right of her husband in the said parish of Westbury-upon-Trym, by reason of her husband, the said Samuel Coleman (to whom she was married in 1860), having resided in the said parish for the term of three years and upwards next before the application for the said order, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable within the enactment of 39 & 40 Vict. c. 61, s. 34; that her maintenance in the said asylum was not relief to him within the meaning of sect. 1 of 9 & 10 Vict. c. 66; and that, even if it was, he had resided more than three years after deducting the period during which she was so maintained, so as to gain a settlement in the said parish.

8. It is contended on behalf of the appellants that by reason of the said Mary Coleman having been maintained in the Broadmoor Lunatic Asylum during the period and under the circumstances hereinbefore set out, her husband, the said Samuel Coleman, was during the whole period of such maintenance, and still is, a person

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receiving relief within the meaning of 9 & 10 Vict. c. 66, s. 1.

9. It is further contended by the appellants that the 34th section of 39 & 40 Vict. c. 61, is wholly prospective in its operation, and that the three years' residence specified therein is a three years' residence commencing at a period subsequent to the 15th Aug. 1876, the date of the passing and coming into force of the said Act; and that consequently the said Mary Coleman and her husband had not, at the date of the application for the said order of the 4th Dec. 1877, acquired a settlement in the said parish of Westbury-upon-Trym under or by reason of the provisions of the said section.

10. If the said Mary Coleman had not, by reason of the circumstances hereinbefore set out, acquired at the date of such application as aforesaid a settlement in the said parish of Westbury-upon-Trym, under 39 & 40 Vict. c. 61, s. 34, it is admitted that she was at the date of such application, and still is, legally settled in the parish of Almondsbury, in the Thornbury Union. It is also admitted that she was settled there in Sept. 1867, when the Secretary of State's order was made for her removal to the asylum.

11. The appellants further contend that the settlement of the insane person into which the justices of the peace are directed to inquire under 3 & 4 Vict. c. 54, s. 7, is the settlement of such insane person at the date of the order for his or her removal to the lunatic asylum, and not the settlement which he or she may have at the date of the application for the order of maintenance.

The question for the opinion of this honourable court is whether the order of 4th Dec. 1877, adjudging the settlement of the said Mary Coleman to be in the said parish of Westbury-upon-Trym, is, upon the facts stated, properly made.

And it is agreed that a judgment in conformity with the decision of this honourable court, and for such costs as this court shall adjudge, shall be entered on motion by either party at the general quarter sessions of the peace to be holden in and for the county of Berks next, or next but one, after such decision shall be given.

Charles, Q.C. (with him *Clerk*) argued for the appellants. — This order was made upon the authority of *Reg. v. Stepney Union*, L. Rep. 9 Q. B. 383, by which it was held that, notwithstanding the total repeal of 9 Geo. 4, c. 40, by 8 & 9 Vict. c. 126, s. 1, the effect of 3 & 4 Vict. c. 54, s. 7, was so far to incorporate the 54th section of the first-named Act as to continue the power of two justices to inquire into and adjudge the settlement of a pauper detained in custody during pleasure, who has been acquitted of felony on the ground of insanity, and to order the overseers or guardians of the parish of settlement to pay such weekly sum for his maintenance as the justices shall from time to time direct. It must be admitted that there is authority for making this inquiry and order of maintenance at any time during the detention in custody; but in all the cases the settlement determined by the justices has been that which existed at the time of the removal under the order of the Secretary of State. Here the settlement at that time was not in the appellants' union, and if the order ought to have been made on the parish or union of that settlement, this appeal must be allowed. In consequence of the decision of this court in *Brampton Union v. Carlisle Union* (38 L. T. Rep. N.S. 714, L.

Rep. 3 Q. B. Div. 479), it cannot now be contended that the husband's settlement at the time this order of maintenance was made, was anywhere but in the appellants' union. The only question, therefore, for consideration now is whether the settlement at the time of the first detention in custody, or that at the time of the inquiry and order of maintenance is to be determined by the justices. One inquiry only is provided for, and the determination must apply to the whole term of the detention. If a female criminal lunatic can derive a settlement from her husband during the time of her detention, that settlement might vary during her detention; but there is no provision for rescinding an order of maintenance, at the instance of the parish or union upon which the order has been made, when the husband's settlement has become changed.

Mc Kellar (with him *Bowen*) for the respondent.

— It is admitted that upon the authorities there is no limitation as to the time of this inquiry and order of maintenance; and the provision simply requires the justices to ascertain the place of the last legal settlement. There can be only one such place, namely, that of the last legal settlement at the time of the inquiry. There is nothing in any Act of Parliament which can suggest to the justices that under such circumstances as these it is their duty to ascertain some other settlement than the last, and it might be a very difficult thing to do. The consequences of this clear and definite construction of the Act ought to have no weight in the matter; but if they be considered, in this particular case there can be no hardship upon the appellants. Should the detention of the insane woman cease, as it may do at Her Majesty's pleasure, the same parish would be responsible for maintenance when she is at large as is now liable for her maintenance in Broadmoor. If during her detention her settlement should change in consequence of her husband's removal, there is nothing to prevent the superintendent of the asylum from applying again to two justices, at the appellants' instance, for another order of maintenance upon the husband's new place of settlement.

Charles, Q.C. in reply.

Mellor, J. — I confess myself to have had very considerable doubt upon this point during the argument. It seems, however, to me a greater hardship and a very strange conclusion, if a woman detained during Her Majesty's pleasure should be maintained by a different parish from that which would have to maintain her when she comes out. It is said that the inquiry was intended to be made once for all at the time when the lunatic is first detained, and that if made afterwards it cannot concern a settlement which she could not acquire during detention. There may be hardships upon parishes or unions thus rendered liable, and difficulties in ascertaining the proper liabilities; but the governing principle of a decision upon such a question as this should be the comparative hardship, and I think the respondent's is the more reasonable construction. I answer the question in the respondent's favour, and affirm the order of maintenance.

Manisty, J. — I also am of opinion that our judgment must be for the respondent. To say that the case is free from doubt would be to go beyond any conclusion possible concerning this confused legislation. I agree, however, that if we can con-

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strue the Act in accordance with general principles as to the parish which would have to maintain this woman if she were free, we ought to do so; and it seems to me that the respondent's construction is the better one of the two. Looking at the case of *Reg. v. Stepney Union*, what is meant is clearly that, although the first statute is repealed by the third, you must give effect to the enactment incorporated by the 7th section of the intermediate Act, by excluding from the repeal as much of the first Act as is necessary for that purpose. At p. 392, Cockburn, C.J., puts it: "There is no doubt that sect. 7 of 3 & 4 Vict. c. 54, was introduced, not so much for the purpose of creating a substantive enactment as for the purpose of modifying the previous enactment of sect. 54 of 9 Geo. 4, c. 49." But the conclusion is that we must interpret sect. 7 by reading into it so much of the previous Act as to make it a substantive enactment. Sect. 7 does not say the time at which the settlement is to exist of which the inquiry must be made, nor indeed does the 54th section of 9 Geo. 4, c. 40. But the inquiry must be as to the place of the last legal settlement; the justices are not to ascertain in what place the lunatic seems to have been legally settled at the time of the Secretary of State's order. There is nothing to militate against the ordinary construction of the words, and that construction is reasonable and in accordance with general principles.

Leave to appeal was granted to the appellants.

Judgment for respondent.

Solicitors for appellants, *Gregory, Rowcliffe, and Co.*

Solicitors for respondent, *Hare and Fell*, for the Solicitor to the Treasury.

COMMON PLEAS DIVISION.

Tuesday, Nov. 19, 1878.

(Before Lord COLERIDGE, C.J., GROVE and LINDLEY, JJ.)

APPEALS FROM REVISING BARRISTERS.

BARTON (app.) v. TOWN CLERK OF BIRMINGHAM (resp.). (a)

Parliament—Borough vote—Registration—Rating of owner by agreement with occupier—Omission of occupier's name from the rate-book—Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41), ss. 3, 4, 7, 8, and 19.

Sect. 19 of the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41) enacts that the overseers in making out the poor rate shall in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter the name of the occupier in the rate-book, and that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every franchise and qualification depending upon rating, in the same manner as if his name had not been omitted.

Held, that this includes cases where the occupier's name has been omitted, the liability of the owner to pay the rates being by agreement with the occupier, and not only cases where the owner's liability arises by agreement with the overseers

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

under sect. 3, or by order of the vestry under sect. 4. (a)

Smith v. Overseers of Seghill (32 L. T. Rep. N. S. 859; L. Rep. 10 Q. B. 422) followed.

Cross v. Alsop (23 L. T. Rep. N. S. 589; L. Rep. 6 C. P. 315) distinguished, and obiter dicta in that case disapproved of.

THIS was an appeal from the Revising Barrister of the borough of Birmingham, allowing a claim to the franchise.

The following case was stated:

At a court held by me, the barrister appointed to revise the list of voters for the borough of Birmingham, William Barton duly objected to the name of Baligan Hackney being inserted in the list of voters for the said borough.

The claim was in the following form: "Hackney, Bernard Baligan, 113, Pershore-road, occupation of offices, 37, Waterloo-road."

The following facts were established by the evidence. Hackney had during the qualifying period resided at 113, Pershore-road, within the borough, and had occupied offices at 37, Waterloo-road, as yearly tenant, for the purpose of his business as a law stationer, at a yearly rent of 34*l.*

The offices consisted of three rooms communicating with each other and having a door leading to the hall common to all occupiers.

Hackney had the exclusive right to the offices, the key, and complete control of the door leading from them to the common hall, and a key to the street door which he used when he pleased. Hackney's name was painted on the door post in the street with others. There were several sets of offices of the same description and let in the same way on the premises. The landlord, who himself occupied part of the premises, but did not sleep there, was rated and had paid all rates for the whole house, and his name appeared on the rate-book as occupier. Hackney had not claimed to be rated or tendered payment of any rates. Hackney's name was not entered on the rate-book. The rent paid by Hackney was more than it otherwise would have been, in consideration of the landlord paying the rates. Twelve other persons whose names are set out in the schedule hereto attached claimed to be inserted in the said list under similar circumstances.

It was contended on behalf of the objector that Hackney's name not appearing in the rate-book, he was thereby disqualified from being placed on the said list.

I found that Hackney was an occupier as tenant of a counting-house or other building, within the meaning of 2 Will. 4, c. 45, s. 27, and that he was the occupier of a rateable hereditament within the meaning of sect. 19 of 32 & 33 Vict. c. 41, and I decided that, notwithstanding that the overseers had omitted his name from the rate, he was, under the proviso to the said section as interpreted by the case of *Smith v. Overseers of Seghill* (L. Rep. 10 Q. B. 422), entitled to every qualification and franchise depending upon rating in the same manner as if his name had not been so omitted, and I accordingly inserted his name in the list of voters together with the names of the said twelve other persons.

Due notice of the appeal from my decision was

(a) This construction of the Act will, after Feb. 1, 1879, be also required by express statutory enactment (41 & 42 Vict. c. 26, s. 14).

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given, and I ordered the appeals in all the before-mentioned cases to be consolidated.

If the court be of opinion that my decision was wrong, the register is to be amended by erasing the names of Bernard Baligan Hackney and of the said twelve other persons from the said list.

By sect. 3 of the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41), in case the owner of any hereditament not exceeding a certain rateable value is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow him a commission not exceeding twenty-five per cent. on the amount thereof.

By sect. 4, the vestry of any parish may from time to time "order that the owners of all rateable hereditaments, to which sect. 3 of this Act extends, shall be rated to the poor rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order," allowing the owners so rated a deduction of fifteen per cent.

By sect. 7, every payment of a rate by the owner, "whether he is himself rated instead of the occupier, or has agreed with the occupier or the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate," shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which, as regards rating, depends upon the payment of the poor rate.

By sect. 8, when an owner "who has undertaken, whether by agreement with the occupier or the overseers, to pay the poor rate, or has otherwise become liable to pay the same," omits or neglects to pay any such rate, the occupier may pay the same and deduct the amount from the rent.

By sect. 19 the overseers, in making out the poor rate, "shall in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupier's column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid; and if any overseer negligently or wilfully, and without reasonable cause, omits the name of the occupier of any rateable hereditament from the rate . . . such overseers shall for every such omission . . . be liable on summary conviction to a penalty not exceeding two pounds; provided that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted."

Jelf for the appellant.—The claimant's name has been omitted in this case, but he is nevertheless not aided by sect. 19, and his name should not be placed on the register. That section is confined to cases where "the owner is liable to the pay-

ment of rates instead of the occupier." "Liable" means liable in one of the two ways prescribed by sects. 3 and 4, i.e., either by agreement with the overseers or by order of the vestry. *Cross v. Alsop* (23 L. T. Rep. N. S. 589; L. Rep. 6 C. P. 315) is expressly in point as to this, and has never been overruled, though in *Smith v. Overseers of Seghill* (32 L. T. Rep. N. S. 859; L. Rep. 10 Q. B. 422) the Court of Queen's Bench expressed an opinion opposed to the appellant's contention. This court, however, sitting as a court of final appeal for registration appeals, will follow its own decisions. [COLERIDGE, C.J.—Why should not the word "liable" in sect. 19 include all the three modes of liability spoken of in sects. 7 and 8?] Sect. 19 refers only to such a liability as is created by the Act.

Mellor, Q.C. and Dugdale for the respondent.—The facts in *Cross v. Alsop* (*ubi sup.*) are distinguishable from those in the present case, and the dicta on which the appellant relies were not necessary to the decision. *Smith v. Overseers of Seghill* (*ubi sup.*) is the later authority, and is expressly in the respondent's favour.

Lord COLERIDGE, C.J.—I am of opinion that the decision of the revising barrister was right and must be affirmed. In so deciding it might seem at first that we are in conflict with the decision of this court in *Cross v. Alsop* (*ubi sup.*). But, for a reason which I will give presently, it will be found that we are not overruling nor even differing from that case—scarcely seriously differing from the *obiter dicta* in that case. This is a case in which the revising barrister has found an agreement—if not in terms, at any rate in facts from which it necessarily follows—between the owner and occupier that the owner should pay the rates; and it is found that the occupier paid more rent in consideration of that agreement than he otherwise would have done. The facts are these: that the occupier pays the rates in the shape of increased rent to the landlord, and we have to deal with the Act in respect of those facts. The material sections of the Act (32 & 33 Vict. c. 41) are sects. 3, 4, 7, 8, and 19. Sects. 7 and 8 seem to describe the very facts which we find in this case, because sect. 7, omitting that part which refers to deductions from rent, goes on to say that "every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or overseers to pay such rate. . . shall be deemed a payment of the full rate by the occupier." Rating the owner instead of the occupier is the course prescribed under sect. 4, by order of the vestry; agreement with the overseers is the course contemplated by sect. 3; and agreement with the occupier is a third course mentioned by the statute. Then comes sect. 8, which enacts that where an owner who has undertaken, by agreement with the occupier or overseers, to pay the poor rates, or who has otherwise become liable to pay them, omits to do so, the rates may be paid by the occupier, and deducted from the rent. Sects. 3 and 4 are, as I have said, incorporated by reference into sects. 7 and 8. Then we have sect. 19, the first part of which imposes certain duties on the overseers the neglect of which it visits as an offence liable to summary conviction; and the duty is to enter the names of the occupiers in the rate book in every case where the owner is

liable to the payment of the rate instead of the occupier. Now how is the owner liable? He may be liable in any one of three ways; by an order of the vestry (sect. 4), by agreement with the overseers (sect. 3), or by agreement with the occupier. The word "liable" is used in sect. 8 as applicable to all those three modes of liability. What is there to show that, when the word "liable" is used in sect. 19, it is to be limited to two of the three modes mentioned in former parts of the Act? Then, if the case is within the first part of the section, it is within the last part; which provides that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon such rating, in the same manner as if his name had not been omitted. It seems to me, therefore, that this is a case distinctly within the words of the section, and that the claimant's franchise is not lost by the omission of the overseers. It has been said that this decision must conflict with the case of *Cross v. Alsop* (*ubi sup.*); but, in the first place, the facts in that case are not these facts. So far from the complainant's name in that case having been omitted, it had been inserted, and wrongly inserted; and the argument in the case raised the point distinctly. On those facts, argued upon that footing, the judges in *Cross v. Alsop* say that when the complainant has lost his vote, partly in consequence of its having been improperly claimed, the case is not within the statute, his name not having been omitted from the rate book, but inserted in a wrong manner. The judges do, no doubt, go on—and it was necessary for them to go on, in order to show that the proviso in sect. 19 did not apply to the case before them—to deal with the only two questions raised by the facts. There was no order of the vestry, and no agreement between the owner and the overseers; and they say that the complainant is not therefore aided by sect. 19—first, because his name was not omitted from the rate book; and secondly, because the owner had not been made liable to the payment of rates in either of these two ways. It was not suggested that this third mode of liability existed in that case. But in this case the facts raise a question which was not before the court then, and was not decided by the judges at all. We are not therefore conflicting with the decision of this court in that case, though no doubt expressions may be found in the judgments which appear to limit the operation of sect. 19. I do not, however, think that those expressions are to be taken in their full sense, especially as sects. 7 and 8 were not brought before the notice of the court. But there is a case which is directly in point—the case of *Smith v. Seghill* (*ubi sup.*). In that case it was necessary to consider the question of the omission of the occupier's name, and the effect of sect. 19 in inflicting a penalty on the overseers; and it therefore became essential to put the true construction upon that section, as part of the *ratio decidendi*. In that case the Court of Queen's Bench put the same construction upon sect. 19 that we are now putting on it, and, so far as it was necessary for them to express an opinion contrary to the decision of *Cross v. Alsop* (*ubi sup.*), they did express it. The expressions to which I have referred in *Cross v. Alsop* were not necessary to the decision of that case; and our

judgment, therefore, not conflicting with that of *Cross v. Alsop*, and assenting to that of *Smith v. Seghill*, must be that the decision of the revising barrister be affirmed.

GROVE, J.—I am of the same opinion, and do not wish to add anything to what the Lord Chief Justice has said with regard to sects. 7 and 8, but on the other point I will say a few words. Now, in forming an opinion as to the effect of the judgment of the court, one must look at the real point raised. In *Cross v. Alsop* (*ubi sup.*) the question was whether the complainant required to be separately rated, he not being separately rated in fact. Under the Representation of the People Act 1867 (30 & 31 Vict. c. 102) s. 61, separate rating was essential, and the argument was whether that defect was remedied by 32 & 33 Vict. c. 41, so as to entitle this occupier, who was not separately rated, to a vote or not. That being so, the Lord Chief Justice applies himself in his judgment to those sections of this Act—3, 4, and 19—which were supposed to be the only sections which could entitle him to a vote, and then proceeds as follows: "With respect to the proviso at the end of that section, that any occupier whose name has been omitted shall, notwithstanding such omission, be entitled to every franchise and qualification depending upon rating, that is applicable only where the name of the occupier has been omitted from the rate, which is not the present case, for here the names of the several occupiers are inserted in the rate." The real judgment is that the complainant there did not come within sect. 19, because his name was not omitted from the rate, and the judgment of the Lord Chief Justice is explicit on the point. It is true that some of the expressions used by the other judges appear to show that their minds inclined to confine sect. 19 to cases within sects. 3 and 4; but these opinions were not necessary to the judgment; and not only the Lord Chief Justice, but also Brett, J., puts the very ground on which the complainant did not come within sect. 19. Then the case of *Smith v. Seghill* (*ubi sup.*), in which the facts are the same as those now before us, arises in the Queen's Bench. In that case the name of the occupier had actually been omitted, and Mellor J. distinctly points out the difference between it and the previous case of *Cross v. Alsop*: "It was sufficient to have decided *Cross v. Alsop* that the occupier of part of a house must be separately rated to the relief of the poor, and that a joint rating with other occupiers was not sufficient. Therefore, without interfering with *Cross v. Alsop*, the construction put upon sect. 19 not being directly necessary for the decision of that case, we are at liberty to consider the construction of that section independently of that authority." (L. Rep. 10 Q. B. 429.) The case is also distinguished by Lush and Quain, JJ. from *Cross v. Alsop* in the same manner as we are distinguishing the present case, on the ground that there the question was one of separate rating, and that the name was not omitted as it is here. We are not therefore acting in opposition to the decision of this court in *Cross v. Alsop*, but are distinguishing this from it on the very ground which two of, if not all, the judges indicate as the distinction to be taken. As to how far we should adopt the *obiter dicta*, that is a question which may arise, because no doubt some expressions are used in the judgments in *Cross v.*

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Alsop in the sense for which Mr. Jelf contends. This case is, however, distinguishable on the ground pointed out by the judges in that case itself, and by the judges in the Queen's Bench, and the distinction, to my mind, is a material one.

LINDLEY, J.—I am of the same opinion. But for the case of *Cross v. Alsop*, I should have thought there was no difficulty in the question. It is, however, impossible not to see that a difficulty has been created by that decision. The facts of *Cross v. Alsop* are, however, unquestionably distinguishable from those in the present case, as well as from the facts in *Smith v. Seghill*, as has been pointed out; but still there is no doubt a difficulty in dealing with the judgments. Nevertheless, as the Court of Queen's Bench have had the very same question before them, and came to the conclusion which we all think the more correct, I think we are not bound to follow the dicta in *Cross v. Alsop*. In this case the question will be found to turn on sects. 7, 8, and 19 of 32 & 33 Vict. c. 41. The owner may be liable to the payment of rates in three ways—by agreement between the owner and the overseers, by agreement between the owner and the occupier, or by order of the vestry. It seems to me that sect. 19 must apply to all these liabilities. Then it is said that rating will no longer be a test of the franchise. I do not think so at all. Rating is still the test. The rates must still be paid, whether by the occupier, or by the owner and landlord, under agreement either with the occupier or the overseers.

Decision of the revising barrister affirmed.

Solicitors for the appellant, *Robinson, Preston, and Stow*, for *Rowlands and Bagnall*.

Solicitors for the respondents, *Sharp, Parkers, and Co.*, for *Hayes*, Birmingham.

Saturday, Nov. 23, 1878.

(Before Lord COLERIDGE, C.J. and GROVE, J.)

GREEN (app.) v. MEPHAM (resp.). (a)

Parliament—Registration—Borough vote—Notice of objection, service of—Collector of rates—Office of overseer—6 Vict. c. 18, ss. 16, 101.

The collector of rates for the parishes constituting the borough of B. discharged all the ordinary duties of the overseers, including the duty of making out the lists for revision purposes and of attending at the registration court. It was the uniform practice that all notices of claim and objection should be sent to the collector's office, which was attached to his residence, whether such notices were first delivered to an overseer or not. The parish books were all kept at this office, and there was no other place in the borough where any parish business was transacted. A notice of objection to the appellant's name was left at this office.

Held, that this was a good service on the overseers, on the ground that this office was "an overseer's office or other place for transacting parochial business."

Semble, the collector was an overseer within 6 Vict. c. 18, s. 101.

APPEAL from the revising barrister for the borough of Bedford, who stated the following

CASE.

At a court for the revision of the lists of persons entitled to vote in the election of members to serve in Parliament for the borough of Bedford, holden in Bedford on the 7th Oct. 1878, before the revising barrister duly appointed to revise the said lists, William Mepham objected to the name of Joseph Reynolds Green being retained on the list of persons entitled to vote in the election of members for the borough of Bedford, in respect of property occupied within the parish of St. Mary in the said borough.

The notice of objection required to be given to the party objected to was duly given to Joseph Reynolds Green.

The question in this case was whether the notice of objection required to be given to the overseers of the parish who shall have made out the list in which the name of the person objected to shall have been inserted, was duly given (6 Vict. c. 18, ss. 17 and 101).

Thomas Bithery and Thomas Minney are the regularly appointed overseers of the poor for the parish of St. Mary, Bedford, for the year 1878.

St. Mary is one of the five parishes which constitute the borough of Bedford, and for the whole of these five parishes one collector of poor rates is appointed by the guardians under the provisions of 4 & 5 Will. 4, c. 76, s. 40, and the list of voters for the said several parishes constitute the register of voters for the borough.

The collector's duties, by the terms of his appointment, are to assist the churchwardens and overseers in making, assessing, levying, and collecting the poor rates, and filling up receipts, keeping books, and making returns relating to poor rates, to obey all lawful orders and directions of the guardians and of the majority of the churchwardens and overseers; but as a fact, and by the consent of the overseers, he has been in the habit of discharging all the ordinary overseers' duties, including that of making out the lists for revision purposes and of attending at the registration court, and there performing the overseer's duties.

The present collector, Mr. Thompson, transacts the whole of the business connected with the poor rates and the preparation of the list of voters, at an office, No. 99, Tavistock-street, in the borough of Bedford (called for the purpose of this case the Rate office), being a portion of his own residence, but having a separate entrance to it distinct from the dwelling-house. No allowance beyond his salary is made to the collector for the use of this office. A similar office in his own dwelling-house for such purposes was kept by Mr. Thompson's predecessor, Mr. Joy. It was proved that all persons going to the dwelling-house on parochial business are always sent to the office door; that at this office all the parish books are kept and produced to any voter requiring to see them; that all notices of claims and objections which have been delivered to any of the overseers are sent there to or collected by Mr. Thompson, who produces them to any voter requiring to see them, and that he also attends to produce them to the revising barrister at his court; that Mr. Thompson also makes out the lists of voters and of claims and objections, which are kept at this office to be produced to any voter requiring to inspect them. There is no other office in the borough of Bedford where any parish business is transacted. Annexed hereto is a copy of the demand note and receipt

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

C.P. Div.]

GREEN (app.) v. MEFHAM (resp.).

[C.P. Div.]

delivered by Mr. Thompson on calling for and receiving any rate. It was also proved by evidence that when Mr. Joy (the predecessor in office of Mr. Thompson, who held the same appointment Mr. Thompson now holds) was collector of the rates, notices of claims and objections were usually served at the office then occupied by him in a similar manner, and duly published by the overseers without any objection having been made; and that, since Mr. Thompson has held the appointment, notices of claims and objections have been left at the said rate office and duly published by the overseers; but that on one occasion, when notices were handed to Mr. Thompson personally, he informed the person delivering the same that in his opinion such delivery was irregular, but no objection was afterwards made before the revising barrister to the service of such notices. That both Mr. Joy and Mr. Thompson always received the whole of the allowance awarded by the revising barrister in respect of the overseer's duties connected with the registration, and that for many years past the whole of such allowances for the five parishes were included in one certificate, and were charged by the collector to the said parishes according to the rateable value thereof respectively. On the 24th Aug. 1878 Mefham left at the rate office a notice of his objection to Green's qualification, and this notice was received by Mr. Thompson on the same day. The overseers of St. Mary objected to publish the name of Green in the list of persons objected to. On behalf of Green it was objected that notice of the objection had not been duly given to the overseers.

For Mr. Mefham, the objector, it was contended that Mr. Thompson was, within the meaning of 6 Vict. c. 18, s. 101, a person who, by virtue of his office or appointment, executed the duties of the overseers of the poor, and that the said rate office was the office or other place for transacting the parochial business, within the meaning of the said section, and that the notice was duly served.

I decided on the evidence that, in this case, notice of the objection had been duly given to the overseers, and the said Joseph Reynolds Green not having a good qualification, I struck out his name from the list. Against my decision the said Joseph Reynolds Green has given notice of appeal.

At the said court the name of Lawrence Bartholomew Moore, inserted in the list for the parish of St. Paul (another parish in Bedford), was also objected to. The same question as to the service of the notice of the objection upon the overseers occurred in this case as in Green's, the only difference being that Moore's name was included in the lists prepared by Mr. Thompson, and signed and published by the overseers of the parish of St. Paul. I decided this case in the same manner, and struck Moore's name from the list of voters. Against my decision in this case the said Lawrence Bartholomew Moore has also given notice of appeal. The above appeals depend on the same decision, and ought to be consolidated; and also will affect the qualification of five others.

(1) If the court should be of opinion that in the above cases the notices of objection to the overseers were duly served for the parish of St. Mary, the list as signed by me will remain unaltered.

(2) If the court should rule that such notice of objection to the overseers was not duly served, for the parish of St. Mary, the names (the names of certain occupiers here followed) must be inserted in the list, and the claim of Augustus Tilden disallowed.

(3) If the court should be of opinion that the notices to the overseers were duly served for the parish of St. Paul, or that the overseers by publishing Moore's name in the list of persons objected to cured any irregularity in the service, the list will remain unaltered.

(4) If the court should be of opinion that the notices to the overseers for the parish of Saint Paul, were not duly served, and that the overseers by publishing the lists did not cure any irregularity as to service, the names of (two names here followed, with their qualifications) will be reinstated and the lodger claim of Samler, William, will be disallowed.

(5) The lodger claim in the parish of St. John, of Shrimpton, Walter John, will be disallowed, should the court rule that in Saint Paul's parish the notices were not duly served, or that any irregularity in the service thereof was not cured by the publication of the lists.

W. Graham for the appellant.—The question turns upon the proper construction of sects. 17 and 101 of the 6 Vict. c. 18. Sect. 17 gives any voter a right to object to the insertion of any name in the list of voters, and provides that the objector shall, on or before the 25th day of August in each year, give or cause to be given a notice of objection to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted. Sect. 101 (interpretation clause) provides that "the words 'overseers' or 'overseers of the poor' shall extend to and mean all persons who, by virtue of any office or appointment, shall execute the duties of overseers of the poor, by whatever name or title such persons may be called and in whatever manner they may be appointed; and . . . that whenever any notice is by this Act required to be given or sent to the overseers of any parish or township, it shall be sufficient if such notice shall be delivered to any one of such overseers, or shall be left at his place of abode, or at his office or other place for transacting parochial business." First, it is clear that the collector spoken of in the case, Thompson, is not an "overseer" within the definition here given. He may, by permission of the overseers, execute certain of the overseer's duties, but he does not execute them "by virtue of any office or appointment." The duties of a collector are defined by art. 4 of the Poor Law Board Orders (cited in Archbold's Poor Law, p. 84), made under the 7 & 8 Vict. c. 101, s. 61, and exclude such a contention. [*Grove, J.*—By sect. 61 of 7 & 8 Vict. c. 101, the collector is capable of being appointed assistant-overseer. If the overseers have desired him to execute their duties, but not formally appointed him under sect. 61, is not that a mere irregularity in the appointment, cured by sect. 101 of the 6 Vict. c. 18? He holds no office or appointment except that of collector, and, as collector, he does not perform these duties. The effect of sect. 101 of the 6 & 7 Vict. c. 18, was considered in *Points v. Atwood* (18 L. J. 19, C. P.), where it was held that service of notice of objection upon an assistant-overseer was a good notice;

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but this is a very different case. The offices of collector and assistant-overseer are distinct:

Guardians of Malling Union v. Graham, 22 L. T. Rep. N. S. 789; L. Rep. 5 C. P. 101.

[Lord COLERIDGE, C.J.—That case is decided on the ground that they are not the same offices in such a sense as to bind a surety, who has guaranteed the due performance of the duties of one of them, to both. In favour of sureties, such contracts are always construed strictly.] Secondly, the place where this notice was served was not an overseer's office. The case finds that parochial business was transacted there, but it was not an office belonging to any overseer at all. It was the private room of the collector, where he discharged his business. [GROVE, J.—The case finds that no parochial business was transacted anywhere else.] That does not make it the office of an overseer.

Hugh Shield, for the respondents, was not called on.

Lord COLERIDGE, C.J.—I am of opinion that the decision of the revising barrister was correct, and that the judgment must be affirmed. I think the service of notice of objection in this case was practically good on the first ground, but I do not propose to rest my judgment on that ground, as my brother Grove feels some doubt upon it. At any rate, it was served at the right place. The Act of Parliament (6 & 7 Vict. c. 18, s. 101) says that "the words 'overseers' or 'overseers of the poor' shall extend to and mean all persons who by virtue of any office or appointment shall execute the duties of overseer of the poor, by whatever name or title such persons may be called, and in whatsoever manner they may be appointed . . . and that wherever any notice is by this Act required to be given or sent to the overseers of any parish or township, it shall be sufficient if such notice is delivered to any one of such overseers, or shall be left at his place of abode, or at his office or other place for transacting parochial business." The last words clearly include this case. The facts here are that the collector has an office, and that at his office the parish books are kept. All notices of claims and objections which have been delivered to any of the overseers were sent there as a matter of course. The overseers do nothing whatever. It seems to me that it is too clear, I had almost said for argument, that this office is a place for the transaction of parochial business; and it is further found in the case that there is no other office or place in the parish where parochial business is transacted. The notice of objection was served at this office, and the service is therefore good.

GROVE, J.—I am of the same opinion. It is hardly necessary to add anything to the judgment of the Chief Justice, and I will only say a few words. The case finds that this is a place where the overseers send these very notices of objection, if delivered to them; that there is no other office in the parish where any parish business is transacted; and it would be to strike the words of sect. 101 out of the Act of Parliament if we were not to hold that this place comes within them. I am inclined to think it was the office of the overseers; but, at any rate, it was the place where parochial business was transacted. On the other point which has been suggested, that this collector does not come within the word "overseer," if it had been necessary to decide it I should like to have heard what the respondent's counsel has to say.

I do not feel perfectly satisfied that the collector in this case was the overseer within sect. 101 of the Act.

Decision affirmed.

Solicitors for the appellant, *Conquest and Olars*.
Solicitors for the respondent, *Sharpe and Ullithorne*.

CROWN CASES RESERVED.

Friday, Dec. 6, 1878.

(Before KELLY, C.B., MELLOR, DENMAN, LINDLEY, and HAWKINS, JJ.)

REG. v. WALTER BROWNLOW. (a)

Larceny Act (24 & 25 Vict. c. 96), s. 75—Agent receiving moneys—Direction in writing to apply the same—Embezzlement.

The prisoner was an agent employed to sell goods on commission, and as soon as he received moneys from customers he was to remit them to his employers. During the employment the prosecutor wrote to the prisoner, "We will send H., B., and P. their bills at the end of the month, and the same day that you receive the money from the customers you must remit it to us. We will attend to your order, as our arrangements were to remit as soon as you received it, as you said they would not pay much before the 20th of each month."

Held, that this letter was not a direction in writing as to the application or disposition of moneys received by the prisoner within the meaning of sect. 75 of 24 & 25 Vict. c. 96.

CASE reserved for the opinion of this court by Fry, J.

The indictment contained three counts:—

The first charged the prisoner with having received 12l. 12s. on the 7th Feb. 1878 from one Edward Wood, and with having converted the same to his own use.

The second count charged the prisoner with having received a sum of 8l. 14s. 9d. on the 2nd March 1878, from one Birkhamshaw, and having in like manner converted the same to his own use.

The third count charged the prisoner with the receipt of a sum of 11l. on the 18th Feb. 1878 from one Hilton, and having converted the same to his own use.

The questions for decision arise under the 75th section of the 24 & 25 Vict. c. 96.

It appeared from the evidence that Edward Thorneycroft carried on business in partnership with his brother at Chesterton in Staffordshire, as a brick maker. That he engaged the prisoner to act as an agent in Derby in October 1877. That the duties of the prisoner were to sell goods on commission at 5 per cent. That as he received the moneys from the customers, he was to remit them to his principals.

It appeared further that in the course of business he sent orders to his principals, who accordingly supplied the goods to the customers.

It was proved that the three sums mentioned in the indictment had been received by the prisoner in respect of goods supplied by his principals, and that the same had not been paid or accounted for to his principals, but had been converted by him to his own use.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

On the 26th Nov. 1877, Thorneycroft wrote to the prisoner a letter, the material parts of which are as follows:

We will send Mr. Hand, Mr. Blood, and Mr. Pemberton their bills at the end of the month, and the same day that you receive the money from the customers you must remit it to us. We will attend to your order, as our arrangements were to remit as soon as you received it, as you said they would not pay much before the 20th of each month.

Upon this state of facts two questions arose: first, whether the prisoner had been intrusted with the three sums of money mentioned in the indictment or any of them within the meaning of the 75th section of the 24 & 25 Vict. c. 96; secondly, whether the letter of the 26th Nov. 1877 was within the meaning of the same section a direction in writing to apply, pay, or deliver the said three sums or any of them.

The prisoner was found guilty subject to this case.

I submit the questions for the decision of the Court for Crown Cases Reserved.

Fry, J. appended to the case the following memorandum:

"The questions turn upon the construction of the 75th section of the 24 & 25 Vict. c. 96. It seems to me open to question whether the prisoner can be considered to have been intrusted with the money.

1. The general drift of the 75th section seems to show that it is intended to apply rather to agents to pay than to agents to receive money.

2. The direction in the present case to pay to the principals shows that the principal did not treat himself as having received the money. Can a man who has not been in possession of money trust another with it?

3. If the direction had been to receive from "A." and to pay to "B." the case might have been different, because there the transaction may be deemed to be of a twofold character, viz., first, a constructive receipt of the money by the principal; secondly, an intrusting of the same money to the agent to pay. But here the direction being simply to pay to the principal, the second part of the transaction which would have brought it within the scope of the section is wanting.

4. The language of this section with regard to the agent being intrusted must be contrasted with the language of the 68th section, where money in the position of that now in question is described as having been delivered to or received or taken into possession by the person receiving it.

5. It appears to me doubtful whether the Legislature were minded to make the misapplication of all moneys received by one person to the use of another, in respect of which a written direction had been given, criminal.

See *Reg. v. Tailock* (2 Q. B. Div. 157), particularly the judgment of Amphlett, B.

Horace Smith for the prisoner.—The conviction cannot be sustained. The indictment against the prisoner was not for embezzlement, but for converting moneys which had been intrusted to him with a direction in writing to apply the same, under the 24 & 25 Vict. c. 96, s. 75. The learned counsel, having read Fry, J.'s observations on the memorandum to the case, was stopped by the Court.

Vesey Fitzgerald for the prosecution.—The conviction was right. The case finds that the prisoner

was an agent to the prosecutors, and the letter of the 26th Nov. 1877 from the prosecutors was a written direction to him as to the application of all moneys he might receive for them. Sect. 75 says: "Whoever having been intrusted," it does not say "by the employer," but leaves it generally, "an agent having been intrusted;" and here the prisoner was intrusted with the money by the prosecutor's customers. Then the letter supplies the direction what he was to do with it, viz., to remit the money the same day that he received it to his employers. [DENMAN, J.—The letter amounts to no more than an intimation that as soon as he has received any moneys he is to remit them the same day.] The direction in this letter is quite as specific as that in *Reg. v. Christian* (L. Rep. 2 C. C. R. 94; 12 Cox C. C. 502). [MELLOR, J.—No; there the prisoner received a specific sum of 336*l.* to apply in payment of certain shares. This was embezzlement if a criminal offence at all.]

KELLY, C.B.—I am of opinion that this conviction must be affirmed. In the cases cited the prisoners were intrusted by the prosecutor with moneys, with specific directions how to apply them; but in the present case there was no written direction at all which specifically applies to the moneys mentioned in this indictment.

MELLOR, J.—I am of the same opinion. This is not a case within the 24 & 25 Vict. c. 96, s. 75. The reasons given by Fry, J. show very satisfactorily that the prisoner ought to have been acquitted.

DENMAN, J.—I am of the same opinion. The only question is whether the letter was a direction in writing within the meaning of sect. 75 of the 24 & 25 Vict. c. 96? I think it is very doubtful whether the letter was ever intended to apply to any other than the three persons' accounts named. At all events it is ambiguous, and, in the absence of any finding by the jury to that effect, I do not feel justified in holding that it did so apply. The arrangements referred to in the latter part of the letter may have been parol for all we know.

LINDLEY, J.—I am of the same opinion. Two questions are reserved for us: (1) Whether the prisoner had been intrusted with any of the sums of money mentioned in the indictment within the meaning of the 75th section. Upon that question I am of opinion that he was not. (2) Whether the letter was a direction in writing to apply, pay, or deliver any of them within sect. 75. I think it was not; it is too ambiguous, and I am disposed to think that it referred to the three customers previously mentioned in the letter.

HAWKINS, J.—I am of the same opinion. The letter is ambiguous in its terms, but, assuming that it does apply to all sums of money received by the prisoner on the prosecutor's account, the case is not within sect. 75, which only applies in my judgment where the agent has been intrusted by his employer with money accompanied by a direction in writing how to apply it, and not where the agent receives the money from a third person on behalf of his master as in this case.

Conviction quashed.

HOUSE OF LORDS.

Tuesday, Nov. 26, 1878.

(Before the LORD CHANCELLOR (Cairns), Lords PENZANCE and O'HAGAN.)

OVERSEERS OF THE POOR OF WALSALL v. LONDON AND NORTH-WESTERN RAILWAY COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Practice — Court of Appeal — Jurisdiction — Case stated by quarter sessions — Rule or order — Judicature Act 1873, s. 19.**By sect. 19 of the Judicature Act 1873, the Court of Appeal has jurisdiction and power to hear and determine appeals from any judgment or order (with certain exceptions) of the High Court of Justice, or of any judges or judge thereof.**By the interpretation clause (sect. 100) of the Act "order" includes "rule."**Held (reversing the judgment of the court below), that under this section the Court of Appeal had jurisdiction to entertain an appeal from a decision of the Queen's Bench Division upon a rule for quashing an order of quarter sessions as to the validity of a rate.*

This was an appeal from a decision of the Court of Appeal, reported in 3 Q. B. Div. 457, and 38 L. T. Rep. N. S. 665.

A poor rate had been made upon the respondent company, and they appealed against the rate to the court of quarter sessions for the borough of Walsall. That court made an order in their favour, subject to the opinion of the Queen's Bench Division upon a special case.

The case having been removed by *certiorari* into the High Court of Justice, the Queen's Bench Division gave judgment discharging the rule which had been obtained to show cause why the order of the court of quarter sessions should not be quashed.

The overseers appealed to the Court of Appeal.

Upon the case coming on for argument a preliminary objection was raised that the court had no jurisdiction to hear the appeal, the decision of the Queen's Bench Division being in such cases final.

The Court was equally divided, Cockburn, C.J. and Brett, L.J. holding that there was no jurisdiction, Bramwell and Cotton, L.J.J. being of the contrary opinion.

The appeal was accordingly dismissed, and the overseers appealed to the House of Lords.

Herschell, Q.C. and Anstie, for the appellants, contended that the appeal lay by virtue of the express words of sect. 19 of the Judicature Act of 1873, as interpreted by sect. 100: see also sect. 45. The contention of the Lord Chief Justice in the court below that the case was never removed from the court of quarter sessions, and that the function of the Queen's Bench was only consultative, is untenable, as is shown by the whole form and practice and history of the growth of proceedings of this kind. They referred to the following cases in support of their argument:

R. v. Inhabitants of Malden, 3 Mod. 247;
Ruislip v. Hendon, Holt. 572;
R. v. Mast, 6 T. R. 154;
Reg. v. Justices of Staffordshire, 26 L. J. 179, M. C.;
R. v. Brightwell, 3 Keb. 464;
Stanlock v. Bampton, Ibid. 674;

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Anonymous case, 2 Salk. 486;
R. v. Alston, Holt. 507;
R. v. Tedford, Bur. Set. Cas. 57;
R. v. St Luke's Hospital, 2 Burr. 1053;
R. v. St Paul's, Covent Garden, Cald. 158;
Reg. v. Sutton Coldfield, L. Rep. 9 Q. B. 153; 29 L. T. Rep. N. S. 840;
R. v. Great Marlow, 2 East, 244;
R. v. Neville, 2 B. & Ad. 289;
Reg. v. Dayman, 26 L. J. 128, M. C.;
R. v. Ronton Abbey, 2 T. E. 207;
R. v. Newtown, 3 L. T. N. S. 79, M. C.;
R. v. Hinsworth, Cald. 42;
R. v. St. Giles, Reading, Ibid. 54;
R. v. Witney, 5 Burr. 2634;
R. v. Natland Bur. Set. Cas. 793;
R. v. Northampton, Cald. 30; and also to
 3 Blackstone's Comm. 41, 42; Coke 4 Inst. 71; Bac. Abr. tit. Court of King's Bench, *Certiorari*, *Supersedeas*, and *Procedendo*.

Bosanquet and N. Neville, for the respondents, argued that it was not the intention of the Judicature Acts to affect the practice of the Crown side of the Queen's Bench: see Order LXII, which must be read with the Act (Garnett v. Bradley, 3 App. Cas. 944; 39 L. T. Rep. N. S. 261); and, as no right of appeal had previously existed, no right of appeal had been conferred in such cases. They cited

Re Ellershaw, 1 Q. B. Div. 481;
Reg. v. Marton-cum-Grafton, 10 Q. B. 971;
Reg. v. Stockton-on-Tees, 14 L. J. 128, M. C.;
Reg. v. West Houghton, 13 L. J. 41, M. C.;
Reg. v. Verrall, 33 L. T. Rep. N. S. 379; 1 Q. B. Div. 9.

Herschell, Q.C. in reply.—We rely on sect. 19: see also rule 11 of Dec. 1876.

At the conclusion of the arguments their Lordships gave judgment as follows:—

THE LORD CHANCELLOR (Cairns).—My Lords, I think that no doubt exists in the minds of any of your Lordships as to the conclusion at which you ought to arrive in this case. The London and North-Western Railway Company were fixed by a decision of a court of quarter sessions with the payment of a certain rate for sanitary purposes, but the overseers of the township of the foreign of Walsall, as the sanitary authority, being anxious to have a larger rate made, obtained in the usual way in the Queen's Bench Division an order for a writ of *certiorari* to bring up the proceedings under which that rate was fixed, for the purpose of having it quashed. I will refer presently to the form of the proceedings. When that was argued before the Court of Queen's Bench the order of the court of quarter sessions was confirmed; and thereupon the overseers moved in the Court of Appeal to reverse the decision of the Court of Queen's Bench. The objection was taken before the Court of Appeal that there was no jurisdiction to hear the appeal, on the ground that the decision of the Queen's Bench Division, having regard to the nature of subject, was final. The Court of Appeal was divided upon that point, and under those circumstances the decision of the Queen's Bench Division prevailed. Your Lordships have now had the matter brought before this House, and have heard it argued upon the question of jurisdiction only. That which is complained of is what is technically called "a rule of the Court of Queen's Bench discharging the rule nisi which was obtained to show cause why the order of the court of quarter sessions fixing the rate should not be quashed." By the interpre-

tation clause affixed to the Judicature Act of 1873 the word "order" in the body of the Act is held to include "rule;" and therefore when in the body of the Act we read the word "order" we read it as if the word "rule" was also contained there. Now sect. 19 of the Judicature Act of 1873 provides that "the Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any judges or judge thereof." The words "save as hereinafter mentioned" refer to particular exceptions which, it is agreed, do not apply to the present case, and therefore, for the present purpose, the section may be read as if those words were omitted; and, as I have said, it is to be read as if the word "order" included the word "rule." Reading it in that way your Lordships find that it is enacted that the Court of Appeal shall have jurisdiction to hear and determine appeals from any rule of the Queen's Bench Division. If the matter rests there, I own I do not think it is open to doubt that these clear and definite words of the Legislature must have their full effect given to them. Your Lordships have here, on the one hand, a rule of the Queen's Bench Division, and you have, on the other hand, an enactment that every rule of the Queen's Bench Division is to be open to appeal. That being so, unless there is something more which has not been brought forward yet, those clear words must have effect given to them, and it lies upon those who wish to cut down their effect to show how it is to be done. Now, the way in which it is attempted to be done is this: It is said that in the particular matter which here came before the Queen's Bench Division the Court of Queen's Bench, when it existed as a separate court, did not act by virtue of its ordinary jurisdiction, and did not indeed act by analogy to its contentious jurisdiction in the ordinary sense of the term, but acted in a "consultative" manner, to use the expression of the Lord Chief Justice; that it was, as it were, consulted by the court of quarter sessions, and the court of quarter sessions, it is suggested, never parted with a case upon which it was consulting the Court of Queen's Bench, but in some way kept seisin of the case until it had obtained the opinion of the Court of Queen's Bench, and then, when it had obtained that opinion, proceeded to act by virtue of its own jurisdiction as a court of quarter sessions. If that were an accurate representation of the jurisdiction, no doubt an element of difficulty might be interposed. It would then have to be considered whether really what your Lordships have before you was a rule or an order of the Court of Queen's Bench at all. But I apprehend that is an inaccurate view of the jurisdiction exercised by the Court of Queen's Bench. As it seems to me, that jurisdiction may be stated very shortly, and there is really, after hearing all that has been said on both sides, little or no controversy upon the subject. The court of quarter sessions was in the first instance the court of appeal before which objections to rates of this kind were to be brought. When the court of quarter sessions had determined a rate, that determination was, as a general rule, final upon the merits. There was no court of appeal in the ordinary sense of the term before which the facts upon which the court of quarter sessions had proceeded could be brought by way of review. But the court of quarter sessions, like

every other inferior court in the kingdom, was open to this proceeding: if there was upon the face of the order of the court of quarter sessions anything which showed that the order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and upon the face of it to put an end to its existence by quashing it—not to substitute another order in its place, but to remove that order out of the way as one which should not be used to the detriment of any of the subjects of Her Majesty. That jurisdiction of the Court of Queen's Bench was found in many cases in reference to the quarter sessions a useful jurisdiction. It appears further, if we go back to the ancient history of quarter sessions, that a court of quarter sessions had a power, if they were in difficulty, of applying to the judge of assize, and asking his advice and assistance in making an order. An appeal of that kind to the judge of assize was not a parting with its jurisdiction by the court of quarter sessions, but was really that which is spoken of by the Lord Chief Justice as a "consultative" act on the part of the court of quarter sessions, that court still retaining and exercising its jurisdiction after the consultation had taken place. But supposing that the court of quarter sessions did not adopt that course, there was still another mode by which any question of law which appeared to them doubtful might be left open for the exercise of the judgment of a higher tribunal. All that was necessary was that the court of quarter sessions, in making its order, should in some way state upon the face of it the elements which had led to their decision. If the court of quarter sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then, if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, that party might go to the Court of Queen's Bench, and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by *certiorari*, and when so removed to pass judgment upon it, whether it should or should not be quashed. In that case, as I said just now, the jurisdiction of the Court of Queen's Bench was merely a jurisdiction to leave the order standing, or to remove it out of the way. It was not a jurisdiction to substitute for it another or a different order; that would be making the Court of Queen's Bench a court of rehearing or of appeal, in the ordinary sense of the term. Now, if that is the jurisdiction of the Court of Queen's Bench, it cannot in any respect be called "consultative;" it is a jurisdiction of the Court of Queen's Bench, as a higher court than the court of quarter sessions, to overthrow and destroy an act of that court, and to remove it out of the way. But then that being, as I think is clear from the cases which have been cited, the origin of the jurisdiction, and the form in which it was exercised during the greater part, if not the whole, of the last century, it is obvious from the more modern cases which have been cited, that, although that jurisdiction has not changed in substance, there has been some change in the form in which it has been appealed to. In modern times the practice has grown up of obtaining opinions from the courts upon special cases. And whereas in the earlier times the orders of courts of quarter sessions did

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nothing more than state by way of recital the facts which the court had found, and then add the order which the court had made, the more modern cases seem to have assumed rather the form of special cases, as to which, in language loose but not altogether inaccurate, it has been said that the court of quarter sessions asks for the opinion of the Court of Queen's Bench. In the very case before your Lordships, although in form you find that the dissatisfied party first applied for a *certiorari*, and then obtained a rule *nisi* to quash the rate, and on the *certiorari* the order of the court of quarter sessions was brought up, and the case appended to the order, still when you look at the case itself you find that the parties who stated that case were obviously under the impression that they could induce the Court of Queen's Bench, if it did not simply confirm the order of the court of quarter sessions, to answer a series of questions, after which the case might be sent back, supposing the rate not to be confirmed, to the court of quarter sessions, so that the rate might be amended or modified according to the answers so obtained from the Court of Queen's Bench. Now, it is quite true that this form of the case has given a certain colour to the argument that the Queen's Bench Division was applied to for the purpose of advice, and not for the purpose of making an order. But that is simply upon the form of the special case. The form of the proceedings before the Queen's Bench Division is clear and unmistakable. In the old original form which indicates the foundation and the ground of the jurisdiction the dissatisfied party simply called upon the Court of Queen's Bench to quash the order made by the court of quarter sessions. When this application was made to the Queen's Bench Division it might, as it seems to me, very well demur to answer the various forms of question which I find put in the special case, but whether it did or did not so demur, the party who objected to the rate and to the order of the court of quarter sessions had a right, if that order was an invalid one, to have it quashed and removed out of the way, and the circumstance that there were appended to the special case the questions to which I have referred could not in any way destroy that right of the suitor, if he was otherwise entitled to an order of the court of quarter sessions. That is all that I have to observe upon the form of the special case. It has given rise to a little difficulty, but to no difficulty which is serious when the whole of the circumstances are looked at. I will only add that I have proceeded upon the view of sect. 19 of the Judicature Act of 1873. I am not persuaded that sect. 45 has anything to say to the question. It seems to me that it is quite sufficient to look upon this as what it was, namely, a "rule;" that is to say, an "order" of the Queen's Bench Division, to see that it was the subject of appeal under sect. 19, and to see that if leave were necessary to appeal, which at present I am not convinced of, leave was given in the present case. I shall therefore recommend your Lordships to declare that the Court of Appeal had jurisdiction to hear and to determine this appeal upon the merits, and to remit the case to the Court of Appeal with that declaration. But looking to the fact that the Court of Appeal was equally divided, and that, therefore, it was necessary to bring this case to your Lordships' House, and looking still

more to the fact that the difficulty or doubt in the case appears to have been pressed upon the respondents by the Court of Appeal, I think I should ask your Lordships to say at the same time that there should be no costs on either side in respect of this appeal.

LORD PENZANCE.—My Lords, I entirely agree with what has fallen from my noble and learned friend. I confess that I feel inclined to base my judgment in this matter entirely upon the simple proposition that the Judicature Act says that there shall be an appeal from all judgments and orders of the High Court of Justice, and that the interpretation clause of the Act says that a "rule" is an "order," and consequently sect. 19 is to be read as if it included the word "rule." If there is to be an appeal from all rules and orders, according to the words of the statute, it seems to me that it would require an overwhelmingly strong case to make out that any particular proceeding which is of the character of the present does not fall within that enactment. The ground on which the supposed exception is placed is shortly this, that this is not a rule or order of the court within the purview of the Act, because the function of the Court of Queen's Bench in these matters is a purely consultative one, that it is the giving of an opinion, and not the making of a judicial order in the exercise of the ordinary jurisdiction of the court. The cases which have been brought before the House appear to me to establish conclusively that that is not a true view of the function which the Court of Queen's Bench before the Judicature Act discharged in respect of these cases. The cases are abundant to show that the Court of Queen's Bench was in the habit of dealing with and reviewing these orders of an inferior court upon the face of them, and if upon the face of them they were found insufficient, of quashing them; if they were not found insufficient they would not be quashed; that is to say, they would be affirmed. That was the function which the court discharged, at a time when the court of quarter sessions were still in the habit of consulting the judges of assize. The practice was for the court of quarter sessions, when they were in doubt upon a question of law, to consult the judge of assize, but notwithstanding that, the Court of Queen's Bench at that time exercised the same jurisdiction which it did up to the time that the Judicature Act passed, of quashing any order of a court of quarter sessions for any insufficiency which appeared upon the face of it. Of course, until the court of quarter sessions set out some facts upon the face of their order, the Court of Queen's Bench could not interfere with it, except upon matters of form; but whenever they did set out facts—and it is shown that for centuries the practice was to set them out whenever they had doubts—the Court of Queen's Bench dealt with the facts as they appeared upon the face of the order, pronounced the order insufficient and quashed it, if they saw reason to do so. Now the action of the Court of Queen's Bench in this matter cannot be considered consultative merely, if the result of what they did was to make an order which dealt with the proceeding itself, and put an end to the order of the court of quarter sessions. If their action in the matter was purely consultative it would follow that they would remit in some form the result of that advice and consultation to the court of quarter

sessions, and that that court should act upon it. But the *certiorari* itself bringing up the proceedings, independently of the order subsequently made upon it, put an end to all further jurisdiction in the court of quarter sessions to deal with the matter. Therefore the Court of Queen's Bench then had the proceeding before them, and could either quash it or let it stand; but the magistrates in quarter sessions were then *functi officio*, they could no longer deal with the matter either by way of affirming or quashing the order. It seems to me, therefore, that it is abundantly made out that, according to the old practice of the court, the function of the Court of Queen's Bench was that which has been argued for—namely, to consider an order of a court of quarter sessions upon the face of it, and, if the facts were stated upon the face of the order, to deal with them as they appeared upon these proceedings, and to apply the law to those facts, and then either to affirm the order or to quash it. That being so, the question arises whether any change has been effected of late years which ought to lead to a different result as regards this appeal. Now from the case of *Reg. v. Kesteven* (3 Q. B. 810), it does seem that at first, when attempts were made to vary this mode of proceeding, the Court of Queen's Bench repudiated accepting any function of the kind that they were asked to discharge. They were asked to answer certain questions for the information of the public, but they positively refused to do that, and said that their business was to say whether the order was a good one or a bad one: if it was a good one it was to remain, if it was bad it was to be quashed; but that the court was not justified, according to the practice, in answering questions. Notwithstanding that, it seems that in modern times the practice has grown up of putting before the court something like an ordinary special case in an action, and of asking them, in accordance with their findings on certain questions of fact, to give certain directions, and to remit the case to the court of quarter sessions, and there is no doubt that the special case in this particular case does something of that kind. But although that is so there is in this case, as I suppose there is also in these cases in which this sort of practice has grown up, an order of the court of quarter sessions to begin with. Now, when ordinary special cases are submitted to the opinion of a court of common law, the practice has never been that there is a judgment and then a special case, and that in accordance with the opinion of the court upon that special case that judgment should be affirmed or set aside; but the parties always agree, after stating the facts, that if the court are of opinion one way judgment shall be entered one way, and if the court are of opinion another way judgment shall be entered otherwise. That is the form it assumes when the function is purely consultative. But here the case starts with an order by the court of quarter sessions. At the same time it is evidently upon the face of it intended by the court to travel beyond their proper legal jurisdiction, and to give answers upon certain questions. Now I agree with my noble and learned friend that when that case was brought up upon *certiorari*, and when one of the parties had moved for and obtained a rule to show cause why the order of the court of quarter sessions should not be quashed, it would be quite competent to the

court, if they thought upon the face of the special case and upon the facts therein stated that the order was a bad one, to quash it, and they might do that although the parties may have asked them to give certain directions to the court of quarter sessions as to the way in which they should deal with their order, instead of quashing it. Having before them the order made by the court of quarter sessions, and the facts upon which that order was made, and coming to a legal conclusion that upon those facts the order was one which was contrary to law, it would have been competent to the court to do what those who applied to the court for a rule asked that they should do, namely, to quash the order. Under these circumstances therefore, although some little difficulty has, I think, been introduced into the discussion of the case, by reason of the form in which the parties have endeavoured to obtain the opinion of the Court of Queen's Bench, nevertheless I think, looking at the form of the proceeding, which is what this House has to deal with, that it is a proceeding in which the Court of Queen's Bench is asked to exercise its original function of quashing an order which is not legally made, and consequently there is no more reason why the order in this rule should not be made the subject matter of appeal than any other order or rule which the court may make; therefore I entirely agree with what my noble and learned friend has proposed.

Lord O'HAGAN.—My Lords, I quite concur with my noble and learned friends. I wish to be understood as basing my opinion upon the plain meaning of sect. 19 of the Judicature Act of 1873, as applied to the very plain facts which are before the House in this case. We have here a "rule" of court, which, according to the interpretation clause of that Act, is to be held an "order" of court. We have a section of the Act giving jurisdiction to the Court of Appeal to review the "orders" of the court, and I fail to ascertain any reason for thinking that the rule of court, which was an order of the court in this case, was not a legitimate subject of appeal under sect. 19. I wish to say that, because I am not convinced that sect. 45 can be safely relied on for the purpose of founding our judgment upon it. Upon the case generally I have only a word or two to say. As has been observed, the whole foundation of the judgment of two of the learned judges in the court below has been based upon the ground of the consultative character of this jurisdiction of the Court of Queen's Bench. Now at common law the Court of Queen's Bench has, as we know, a supreme control over inferior jurisdictions, and its general relation to inferior jurisdictions is not of a consultative, but of a controlling and dictating character. In the particular case before us, no doubt, originally, according to the operation of certain statutes, the court of quarter sessions had a jurisdiction which was not controlled in any way by appeal, and I am not prepared to go with the argument that there has been such a change introduced through the Judicature Acts that we can fairly say that there is to this House an appeal against the decisions of the court of quarter sessions in cases such as we have to deal with here. But there has been undoubtedly an established practice, so long existing as to render it impossible now to call it in question, that the court of quarter sessions may put itself in relation with

the Court of Queen's Bench for the purpose of being guided, directed, and controlled as to its own action. That is what has been done in this case. The court of quarter sessions here did state a case, and, that case being stated, it appears to me, for the reason I gave just this moment, that the subsequent proceedings took the matter wholly out of the operation of the special case, and left the court perfectly at large to act according to its practice, and according to what it considered the justice of the case. I observe that, in one of the judgments of the learned judges of the court below, observations are made as to the necessity of avoiding an excessive number of appeals, and as to the necessity of cheap and speedy justice. I go with those observations very strongly, but I cannot shut out from my consideration that this Judicature Act was manifestly intended not to limit appeals, but to extend the power of appeal; and we are bound to assume that there were very good reasons for that on the part of the Legislature. We see that that was the policy of the Act, for we see that a jurisdiction is given to the Court of Appeal, which did not belong to the Court of Exchequer Chamber, in most important particulars. With regard to ecclesiastical procedure, with reference to the New Trial Paper, and so on, matters which could not be dealt with by the Court of Exchequer Chamber are dealt with every day by the Court of Appeal. And I am of opinion that we are not at liberty to attempt to limit the policy of the Act which is so clearly presented to us, and to confine the operation of words which appear to me to bear, in common sense and common understanding, but one meaning. That being so, what is there in this case to countervail the plain meaning of the words of this section? I confess that I have failed to see any argument to sustain the statement that the proceeding here was of a consultative character. The distinction between what is consultative, and what is magisterial or commanding, is very fairly and properly exhibited in the cases showing the old practice of the courts of quarter sessions consulting the judges. When a court of quarter sessions had a desire for information, that practice enabled them to go to the judge and consult him, as the foreman of a grand jury now consults the judge every day at the assizes, in order to get from him information. But it was after the information was given by the judge and received by the court of quarter sessions that the decision was made which bound the court of quarter sessions. I may illustrate it in this way: In Ireland, where the judges are applied to by courts of quarter sessions with reference to civil bills and many other things, the judge decides magisterially and decides conclusively; but he is not consulted, he does not advise the people who come before him. Just in the same way, it seems to me, in this case, when the Court of Queen's Bench was approached under the circumstances before us, it was in no sense a consulting for the purpose of receiving from the court the authoritative decision which it gave, and, as it appears to me, could not help giving, according to the settled practice of that court as established in many cases. But if there were nothing but the documents in the case, is it possible to say, upon the face of this *certiorari* and these orders, that the proceeding was wholly consultative? The *certiorari* concludes in these words: after requiring the produc-

tion of all the deeds and documents and so forth, the object is stated to be "that we may cause further to be done thereon what of right and according to the law and custom of England we shall see fit to be done." Not for the purpose of answering a consultation, but of doing that which according to right and justice the Queen's Bench Division thought ought to be done. Then when you come to the forms of the orders you find that, "It is ordered" that a certain day shall be peremptorily given to show cause why the proceedings "should not be quashed for the insufficiency thereof." And then the final order is, "Upon hearing counsel, it is ordered," it is not advised, the case is not sent down, as it was supposed to have been in the judgment of one of the learned judges, with advice given to the court of quarter sessions nothing of the kind; there is an absolute order which everybody is bound to obey. We find it stated by the Lord Chief Justice that these orders of the Court of Queen's Bench had never in any single case been disobeyed within the memory of man. Therefore it seems to me impossible to maintain the supposition of the consultative character of the proceeding. I was struck by the terms of the special case, and certainly some difficulty and some confusion arose from that. The special case, if it were to be taken as a consensual affair, certainly did ask advice, and did not ask decision, and in that respect there might perhaps have been some difficulty. But I ventured to suggest in the course of the argument that that difficulty might fairly be considered to be got over by the fact that after the special case had been framed, and after it had been, I suppose, put before the Court of Queen's Bench, we have here, "by consent of counsel on both sides," an order that a writ of *certiorari* should issue "to remove into this divisional court the orders" relating to the rate. Now it appears to me that, as soon as the parties by consent obtained that *certiorari*, there was an end to the operation of the antecedent affair, even if it was consensual. The moment the *certiorari* was granted and came into active operation all the proceedings were transferred from the one court to the other; and with those proceedings all the jurisdiction of the one court was transferred to the other, and from that moment it became the right of the Court of Queen's Bench to act according to its own established practice, and to do what, according to the terms of the *certiorari*, it considered "just and fitting to be done;" and from that moment it became, in my opinion, quite immaterial what were the terms of the special case, and how the parties by these terms might, but for the subsequent *certiorari*, have limited the operation of their demand upon the court. I think, therefore, upon that point there is really no difficulty in the matter. I only wish to repeat that in giving my judgment I proceed upon sect. 19 of the Judicature Act of 1873, applying, as I think it does, to the plain facts of this case.

Order of the Court of Appeal reversed. Declared that the Court of Appeal had jurisdiction to entertain the appeal. Cause remitted with this declaration. No costs of this appeal on either side.

Solicitors for the appellants, *Sharpe, Parkers,*
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ROSSITER (app.) v. PIKE (resp.).

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Pritchard, and Sharpe, agents for Wilkinson and Gillespie, Walsall.

Solicitor for the respondent, R. F. Roberts.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Wednesday, Dec. 4, 1878.

(Before MELLOR and MANISTY, JJ.)

ROSSITER (app.) v. PIKE (resp.). (a)

Salmon fishery — Fishing milldam since 1861 — Obstruction to fish—24 & 25 Vict. c. 109, s. 20.

The appellant, a miller, was convicted by justices under sect. 20 of the Salmon Fishery Act 1861 for not causing to be removed and carried away from the waters within his fisheries all obstructions to the free passage of fish in or through his cruives, cribs, and boxes during the annual close time. It was proved that, although there were now at the appellant's milldam no appliances for taking fish, the place was used until 1862, after the passing of the Act, for that purpose, and that there remained still a broken box with fenders over openings of the required size, the bars and cribs having been removed from the weir at that time. When the fenders were down, or partially down, as upon the occasion charged against the appellant, it was now impossible for the fish to ascend to the higher waters; but the appellant's mill would be ruinously injured by lifting the fenders during the whole of the annual close time.

Held (upon a case stated), that there was no ground for the appellant's milldam being now a fishing milldam because it had continued to be so after the passing of the Act of 1861: that sect. 20 did not apply, and that the justices were wrong in convicting the appellant.

Pike (app.) v. Rossiter (resp.) (37 L. T. Rep. 635) discussed and followed.

THIS was a case stated by five of Her Majesty's justices of the peace in and for the county of Devon under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law which arose before them as hereinafter stated.

1. At a petty sessions held at the Guildhall in Totnes, in and for the division of Stanborough and Coleridge, in the county of Devon, on the 8th Oct. 1877, an information preferred by Anthony Pike (hereinafter called the respondent), against John Reap Rossiter (hereinafter called the appellant), charging "for that he the said appellant on the 5th Sept. 1877, then being the occupier of fisheries at the Totnes weir in the parish of Darlington, and the fulling mills in the parish of Totnes, both in the said county of Devon, did not within thirty-six hours after the commencement of the close season for the river Dart cause to be removed and carried away from the waters within his fisheries all obstructions to the free passage of fish in or through his cruives, cribs, and boxes within his fisheries contrary to sect. 20 of the Salmon Fisheries Act 1861," was

heard and determined, the said parties respectively being then present, and upon such hearing the appellant was duly convicted of the said offence, and the justices adjudged him to forfeit all obstructions to the fisheries, to pay the respondent on behalf of the board of conservators of the river Dart by way of penalty the sum of 10s., and also to pay to the respondent the sum of 4l. 2s. 6d. for his costs in that behalf, and also to pay the sum of 10s. for every day he suffered any engines or other obstruction to the free passage of fish to remain unremoved beyond the period prescribed by the Salmon Fishery Act 1861, being 24 & 25 Vict. c. 109, s. 20.

2. Upon the defendant's application, a special case was stated, of which the following is the material part:

3. Upon the hearing of the information it was proved on behalf of the respondent by a surveyor of twenty years' standing, that the various parts of the said fisheries were correctly represented by certain plans and models produced. [These fisheries are sufficiently described in the report of the case of *Pike (app.) v. Rossiter (resp.)* (37 L. T. Rep. 635), which was an appeal against a refusal to convict the same person for breach at the same place of the provisions concerning the weekly close time contained in sect. 22 of the same Act.] This witness also stated that there was a box at the weir, but it was not a perfect box, and that the iron works at the trips, and also the iron work in front of the fenders, had been removed, and that the wooden framework in which the fenders slide could not be removed without damaging the masonry, and that the gratings, &c., might have been removed, from what the witness knew, forty years since.

4. It was proved by another witness who formerly rented the fisheries at the Totnes weir, and at the fulling or tucking mill, that the box was still at the Totnes weir, and fenders were attached to the higher end of it, but the trips had been removed; that there used to be four wooden fenders at the weir, but there were now three iron ones instead, and that the sill pieces were level with the paving; that this witness had rented the fisheries in question for four years, from 1856 to 1859, both inclusive; that the box at each fishery was then used for catching fish; that the gates were now removed, and that there used to be gratings behind them; that the gratings at the back of the fenders were not there now, nor were the gates at the foot, but that the sill pieces still existed; that the keeping the fenders down would prevent fish from ascending to the higher waters of the river unless there was a flood over the weir: that during the years 1856 to 1859 the fenders were opened at twelve o'clock on Saturday nights, and that they were closed on the following night at twelve.

5. It was proved by the complainant that he was clerk to the Dart Board of Conservators, and he laid the information pursuant to a resolution passed by the board. That the weir was built right across the river Dart, and that the box was on the Dartington side. That the dam turned the water into the mill leat for milling purposes, and if the gates and bars in the box were replaced, the effect would be that fish could be caught as they formerly were. That when the fenders were down it was impossible for fish to ascend to the higher waters except there was a flood over the weir. That on

(a) Reported by M. W. McKELLAR Esq., Barrister-at-Law.

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the 5th Sept. 1877 the fenders at the weir were only partly open, but neither of them was clear of the water, and that they were in such a condition as to prevent any fish from passing through, and that they were then lifted about a foot or eighteen inches, and that the effect of this partial lifting would be that the weight of water behind would be so great that no fish could ascend, but in all cases the fish would fall back into the pool. That the fenders at the fulling or tucking mill were on the said 5th Sept. 1877 quite closed, and that witness did not know who rented the fulling mill, but that appellant had possession of the fenders, and lifted them when he required it.

6. It was proved by another witness that he had seen fish trying to pass up the box at the weir, but he had always seen them fail in the attempt, and that when the fenders were only partially opened the effect would be to prevent fish passing up.

7. Another witness who worked the weir and tucking mill fisheries for a company for three years, and up to 1862, stated that he fished the trips up to 1862. That when he had charge of the fisheries the fenders were opened at twelve o'clock on Saturday night and closed at twelve o'clock on Sunday night, until the new law came into operation, and afterwards they were opened at twelve o'clock at noon on Saturdays, and closed at six o'clock the following Monday morning, and that during these hours there was a free passage for fish. That the fenders used to be raised by means of a bar at first, and afterwards by means of a handle.

8. A witness who rented the Duke of Cleveland's fishery (not the before-mentioned fisheries, but the next fishery below the weir) from 1863 to 1870 stated that the bars at the bottom and the gates outside were removed in the year 1862; that the fenders used to be lifted up and down by witness as required; that the appellant then kept the keys, and that this witness used to apply to him or at his mills for them, whether the water was plentiful or not. That the appellant used to lend the keys that the fenders might be unlocked, as more fish were then caught by witness in the Cleveland fishery, but this was only done when the water was not required for milling purposes. That the custom used to be to open the fenders at twelve o'clock at noon on Saturdays and close them on the following Monday morning at six o'clock. That in 1870 this witness had a dispute with the appellant because he had not opened the fenders for a whole month, and at this time fish were very scarce; that previous to this time the appellant had received many fish for obliging witness with the keys; that after the 10th July 1878 the fenders at the fishery at the fulling mills were raised, but not at the weir. That witness had nothing to do with the fenders at the fulling mill, it was only the fenders at the weir he had to deal with.

9. It was proved by the clerk to the Endowed Schools Governors for Totnes, who had succeeded to the property formerly held by the Totnes Charity Trustees, that the governors had the management and administration amongst other properties of the Totnes mill, the fulling mill, and weir, a portion of which property was the weir milldam. He produced a certificate from the Special Commissioners of English Fisheries, dated the 13th Dec. 1871, showing the legality of the fishing milldam at the Totnes weir. He also pro-

duced another certificate as to the fishery at the fulling mill, and this witness, so far as he knew, considered the fisheries the same now as when they were examined by the special commissioners. That the appellant was then and still was the occupier of the town mills; that the fenders at the weir conducted the waters to the town mills. This witness produced a minute-book of the Charity Trustees, in which, under the date of the 28th Oct. 1862, occurred the following: "The clerk reported that he had met Mr. Eden, the Government Inspector of Fisheries, and with him had viewed the weir trips, and that Mr. Eden had consented to waive the order of the Secretary of State with regard to the ladder in the weir, but the trips at the weir should be removed so that all attempts to make the weir a trip available for fishing should be destroyed;" and that at the time of the inquiry held by the special commissioners on the 13th Dec. 1871, the following occurred in the judgment which he produced, *videlicet*, "Evidence had been given by the same witness that these (the trips) have been as far back as living memory goes and up to the year 1861."

10. Another witness proved that he was surveyor to the Endowed Schools Governors, and looked after their property, and collected the rents of the mills. He stated that the tucking mill was now and had been for many years used only as a store by Mr. Bowden, and he did not know that appellant occupied it at all. That the bars, cribs, &c. at the weir, and also at the fulling mill, had been removed about sixteen years since; that there were not now appliances there for taking fish. That the sills of the sluices were level with the pavement, and were so placed that they could not be removed without damage to the freehold; that one piece of the sill still remained which was composed of wood; that there was nothing at present there like a box for taking fish, and that the stonework could not be removed without damaging the freehold.

11. It was contended by the solicitor for the appellant that the fulling mill was in the occupation of Mr. John Bowden, and not of appellant, as had been proved by one of the witnesses for the respondent; and that, as the fisheries were reserved in the lease under which the appellant held, he could not be regarded as the occupier of the fisheries, and could not be convicted under the present information. In support of the appellant's case a witness was called who produced a lease from Mr. John Bowden (the original lessee) to the appellant as sub-lessee. It was a lease of the Totnes town mills. In that lease the fisheries and right of fishing (if any) were reserved, and the lease contained a covenant that the trustees should keep the weir in repair. The lease to appellant was dated the 31st July 1877. The witness stated that the original lease for twenty-one years from the trustees to Mr. Bowden was dated the 6th May 1863; that the lease to the appellant contained a recital of the lease to Mr. Bowden. Witness also stated he gave evidence before the special commissioners, and that they decided that the fisheries then at Totnes were legal. That the lease to appellant had been executed so recently as the 31st July 1877, owing to a dispute having arisen between Mr. Bowden and the appellant respecting the use of the water. That this witness had instructions to prepare the lease of 31st July 1877 as far back as 1870, but

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that owing to the dispute the business had been delayed. This witness stated that the fenders were a part of the apparatus of the mill, and if the fenders were taken away the mill would be of little value.

The justices convicted the appellant because they considered: first, that there were fisheries within the meaning of the statute, with an old fishing milldam belonging thereto; secondly, that the fenders with locks and keys belonging thereto were part of an apparatus for taking fish up to the year 1862, and that recently the old wooden fenders had been replaced by new iron ones; thirdly, that no evidence had been given that the fenders might not be used again as part of an apparatus for catching fish; fourthly, that the appellant is the occupier of the town mills and the Totnes weir or milldam and the fenders attached thereto, and he has the use and control of the fenders at the fulling mill, but by the lease produced under which the appellant holds the fisheries and right of fishing (if any) were reserved; fifthly, that when the fenders at the weir are down, no fish can pass through the box within that fishery and get up the river, and that when the fenders at the fulling mill are down no fish can pass through the box and fenders within that fishery and get up the river; sixthly, that although the mill would be ruinously injured by lifting the fenders during the whole of the annual close time, and partially in the weekly close time, yet it having been proved that the fenders or sliding doors were kept down by the appellant during a prohibited time, although previously to and for some time after the alteration in the law as to close time they had been opened during a weekly close time, the justices considered that the removal of all obstructions to the free passage of fish through the cruives, cribs, boxes, &c., of the fisheries had not been complied with by the appellant as required by the statute.

The questions of law arising on the above statement for the opinion of this court, therefore are: 1. Whether all the obstructions to the free passage of fish in or through the cruives, cribs, boxes, &c., within the fisheries at the Totnes weir, in the parish of Dartington, in the county of Devon, and the fulling mill in the parish of Totnes, in the same county, had been removed and carried away from the waters within the fisheries within thirty-six hours after the commencement of the close season for the river Dart in accordance with the provisions of the Salmon Fishery Act 1861 (24 & 25 Vict. c. 109), s. 20. 2. Whether under the circumstances before stated the appellant, as the occupier of the Totnes town mills, and having the use and control of the two sets of fenders, is also the occupier of the fisheries at the Totnes weir and the fulling mill, as alleged in the information, and as such occupier of the fisheries is responsible for the removal of all such obstructions as aforesaid, and is properly convicted for not having removed them.

Whereupon the opinion of the Court of Queen's Bench was asked upon the said questions of law: Whether or not the said justices were correct in convicting the appellant as aforesaid, and if so the said conviction was to stand; but if the court should be of opinion otherwise then the said information was to be dismissed. And the court was humbly solicited, according to the power vested in the court by the said statute (20

& 21 Vict. c. 43), to remit the case to the said justices with the opinion of the court thereon, or to make such further order as to the court might seem fit.

The case was sent back to the justices to restate the questions raised for the opinion of the court; and, in obedience thereto, the justices returned that they intended to raise for the opinion of the said High Court of Justice the following questions, *videlicet*: Whether, upon the evidence before them as stated in the case they were justified in holding, 1. That there was a fishery within the meaning of the Act. 2. That the fenders as used were obstructions within the definition and meaning of the Act. 3. That the appellant was the occupier of such fishery within the meaning of the Act.

By sect. 20 of the Salmon Fishery Act 1861 (24 & 25 Vict. c. 109):

The proprietor or occupier of every fishery for salmon shall, within thirty-six hours after the commencement of the close season, cause to be removed and carried away, from the waters within his fishery, the inscales, hecks, tops, and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs, and boxes within his fishery; and if any proprietor or occupier omits to remove and carry away in manner aforesaid any things hereby required to be removed and carried away he shall incur the following penalties (that is to say): (1.) He shall forfeit all the engines or other things that are not removed and carried away in compliance with this section. (2.) He shall, for every day during which he suffers such things to remain unremoved beyond the period prescribed by this Act, pay a sum not exceeding ten pounds.

By sect. 25:

Every person who, after the passing of this Act, in waters where salmon are found, constructs a new dam, or raises or alters, so as to create increased obstruction to fish, a dam already constructed, shall attach and maintain attached thereto in an efficient state a fish pass of such form and dimensions as may be determined by the Home-office; and if he do not, such person shall incur a penalty not exceeding five pounds.

O. Russell, Q.C. (with him Pitt Lewis) argued for the appellant.

J. Paterson (with him Bompas, Q.C.) for the respondent.

The authorities referred to in the argument of *Pike* (app.) v. *Rossiter* (resp.) (37 L. T. Rep. 635) were elaborately considered and discussed.

MELLOR J.—I entirely abide by the decision of the former case concerning this weir, under sect. 22 of the Salmon Fishery Act 1861. The facts are so nearly the same that the cases, although under different sections, may be said to be identical, with the exception that it is here found that the alteration in the construction of the milldam was made after the passing of the Salmon Fishery Act 1861, instead of before that time, as was supposed at the hearing of the former case. The only question therefore is whether, under the circumstances here stated of the abandonment of the dam for all fishing purposes, the impress of a fishing milldam, which had existed after the passing of the Act, must so remain, notwithstanding the abandonment, as to constitute the place a fishing milldam for all time. I can see nothing in the Act to make me think so; but, on the contrary, in my opinion it cannot be that the Legislature could have intended to make a milldam, because it was once a

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fishing milldam, always to continue so. It is found in the case that the mill would be ruinously injured by lifting the fenders during the whole of the annual close time, and partially so in the weekly close time. We must take it that the appellant has intentionally abandoned this dam for all purposes of fishing during the last sixteen years; and I think we must hold that he has no longer a fishery in his occupation. I see no great public damage likely to be caused by our so holding, for sect. 25 of the Act provides that the appellant shall be liable in a penalty for not having a fish pass at this dam if he has so altered the dam as to increase the obstruction to the fish. Taking into consideration the state of things before the Act passed, the short continuance of that state of things afterwards and the subsequent abandonment of the fishery, I think our necessary conclusion is that the fishing milldam has long before this been converted and restored to the character of a milldam *simpliciter*. Being justified, as I think we are, in holding that this is no longer a fishing milldam, it follows that the appellant is free from the obligation which the Act would impose upon him if it were otherwise, and the conviction must be quashed.

MANISTY, J.—I also am of opinion that our judgment must be for the appellant. We are of course bound by the decision of this Division in *Pike* (app.) v. *Rossiter* (resp.); and the only further question for us is, whether there is any difference between the facts found now and those there stated, which requires us to hold that the conviction which then failed under sect. 22 ought now to be sustained under sect. 20. It is said that, by reason of the use of this weir and dam as a fishing milldam after the passing of the Act of 1861, the case of *Hodgson v. Little*, on its second hearing (16 C. B. N. S. 198; 33 L. J. 329, M. C.), is conclusive that this conviction was right; but it seems to me that we are precluded from holding that case to be applicable by the decision in *Pike* (app.) v. *Rossiter* (resp.), that this place is not now a fishery. The 25th section of the Act of 1861 seems to contemplate this very case, for there is nothing that I can find to prevent a man from giving up his fishing milldam at any time and using it as a milldam only. If he makes substantial alterations so as to increase the obstruction to the fish, he will be liable to a penalty under that section. He is not here convicted of that offence.

Judgment for appellant.

Solicitors for appellant, *Makinson and Carpenter*, for *Merlyn Fryer*, Exeter.

Solicitors for respondent, *Parkers*, for *Hooper and Michelmores* Newton Abbott.

Nov. 7, 8, and Dec. 20, 1878.

(Before COCKBURN, C.J., MELLOR and FIELD, JJ.)

MOYCE v. NEWINGTON. (a)

Sale—Fraud—False pretences—Innocent purchaser—Passing of property—24 & 25 Vict. c. 96, s. 100.

The plaintiff purchased some sheep in an open market, recently established under a local Act, paid a fair price for them, and removed them to his farm. The person from whom he purchased them had obtained them just before from

the defendant for a cheque upon a bank which had no account in his name; but the plaintiff knew nothing of this. When the cheque was dishonoured, the defendant took criminal proceedings against the drawer, and afterwards got him convicted for obtaining the sheep under false pretences. On the day before this conviction, the defendant with a policeman removed the sheep from the plaintiff's to his own farm, and the plaintiff now brought this action to recover them.

Held, that, the property in the sheep having passed to the plaintiff before the defendant had avoided the contract, which he had been induced to enter into by fraud, the provision for restitution upon conviction in 24 & 25 Vict. c. 96, s. 100, had no application, and that the plaintiff was entitled to recover.

THE following considered and written judgment of the court fully describes the facts and arguments as they were adduced at the hearing.

Nov. 7 and 8.—*Willoughby*, for the plaintiff, moved for judgment.

Grantham, Q.C. and *Arbuthnot* showed cause for the defendant.

Willoughby in reply.

Our. adv. vult.

Dec. 20.—COCKBURN, C.J. (the Court consisted of Cockburn, C.J., Mellor and Field, JJ.)—This was a case tried before me at the last assizes for the county of Kent, in which the action had been brought by the plaintiff to recover a lot of forty-nine sheep under the following circumstances: On the 30th Oct. 1877 the plaintiff, who is a butcher, and who is in the habit of attending cattle and sheep markets, being at Maidstone market, bought of a man named *Wale*, through a salesman of the market, this flock of forty-nine sheep. The purchase was made in the open market; the price was a fair one, and was paid. The transaction was a regular one, and no blame attached to the plaintiff in respect of it. It turned out, however, that the sheep had been obtained from the defendant, who is a farmer, by *Wale*, under colour of a purchase, but in reality by false pretences. Proposing to buy the sheep at the price of 48s. a head, *Wale* gave in payment a cheque on a bank at which he had no funds, and kept no account. The cheque was of course dishonoured. A warrant was taken out against *Wale* by the defendant on the 25th Oct., and he was afterwards convicted of having obtained the sheep by false pretences, and it must be taken for the present purpose that they were so obtained. It is to be observed that, though the sale from *Wale* to the plaintiff took place in open market, it was admitted before us that the market having been recently established by the corporation of Maidstone under a local Act, was not one in respect of which the protection arising from a sale in market overt would attach. The sheep were taken to the plaintiff's premises at *Seale*, which is some distance from Maidstone, and arrived there on the 31st, the ensuing day. On the 6th Nov. the defendant, having in the meantime set the police to work, and having learned what had become of the sheep, went with a police officer to the plaintiff's premises, and there took possession of the sheep, which were afterwards removed to his own farm. On the 7th Nov. *Wale* was convicted of obtaining the sheep by false pretences. The sheep being already in the plaintiff's possession, no order of

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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restitution was asked for. The question under the circumstances is which of the two, the plaintiff or defendant, is entitled to the sheep. Although, if the matter rested on abstract principle, it might be open to be contended that, inasmuch as to make a valid contract both parties must intend to be bound by it, consequently, where in an apparent contract of sale the buyer intends to get the goods but not to pay for them, but to defraud the seller, the contract fails to take effect and though the seller intended the property to pass, yet that the contract failing to take effect the property still remains unaltered, yet the question is now so concluded by authority as to be no longer open to discussion. We must now take it to be settled—it is unnecessary to go through the cases which are set out in Mr. Benjamin's work—that, though a seller is induced to sell by the fraud and false pretences of the buyer, and though it is competent to the seller by reason of such fraud to avoid the contract, yet till he does some act so to avoid it, the property remains in the buyer, and that if he in the meantime has parted with the thing sold to an innocent purchaser, the title of the latter cannot be defeated by the original seller. The reasoning on which this conclusion is based may not appear altogether consistent with principle, and agreeing in the result we should prefer to accept the view of the American Courts as stated in the case *Root v. French* (11 Wendell, 570), a case decided in the Supreme Court of Judicature of the State of New York, according to which the preference thus given to the right of the innocent purchaser is treated as an exception to the general law, and is rested on the principle of equity that, where one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third party to commit the fraud. But on whatever ground it may be said to rest, the law must be taken to be now definitely settled. The question, which in some cases might be a very material one, as well as one of some nicety, namely, what on the part of the defrauded seller, short of retaking possession of the thing sold, will amount to an avoidance of the contract, does not arise in the present instance. The defendant, not knowing what had become of his sheep, or where to find Wale, his buyer, had done and could do nothing beyond giving notice to the police up to the time when the sheep were bought by the plaintiff. We must take it, therefore, as incontestable that, but for the subsequent conviction of Wale for having obtained these sheep by false pretences, no question could be raised as to the title of the plaintiff. But it is contended that by reason of such conviction the defendant is entitled to the benefit of the provision of the 24 & 25 Vict. c. 96, s. 100, which enacts that where property has been obtained (*inter alia*) by false pretences, on conviction of the party so obtaining them, restitution shall be made to the party by whom they have been so obtained. But we are clearly of opinion that this enactment, which is in these terms, "If any person guilty of any felony or misdemeanor in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such

case the property shall be restored to the owner," has no application to such a case as the present. The language applies, and is obviously intended to apply, to cases, and to those only, in which possession has been obtained without the property passing. This was the construction put on the statute by the court in *Lindsay v. Cundy* (L. Rep. 1 Q. B. Div. 348), and, though the view there taken by the court on the primary question as to whether a contract had been made by the seller with the person obtaining the goods was reversed on appeal, the second ground of the judgment, which is the one immediately applicable to the present case, remains unshaken, and we have no hesitation in adhering to it. And it is strongly confirmed by the case of *Horwood v. Smith* (2 T. R. 750), which was a case of sheep stolen, and sold by the thief in market overt, and in which, subsequently to the sale, the thief was convicted of the larceny; yet it was held that, as the conviction did not take place till after the sale, the owner was not entitled to restitution under the 21 Hen. 8, c. 11. In the present case, as in the foregoing, there was no property in the prosecutor at the time of the conviction. It had been parted with by a contract, which, though under the circumstances voidable, ceased on the sale before it had been avoided to be any longer voidable, and as to which therefore the right of the plaintiff had become indefeasible. It cannot have been the intention of the statute to defeat it nevertheless, and by the mere conviction of the fraudulent purchaser to deprive the innocent buyer of the right which, according to the decisions in the series of cases already referred to, had become absolute in him. Our judgment must therefore be for the plaintiff. *Judgment for the plaintiff.*

Solicitors for plaintiff, *Palmer, Bull, and Fry.*
Solicitors for defendant, *S. F. Langham and Son.*

June 20 and Dec. 20, 1878.

(Before COCKBURN, C.J., MELLOR and LUSH, JJ.)

REG. v. HOLBROOK. (a)

Libel—Newspaper—Authority to editor—Protection of proprietor—6 & 7 Vict. c. 96, s. 7.

Upon a criminal information for libel it was proved that the three defendants, the proprietors of the newspaper in which the libel appeared, took an active part in the management of the paper, but had given a general authority to a competent editor to publish whatever he thought proper in the literary part of it, which contained the libel. It was also proved that at the time of the publication of the libel, one of the defendants was absent from home on account of ill health, and that neither of them had given any authority for, or consent to, or had any knowledge of the publication of the libel. The jury found that the defendants had not brought themselves within the protection provided by 6 & 7 Vict. c. 96, s. 7, and convicted them all.

Held by Cockburn, C.J. and Lush, J. (dissentientes Mellor, J.), that the direction at the trial was defective, in not explaining that a general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law; and that

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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the verdict—at least as to the absent defendant—being inconsistent with that principle, there must be a new trial.

This was a rule nisi for a third new trial on the ground of misdirection in a criminal information for libel, which had been twice tried at the Winchester Assizes. Upon both occasions the jury had convicted the defendants.

A similar rule was argued on the 30th Nov. 1877, after the first trial, and is reported at length L. Rep. 3 Q. B. Div. 60; 37 L. T. Rep. N. S. 530. The rule was then made absolute by Cockburn, C.J. and Lush, J. (Mellor, J. dissenting.) In consequence, the second trial took place at the spring assizes 1878, before Grove, J.

June 20.—Charles, Q.C. and A. L. Smith, showed cause on behalf of the prosecution.

Cole, Q.C. and Folkard supported the rule.

The facts, the direction of the learned judge, and the arguments are fully described in the several judgments of the court.

Our. adv. vult.

Dec. 20.—LUSH, J.—The question presented for our decision on this rule is substantially that which arose upon the former motion for a new trial, and which was argued in November of the last year. Upon the first trial it was proved that the literary department of the newspaper in question had been intrusted to an editor, who inserted in it what he thought fit in the way of articles, correspondence, &c.; that of the three defendants who were proprietors of the paper, each took the management of a particular department of the business other than the literary department; that at the time of publication of the libel, one of them was absent from home on account of ill health, and that neither of them had given any authority for or consent to the publication complained of, or had any knowledge of the libellous article until his attention was called to it, after the paper was in circulation. My brother Lindley on that occasion ruled, as a matter of law, that as an authority had been given to the editor to edit the paper, and to insert what he thought fit without supervision or control, the libel could not be said to have been published without the authority of the defendants within the meaning of the Act, 6 & 7 Vict. c. 96, s. 7. The Lord Chief Justice and myself took a different view of the meaning of that section, and for reasons we then gave, we held that the "authority" mentioned in the 7th section was an authority to publish the libel, and that the general authority given to the editor to use his discretion in admitting or rejecting articles or correspondence, was not of itself sufficient under the circumstances to make the proprietor criminally responsible. Upon the second trial, the ruling in which is now in question, the evidence of authority was carried no further than on the former occasion; but instead of holding as a matter of law that the 7th section of the Act did not protect the defendant, the learned judge left the question of authority to the jury, but without such an explanation of the meaning of the section as appeared to the majority of the court on the previous occasion to be required in order to enable the jury properly to apply it to the facts. Other grounds, such as want of due care and caution, the omission to stop the sale of papers outstanding in the hands of retail sellers when the attention of the two de-

fendants who were in Portsmouth was called to the objectionable article, and the inadvertent sale in the shop afterwards of another copy of the paper were also put forward; but the jury must have found their verdict on the question of authority, inasmuch as they implicated the absent defendant, against whom, these which I may call, minor matters of complaint were not and could not have been made. As my brother Mellor, after a second argument, retains the opinion which he expressed before, and as my brother Grove, as I infer from his summing-up, rather inclines to the same opinion, I have carefully reviewed the authorities and the argument; and after the best consideration which I can give to the case, I am constrained to hold that the construction of the Act which the Lord Chief Justice and myself adopted on the former occasion, is the true construction. It must be admitted that the 7th section upon which the question turns is not so precise and clear as it might have been. In order to ascertain the intentions of the Legislature, we must have recourse to the well-known rule of construction laid down by Coke, C.J. in *Heydon's case* (3 Rep. 7a.): "For the wure and true construction of all statutes in general," he says, "(be they penal, or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: First. What was the common law before the making of the Act? Secondly. What was the mischief and defect for which the common law did not provide? Thirdly. What remedy the Parliament hath resolved and appointed. Fourthly. The true reason of the remedy; and then the office of the judges is always to make such construction as shall suppress the mischief, and advance the remedy. "Pursuing this line of reasoning, the first question is: What was the law as regards the criminal liability of the proprietor of a newspaper for libel? Libel on an individual is, and has always been regarded as both a civil injury and a criminal offence. The person libelled may pursue his remedy for damages, or prefer an indictment, or, by leave of the court, a criminal information, or he may both sue for damages, and indict. It is ranked amongst criminal offences because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace; but the libeller is not the less bound to make compensation for the pecuniary or other loss or injury which the libel might have occasioned to the person libelled. In this respect libel stands on the same footing as an assault, or any other injury to the person. But the publication of a libel, when prosecuted as a criminal offence, was treated upon an exceptional principle, and with exceptional severity. The maxim *Respondet superior*, which (with rare exceptions founded on reasons not applicable to libel, which I will presently notice) pertains to civil liability only, was applied to an indictment for libel; and the proprietor of a newspaper in which a libellous article had been inserted, was held to be criminally, as well as civilly responsible for it, though he had never authorised it, or had anything to do with its insertion, and whether the editor had inserted it by negligence or wilfully. It was not so in other cases of personal injury. If a coachman, accustomed to drive, were, while engaged on his master's business, by carelessness or furious driving, to cause the death

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of another, the master would be liable to an action for damages, but not to a criminal prosecution. The offending servant alone could be charged with the manslaughter; and if the coachman were to be guilty of such an offence while using his master's carriage without his permission and upon his own business, or if while doing his master's work he were wantonly to assault another, the master would not be liable even to an action for damages. Subject to the exceptions already referred to, the criminal law makes no one punishable for an offence but the person who either committed it or incited and procured the other to commit it or who aided in its commission. I need only select two cases from the books to show what the criminal law of libel was. The one is *Rex v. Walter* (3 Esp. 21). "A criminal information had been filed against the proprietor of the *Times* for a libel on a lady. The defendant pleaded not guilty, and proved at the trial that although he was the proprietor of the paper, he had nothing to do with the conducting of it; that he resided entirely in the country, and that his son was concerned in the conducting of the paper, without any interference on his part. Mr. Erskine, his counsel, contended upon this evidence that though his client might be liable in a civil suit for all acts of his agent, it was otherwise when he had to answer criminally; that though the proving him to be the proprietor of the paper might *prima facie* subject him criminally, it was otherwise when it was clearly shown that the fact of the publication was not his, nor done with his privity; that *actus non facit reum nisi sit mens rea*, so that if the act of publication which constituted the crime was proved to be that of another, the jury would be bound to acquit the defendant. Lord Kenyon said he was clearly of opinion that the proprietor of a newspaper was answerable criminally for the acts of his servants or agents for misconduct in the conducting of the paper; that this was not his opinion only, but that of Lord Hale, Justice Powell, and Justice Foster, all high law authorities, to which he subscribed. This was the old and received law for above a century, and was not to be broken in upon by any new doctrine upon libel." This occurred in 1808. I have cited the case in full from the report, because of its exact analogy in all material circumstances to the present case. The other case is that of *Colburn v. Patmore*, tried in 1834, and reported in 1 C. M. & R. 73. A criminal information had been filed against Mr. Colburn, as the proprietor of the *Court Journal*, for a libel on a lady. He pleaded guilty, and was sentenced to pay a fine of 100*l.* and to be imprisoned till the fine was paid. He paid the 100*l.*, and then brought an action against his editor for breach of duty in inserting the libellous paragraph alleging that it was done without his authority or knowledge, and in violation of the contract between them. This allegation was fully proved, and a verdict was given for the plaintiff for a sum by way of damages, which included the 100*l.* penalty. A motion was then made to arrest the judgment on the ground that the plaintiff was in contemplation of law a party to the offence, and one wrongdoer cannot have in a court of law contribution or redress against another who was his accomplice. The judgment was ultimately arrested because of a defect in the pleadings, it not being alleged that the plaintiff did not sanction the circulation of the

journal after he knew of the libel, and so became actual "publisher" of the libel. But the case is important for the uncertainty which evidently prevailed, both on the bench and between the counsel on both sides as to the state of the law. The late Mr. Justice Maule was counsel for the defendant, the editor, and it never occurred to his acute and well-informed mind to suggest that Mr. Colburn brought the mischief upon himself by pleading guilty, and that he might have defended himself by proving the real facts. This would have been an obvious ground of defence for his client. On the contrary, he admits in his argument "the law has made the proprietor of a newspaper criminally answerable for the publication of a libel in its columns, whether the libel was inserted with or without his knowledge;" and his only argument was that though the plaintiff was actually innocent, the two parties were in the eye of the law equally guilty. Sir Wm. Follett, on the part of Mr. Colburn, contended that as his client was, in fact, innocent, the rule of law which prohibited a claim for redress by one wrongdoer against another ought not to be held applicable. Baron Alderson remarked, in the course of the argument, "Is it not more correct to say that the plaintiff was actually ignorant, but 'legally ignorant'?" He afterwards remarks: "A master is presumed to authorise the insertion of a libel; in other cases he is not presumed to authorise the wilful act of his servant either in civil or criminal proceedings. Does the proprietor of a newspaper give authority to the editor to publish everything libellous or not?" This then was the state of the law before the Act was passed. The proprietor of a newspaper which contained a personal libel was treated as a criminal, though he had not himself committed the criminal act, or procured or incited another to commit it, nor aided in its commission, nor knew that it was about to be committed. I think it cannot be doubted from the tenor of the Act itself, apart from its historical origin, that the intention of the Legislature was, amongst other things, to mitigate the rigour of the common law in this particular, and to place the proprietor of a newspaper in the same position as any other employer, whose servant had in the course of his employment committed an offence against, and to the injury of a third person. The Act is entitled "An Act to amend the law of libel," and its declared objects are—first, the better protection of private character; secondly, the more effectually securing the liberty of the press; and thirdly, the better preventing abuses in exercising the said liberty." The second object forms the subject of several sections, and by them the defendant in an action for libel is allowed to give in evidence in mitigation of damages (under certain conditions) an apology; and to pay money into court; and the defendant in an indictment or information is permitted to plead the truth as a justification provided he shows that the publication was for the public benefit; and to be entitled to costs upon a verdict of not guilty. Between these latter provisions comes the 7th section, the true meaning of which is the question now before us. The words are: "Whosoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of

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any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care and caution on his part." Although the section is wanting in precision, it seems clear that the word "publication," wherever it occurs in the section, points to the libel and not to the newspaper. The section says nothing about newspapers. It applies to any printed or written slander whether contained in a newspaper, book, pamphlet, handbill, or letter. What it deals with is the libel, and nothing more. Again, the clause does not say what is to be the effect of proving the negative; but there can be as little doubt that it means it to be an entire defence entitling the defendant to a verdict and not merely to a mitigation of punishment. The effect of it, read by the light of previous decisions, and read so as to make it remedial, must be, that an authority from the proprietor of a newspaper to the editor to publish what is libellous is no longer to be as it formerly was, a presumption of law, but a question of fact. Before the Act the only question of fact was whether the defendant authorised the publication of the paper; now it is whether he authorised the publication of the libel. It is true that the production of the paper which contained the libel, coupled with proof that the defendant is the proprietor, is *prima facie* evidence that he caused the publication of the libel, and the onus is on him to prove the negative. But when he has proved that the literary department was entrusted entirely to an editor, the question what was the extent of the authority which that employment involved, is to be tried upon the principle which is applicable to all other questions of authority; and I think the jury ought to be told, in this as in every other case, that criminal intention is not to be presumed, but is to be proved; and that, in the absence of any evidence to the contrary, a person who employs another to do a lawful act, is to be taken to authorise him to do it in a lawful and not in an unlawful manner. This is the doctrine which is applied to other cases of wrong done by servants when it is sought to fix with criminal liability the employer; and the statute intended to place libel upon the same footing in this respect as other torts. Although the employer is liable civilly for such a wrong, this is not upon the presumption of authority, but by virtue of the maxim *Respondent superior*, which, on grounds of policy and general convenience, puts the master in the same position as if he had done the wrong himself—a maxim which, as I before observed, pertains to civil, and not, except in rare instances, to criminal liability. I am far from saying that the mere appointment of an editor without supervision or control, may not, in some cases, involve an authority to publish libels. If the paper was a calumnious paper, its general character would negative the ordinary presumption of innocent intention and fairly lead to the inference that the proprietor authorised the insertion of slanderous articles. But that cannot be said of a respectable paper, as the one in question is admitted to be. The exceptionable class of cases to which I have referred are public nuisances. In these cases the wrong is done to the public, and not to any particular individual; and in that case no one can sue for damages unless he happens to have sustained

some exceptional injury. Of such a class the case of *Reg. v. Stephens* (L. Rep. 1 Q. B. 702) is an illustration. The workmen of the owner of a colliery quarry had stacked the refuse of the quarry by the side of a navigable river in such a manner that it fell into the stream and obstructed the navigation; and although the owner proved that he lived at a distance and did not know what was being done, and although he had given directions to the contrary, he was held criminally liable for the nuisance. Here the wrong was common to all the public, and the remedy by indictment was the only remedy. This was the ground of the decision. Libel, as I have already observed, does not belong to this class, but to the ordinary class of offences against the person. I am therefore of opinion that the direction to the jury was imperfect, and the verdict wrong, and consequently that the verdict ought to be set aside.

MELLOR, J.—The question for consideration in this case arose upon the trial before Grove, J., of a criminal information against the defendants, who are the proprietors and publishers of the *Portsmouth Times and National Gazette*, for a libel on a Mr. Howard contained in that newspaper. On the trial the verdict passed against all the defendants, who were all found guilty of the offence. There had been a former trial of the case, in which the judge had directed a verdict to be entered against all the defendants on the ground that they did not, upon the evidence then given, come within the true intent and meaning of the 7th section of the 6 & 7 Vict. c. 96. A rule for a new trial was thereupon obtained by Mr. Cole, and afterwards made absolute, on the ground that the judge ought not to have withdrawn the question from the jury, but should have left it to them, upon that evidence, with a suitable direction. The only respect in which my present judgment differs from that I gave in the former case is that I think that I was wrong in holding that the judge was right in withdrawing the evidence from the consideration of the jury and deciding it himself. On the last trial Grove, J. left the question to the jury, with a careful and elaborate summing up, and they thereupon found a verdict of guilty against all the defendants. Upon the hearing of the present rule Mr. Cole, for the defendants, made several objections to the verdict, viz., on the ground that it was against the weight of the evidence, and on the ground of misdirection by the judge. On the argument against that rule, the only substantial question turned upon the construction of the statute 6 & 7 Vict. c. 96, entitled, "An Act to amend the law respecting defamatory words and libel." The recital to the first section shows the object of the Act to have been for the better "protection of private" character, and for more "effectually securing the liberty of the press," and for better preventing "abuses in exercising the said liberty." The section upon which the matter more particularly depends is the 7th, which enacts "that whensoever upon the trial of an indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumption of publication, against the defendant by the act of any other person, by his authority it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did

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not arise from want of due care and caution on his part." I regret that there exists a difference of opinion amongst the judges who heard the argument as to the true construction of this statute. I have read the very able arguments of my Lord Chief Justice and my brother Lush with care, and regret that I am not able to come to the same conclusion with them. I admit the force of their reasoning, but it does not satisfy all the difficulties in the construction which press upon my mind. I am of opinion therefore that the rule should be discharged, and that the verdict should stand. The several defendants were joint proprietors of the newspaper in question, and each contributed his assistance in various departments to the management and publication of the same, but neither of them took part in the editorial management of it; but that department was by the defendants devolved upon a manager named Green, who, it appeared on the evidence, had procured the article in question to be written, and had caused it to be inserted in the newspaper. The defendants were not any of them aware of the insertion of the offensive article in the newspaper until after the publication thereof, when their attention was called to it. I do not stop to refer to the subsequent sale of a single paper, or to the steps taken on the part of the defendants to stop the further circulation of the newspaper, when they became aware of the libel. I consider that the evidence of Mr. Green, the manager appointed by the defendants, raises the real question in the case, and it is upon that evidence that I base my opinion. Mr. Green being called as a witness on the part of the defendants said that, "they (the defendants) leave it entirely to my discretion what I shall put in the paper; they appointed me with general authority to conduct the paper, they have never taken notice of my articles one way or the other, they have never found fault with the articles." It is difficult to conceive of an authority more complete or unfettered; and it appears to me that by so constituting Mr. Green the editor, with such authority, the defendants must be taken to have authorised the insertion of all matter appearing in the newspaper in question. The recital in the statute defines one main object of it to have been "the better protection of private character," as well as the "more effectually securing the liberty of the press," which I concede to be a perfectly reasonable object. The words are, "Whenever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge." Now, I think that these words may well be satisfied by permitting the defendant to negative in point of fact the presumption which before arbitrarily prevailed, and could not be controverted on the trial by giving in evidence the real facts. For instance, as proprietors they might have expressly forbidden the insertion of some specific libel in the paper, and have ordered it to be destroyed; nevertheless, by accident, or by design, or misunderstanding, it might have got into the newspaper against their order and without their consent. Again, they may have expressly forbidden the editor to insert

any article of a defamatory character without their express authority, but the editor may nevertheless have inserted it in the newspaper without their knowledge. Other circumstances may be imagined in which, libels may have been inserted in the newspaper, and for which but for this section, the defendants would have been liable as upon an actual authority. But to apply it to a case like the present, where the fullest authority was given to insert any article at the discretion of the editor without restriction as to their character and nature, seems strangely at variance with the recited object of the statute—viz., "for the better preventing abuses in the exercise of such liberty;" but it was contended that the statute did protect proprietors of newspapers in all cases in which they had not specially known or authorised the manner of the specific libel. I fear that if such a construction of this section should prevail, the other objects recited in the statute—viz., "the better protection of private character" and preventing abuses in exercising the said "liberty of the press" would be utterly lost sight of, and it would become more properly speaking, a statute for the greater protection of newspaper proprietors, and for the more effectual encouragement of the sale of newspapers containing libellous articles. Another main consideration which influences my opinion, is the increased difficulty which it introduces, and imposes upon a party seeking redress in a case of a scandalous libel, in which the obtaining of damages can afford no adequate satisfaction. It is true that the cases of *Reg. v. Walter* and of *Colburn v. Patmore*, which established the criminal liability of a newspaper proprietor for the acts of his servants, were supposed to have inflicted a great hardship upon the defendant, which cases were doubtless in the mind of the framer of the statute in question; yet it by no means follows that he contemplated the giving of an entire immunity from liability on the part of the newspaper proprietors; and it appears to me, from the recitals in the statute and the nature of its provisions, that it was not intended absolutely to reverse the rule laid down by Lord Kenyon in *Reg. v. Walter*. I cannot help thinking that clearer and simpler language and different recitals would have been adopted had such been the case. It is argued however that unless such be the meaning of the section it will be entirely nugatory. I cannot bring myself to that view of the statute; but, as I have already said, I think that many cases may be suggested in which the objects of the statute may be satisfied, without so construing the words used. Should, however, such construction prevail, it will throw the greatest obstacles in the way of a prosecutor desiring to proceed by indictment or information for a serious and scandalous libel; how is the person defamed to proceed to punish the libeller? If he attacks the proprietor as the person who profits by the libel, and therefore apparently the right person to proceed against, he may be met by evidence on the trial, that such proprietor had nothing to do with the actual management of the newspaper, but merely provided the capital necessary for its establishment, and his only interference the receiving of the profits arising from the sale. How is the prosecutor to find out the actual libeller, whether proprietor, editor, or correspondent, and how is he to prove his identity? Surely if the wide construction con-

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tended for had been intended by the framer of the Act, provision would have been made for the registering of the editor or author who was responsible for the libel and for enabling the prosecutor to discover who he was. Even then it might be that the editor was a man of straw, without the means of satisfying any fine or the costs of any prosecution which on conviction might be imposed upon him; he might be a person alike destitute of character and principles, hired only for his skill in defamation, and his capacity to create a wretched craving to read the scandalous and libellous contents of the paper which he was hired to conduct. This is a consideration which much influences my opinion seeing that no means are provided in a criminal case by discovery by interrogatories or otherwise for ascertaining the real author or contributor. In fact, the result must be, that however scandalous the libel, the person defamed can have no real redress criminally against the actual libeller as he, being upon the hypothesis a man of straw, can pay neither fine nor costs. It may, however, be asked what is then the provision "for more effectually securing" the "liberty of the press," if the meaning of the section be limited, as suggested by me? I find a ready answer in the provisions of the 2nd and 6th sections which enable a person charged criminally with libel, to plead that the substance of the libel is true; and in case of action that it was inserted without malice, and that before action he had tendered an apology, which provisions form a most material alteration in the law heretofore in force with regard to the law of libel. On the trial of the present information, no doubt could be suggested that a presumptive case of publication by authority of the defendants had been established, and the only question which then remained was whether the evidence given on behalf of the defendant negatived the presumption that the libel in question had been published without their authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on their part. I am of opinion that the evidence given on the part of the defendants wholly failed to establish such a defence under the statute, but on the contrary warranted the jury in finding them guilty on both divisions of the proposition which were essential to their defence. An unlimited discretion and authority had been, in fact, conferred on Mr. Green, the editor, to insert articles of whatever nature and character he might deem expedient to insert, and their consent was involved in the same authority; and therefore unless it can be successfully contended, that the authority, consent, or knowledge, mentioned in the exempting clause of the section, requires the prosecutor to prove that the particular specific libel must have been actually authorised, known, and approved, in each case, I cannot but think that the evidence sufficed to warrant the conclusion at which the jury arrived. It was observed during the argument, that as a general rule, an authority to an agent to conduct a commercial business, does not extend to enable such agent by implication to make his principal liable for a crime committed by such agent. Now this may be true as a general proposition, where a crime is committed by an agent, beyond the scope of his authority, without the consent of his principal, but it has no application to a business or commercial speculation of this

description, where, in the very nature of things, it is essential to the prosperity of the paper that articles of very various character and description should be inserted. Indeed the cases of *Rex v. Walter and Colbourn v. Patmore* show that this must be so, as the decisions in those cases proceeded upon the principle that in such a case the liability of the proprietor and superior resulted from the act of the servant. In fact Mr. Green, in the management of the editorial department, was the *alter ego* of each of the defendants, and was in fact authorised to insert in every issue of the newspaper, whatever matter he considered suitable and likely to increase its circulation, and the insertion of the libel in question in the newspaper was clearly within the scope of his authority. As I cannot believe that the object of the statute was to require prosecutors, in such cases, to prove an actual authority or consent to the specific libel, I cannot do other than express my opinion that the jury were justified in finding the defendants guilty. I am further of opinion, although it is not necessary in order to discharge this rule to decide it, that there was a question upon the evidence fit for the consideration of the jury, whether the publication in question arose from want of due care or caution on the part of the defendants, and I think that the jury might well think that the defendants failed to show that it did not so arise. It appears to me that for proprietors of a newspaper to devolve upon an editor the entire control and unfettered discretion as to what articles he shall insert without requiring him to abstain from the insertion of all defamatory matter, or without making some provision for supervision by the defendants, who are the parties interested in the speculation, does exhibit a want of due care or caution on their part. The object of an editor is generally to make the paper sell and to become a profitable speculation to his employers, and unhappily the insertion of sensational or defamatory articles, has too often a great tendency to bring about so profitable a result. I think, therefore, there was evidence that the defendants did not use due care and caution in entrusting Mr. Green with unfettered authority, in the management of the editorial department of their newspaper, and I am of opinion, therefore, that on all grounds the rule should be discharged.

COCKBURN, C.J.—The question in this case is one of considerable importance as regards the law of libel, inasmuch as it involves the construction which is to be put on the 7th section of the 6 & 7 Vict. c. 96; an enactment passed to relieve the proprietors of public journals from the heavy responsibility, so far as the criminal law was concerned, which rested on them before in respect of libellous matters published in such journals, without their authority, knowledge, or consent. The state of the law which this enactment was intended to remedy, was in my opinion inconsistent with the first and common principles of justice, and one which was discreditable to the legislation of this country. It had been laid down authoritatively, at a time when perhaps less liberal views as to the liberty of the press prevailed, that the proprietor of a public journal though absent, and wholly ignorant of matters inserted in the journal by his editor, was nevertheless responsible, not only civilly, but also criminally, if the matter so inserted were libellous—in direct contravention, I

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cannot but think, of the fundamental principle that, to constitute guilt there must be a *mens rea*—an intention to violate the law. It was to remedy this state of the law that the statutory enactment, 6 & 7 Vict. c. 96, s. 7, was passed with which we have here to deal. It provides that when “evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care and caution on his part.” The question is as to what will satisfy the exigency of the terms by which immunity is thus given to the proprietor on the condition of his showing that he has not given authority for the publication of the libel. In the first place, would it be enough for the defendant to show that he had not specifically authorised the insertion of the article or matter complained of, if it should appear that he had given authority to insert matter, whether libellous or innocent, at the discretion of the editor? I answer unhesitatingly in the negative. But it appears to me equally untenable to say that, because a proprietor intrusts the conduct of a public journal to the plenary discretion of an editor, he thereby gives authority to the editor to commit a breach of the law by the insertion of libellous matter. In the first place, let me ask if the principal in appointing and giving authority to his editor were expressly to prohibit the insertion of any libellous matter in the paper, would not, so far as the question of authority is concerned, such express prohibition be sufficient to satisfy the statute? I think the answer must be in the affirmative; for what, unless he himself superintends the insertion of every article, in which case the statute would be useless, can the proprietor do more? But surely the prohibition not to violate the law is impliedly involved in every service in which an agent is employed, and in which the law may possibly be broken by such agent. Take the case of an agent employed to buy goods on which a duty is payable, and who, to benefit his employer, buys smuggled goods unknown to the employer. The agent would be criminally liable, the employer would not. As it seems to me, the proprietor of a public journal, who gives general authority to the editor he employs is entitled to assume that the editor, knowing the law as well as himself, will take care for his own sake as well as for the sake of his employer to keep within the law by inserting nothing which would bring himself within the reach of the law, either criminally or civilly, or make his principal liable in damages which he again would be liable to make good to his employer. I am at a loss to see to what cases the statutory provision in question would be applicable if not to this. It is notorious that in many, perhaps in the majority of instances, public journals are carried on for the benefit of proprietors, who find the necessary capital, by editors employed by them and to whom the conduct of the paper is committed without any immediate control or interference of the principal. In my opinion it was intended to exempt principals so circumstanced, if able to satisfy a jury that they had not authorised, directly or indirectly, the insertion of libellous matter, from being held criminally liable. It is to be observed that in

both the striking cases referred to by my brother Lush, those of *Rees v. Walter* and *Colburn v. Patmore*, as also in the case of *Rees v. Gutch* (Moo. & Mal. 433), the conduct of the journal had been left by the proprietor, as in this case, to the management of an editor while the proprietor, absent at a distance, had been ignorant of the fact of the libellous matter having been published. It was to meet such cases I cannot doubt that this section of Lord Campbell's Act was directed. It was a remedial Act, and one which as bringing the law into harmony with general principles, should receive a liberal interpretation. I think we should be defeating what was intended to be its operation if we were to hold that a general authority given to an editor to manage a public journal involved an authority to publish libellous matter, and that a proprietor giving such authority still remained criminally liable for a libel, without specific authority expressed or implied, for publishing such libel or any consent or knowledge thereto on his part. It is true that the terms in which the authority was given to the editor in the present case at first sight seem large. According to the evidence of the editor, the defendants “left it entirely to his discretion what he should put into the paper. They gave him general authority to conduct the paper, they never took notice of his articles, one way or the other.” But what is this beyond what is implied in the general authority given to an editor by every proprietor? What is this more than *in extenso* what would be implied in a general authority to conduct the paper? In my opinion it would be to put much too strained and unwarranted a construction on such a general authority to treat it as giving a license to the editor to publish libels in a paper he was employed to conduct. I have no hesitation in saying where a general authority is given to an editor to publish libellous matter at his discretion, it will avail a proprietor nothing to show that he had not authorised the publication of the libel complained of. It is equally clear that though in the authority originally given to the editor no license to publish libellous matter may have been contained, still such an authority may be inferred from the conduct of the parties, as for instance from the fact that other libels have been published in the paper which have come to the knowledge of the proprietor, and without his remonstrance or interference, or the removal of the editor, from which the assent of the proprietor might well be inferred. I do not, therefore, feel the apprehension which has been expressed of the mischief which would result from the immunity which newspaper proprietors would derive from holding them free from criminal responsibility when they employ an editor with general authority to conduct the paper. The immunity would quickly cease if they suffered the paper to become the vehicle of calumny. There are journals as to which no jury would hesitate to say that the editors were authorised by the proprietors to invent or give currency to libel. Protection is further afforded to individuals and the public by the immunity afforded by the statute being conditioned on the exercise of due care and caution on the part of the proprietor. Many circumstances might be held by a jury to amount to the absence of the care and caution thus required. The employment of an incompetent or untrustworthy editor, or one who has before been proceeded against for libel, total omission

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ever to look at the paper to see in what manner it was conducted, or, as in this very case, the omission, though taking part in the publication of the paper, to insist on having articles of a doubtful tendency submitted for approval, might be deemed by a jury sufficient to disentitle a proprietor to the protection of the statute. It must always be borne in mind also that it is only on the penal responsibility of the proprietor that a limit is thus placed. His liability to damages in a civil action remains as before. No hardship is therefore imposed on the individual prosecutor, who, in the eye of the law, prosecuted not on his own behalf but on that of the public, and who may still hold the proprietor liable in damages, and if he pleases, prosecute the editor as the publisher of the libel. This being the view I take of the statute, it seems to me that the direction of the learned judge at the late trial was defective in not explaining to the jury that a general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law. I agree that, as regards two of the three defendants, there may have been evidence to go to the jury of knowledge and consent on their parts, as it appears that they became aware of the article in question before the sale of the paper had come to an end, and took no steps to stop the issue of the remaining numbers of the paper, and therefore might be held to have known of and consented to the publication of the libel in such later papers. The jury might also possibly have held that, as regards the two defendants who were on the spot, and who might therefore have looked at the articles before the paper was published, there was a want of due care and caution, as required by the statute. But I agree with my brother Lush that the verdict must have proceeded on the ground of authority, as the jury have included in their finding the third partner, who was absent at a distance on account of illness, and to whom none of the other circumstances can at all apply, and as to whom, taking the view of the case which I do on the subject of authority, I think there was no case to go to the jury. I concur with my brother Lush therefore in holding that the rule for a new trial must be made absolute.

Rule absolute for a new trial.

Solicitors for the prosecution, *Gregory, Rowcliffe, and Co.*, for *John Howard*, Portsmouth.

Solicitors for the defence, *Ford and Ford*, for *Feltham*, Portsea.

Saturday, Nov. 16, 1878.

(Before Lord COLERIDGE, C.J. and MELLOR, J.)

PAUL AND ANOTHER (apps.) v. SUMMERHAYES (resp.). (a)

Trespass — Foxhunting — Assault — Justification —
1 & 2 Will. 4, c. 32, ss. 2, 31, 35.

A huntsman in fresh pursuit of a fox is not justified in forcing an entry upon land against the will of the owner.

The appellants, while in fresh pursuit of a fox, came to land managed by the respondent for his father. The respondent warned them off, and endeavoured to prevent their going upon the land.

The appellants thereupon attempted to force an

entry, and, in so doing, committed an assault, for which they were convicted and fined.

Held that the conviction was right, as foxhunting was no justification of a trespass, which the respondent therefore lawfully resisted.

This was a case stated by justices under 20 & 21 Vict. c. 43.

On the 28th. Dec. 1877 the information of Thomas Summerhayes, the above-named respondent, against Henry Paul and Charles George Elers, the appellants, charging them together in the same summons with assaulting and beating the said respondent at Curry Mallett, in the county of Somerset, on the 2nd Nov. 1877, was heard at a petty sessions holden at Ilminster, in the said county.

It was proved that the respondent lived with his father and attended to his business for him (the father being afflicted), and that a portion of the farm occupied by the father consisted of a field called "The Nineteen Acres," in the parish of Curry Mallett aforesaid. That, on the 2nd Nov. 1877, about midday, the respondent was alone at work in that field when the appellants, who were out with the Taunton Vale foxhounds, were on horseback and riding slowly across an adjoining field, in the occupation of Thomas Zouch, towards "The Nineteen Acres." That "The Nineteen Acres" is east of that adjoining field, and separated from it by a hedge, a bank about two feet high, and a shallow ditch outside the bank, all which belong to "The Nineteen Acres." That the hounds crossed Thomas Zouch's field as far as the said bank, and then turned into a covert which skirts "The Nineteen Acres" and Thomas Zouch's field on the north side. That the respondent got on the bank of "The Nineteen Acres" at a gap near the covert, and, when the appellants were within ten yards of him, said, "Gentlemen, I forbid you to come on this land." The appellant Henry Paul said, "Come on, gentlemen, it is the Prince of Wales's land," and tried to ride up the bank, and the respondent put his hand against the horse, and turned the horse back. That a second time the said Henry Paul tried to ride up the bank, and again the respondent pushed the horse back. That the said Henry Paul upon that struck the respondent on his head with a riding whip more than once. That the respondent then took up a stone, and the said Henry Paul got off his horse, and went into "The Nineteen Acres," and caught hold of the respondent, and a struggle ensued. That during the struggle the appellant Charles George Elers rode into "The Nineteen Acres" and up to and against the respondent, and said, "If you throw that stone I will knock you down." That the respondent then caught hold of the bridle of the said Charles George Elers's horse (to protect himself), and Elers struck at respondent with his hunting whip, and the respondent let go the bridle, and thus avoided the blow. There was no evidence to satisfy the justices that a fox had been seen on the day in question in "The Nineteen Acres."

It was contended on behalf of the said appellants (*inter alia*), that the defendants were, with others, in fresh pursuit of a fox started on other land, and were entitled, under 1 & 2 Will. 4, c. 32, s. 35, to ride over "The Nineteen Acres" without interruption, and that the respondent, therefore, committed the first assault.

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PAUL AND ANOTHER (app.) v. SUMMERHAYES (resp.).

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That the appellants were in the exercise of a *bona fide* claim of right or interest to enter "The Nineteen Acres" as Prince of Wales's land, and also by force of the aforesaid statute, and that consequently jurisdiction of the justices was ousted.

And that, under the circumstances of the case, the respondent was not justified in using force to prevent the appellants entering "The Nineteen Acres."

The justices were of opinion that the 1 & 2 Will. 4, c. 32, s. 35, does not make a forcible entry on land lawful, but merely declares that under certain circumstances a person shall not be liable to be summoned under that Act for trespass in pursuit of game. That there was no colour of title or interest in the appellants to oust their jurisdiction, and that an occupier of land is justified in using such force as may be necessary to remove a person from such land after he has been forbidden to enter; and they convicted the appellant Henry Paul in the penalty of twenty shillings and costs, and the appellant Charles George Elers in the penalty of ten shillings and costs.

The questions of law submitted by the justices for the opinion of the court were:

Whether the 35th section of 1 & 2 Will. 4, c. 32, prevents an occupier resisting an entry on his land of persons hunting after they have been forbidden by him.

Whether the appellants had such a reasonable claim of title or interest as would oust the jurisdiction of the justices.

Whether the respondent was, under the circumstances, justified in resisting the entry on "The Nineteen Acres" after he had forbidden the entry and it was persisted in.

If the court should be of opinion that the said conviction was legally and properly made, and the said appellants are liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

The 1 & 2 Will. 4, c. 32, contains provisions against trespassing in pursuit of game. By sect. 2 "game" is defined for the purposes of the Act to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards; and by sect. 31 are added woodcocks, snipe, quails, land-rails or conies. Then the following exception is made by sect. 35:

Provided always, and be it enacted, that the aforesaid provisions against trespassers and persons found on any land shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox already started upon any other land, nor to any person *bona fide* claiming and exercising any right or reputed right of free warren or free chase.

Cole, Q.C. for the appellants.—There was ample evidence here that appellants were in fresh pursuit of a fox. That being so, they had a perfect right to go upon anyone's land. *Gundry v. Feltham* (1 T. R. 334) is an authority directly in point. Possibly the decision in that case was founded on the idea that a fox was a noxious animal, but that does not alter the law. If it was lawful, then it has not ceased to be so because those who now join in the pursuit of a fox do so in order to obtain the pleasures of the chase. This is *damnum absque injuria*: (*Mitten v. Fandrye*, Popp. 161.) This view is supported by the dictum of Brooke, J. in *Year Book*, 12 Hen. 8. pl. 9; and

by 21 Hen. 7, pl. 28. The right existing at common law has been protected by 1 & 2 Will. 4, c. 32, sect. 35.

A. Charles, Q.C. for the respondent. — The provisions of the Game Act do not apply to this case at all, as foxes are not included in the definition of game. The real point for the decision of the court is whether a foxhunter, hunting for his own diversion, has the right to go across the land of another after being warned off by the owner. The principle governing such a case is so obvious that it could not have possibly been contested except for the decision in *Gundry v. Feltham* (*ubi sup.*). But that case was only decided upon demurrer, and by the pleadings it was admitted that a fox was a noxious animal, and that the course pursued was the only way of killing the fox; but that is a very different thing from hunting merely for the sake of diversion, and this distinction was clearly drawn by Lord Ellenborough in the *Earl of Essex v. Capel* (Locke on the Game Laws, p. 45), a case tried at Hertford Assizes in 1809. There he says, "These pleasures are to be taken only when there is the consent of those who are likely to be injured by them; but they must necessarily be subservient to the consent of others." The dictum of Brooke, J., alluded to on the other side, does not support the decision in the case which was before him. *Baker v. Berkeley* (3 C. & P. 32) is an authority distinctly in my favour. If, as is admitted, the appellants were hunting for diversion, the conviction must be upheld, and it may be so upheld without reversing the decision in *Gundry v. Feltham* (*ubi sup.*), where the facts before the court were of a different nature.

Lord COLERIDGE, C.J.—This is an appeal against a conviction upon a summons for beating and assaulting the respondent at Curry Mallett. It appears that the respondent managed his father's business of a farmer, and on the day in question he was managing his father's business in a field called "The Nineteen Acres." On that day the neighbouring foxhounds were hunting close by "The Nineteen Acres," over which the two appellants, in company with other gentlemen, proposed to ride while in pursuit of the fox. The respondent tried to prevent this, whereupon one of the appellants struck him upon the head with a riding whip more than once; a struggle then took place, and the other appellant came up. The respondent seized hold of the second appellant's horse, in order to prevent being knocked down, when the second appellant struck at him with his hunting whip, but did not hit him. Upon these facts the magistrates convicted both the appellants, and inflicted fines upon them. The question for us to decide is whether, under the circumstances, such conviction was right. Now, one of the first points raised is as to the effect of the 1 & 2 Will. 4, c. 32; but I must confess I do not quite understand the meaning of the question, for it seems to me that statute has really no application to this case. The 35th section merely provides that certain of the foregoing provisions shall not extend to persons in fresh pursuit of a fox; but, as the exception is limited to the previous provisions of the Act, and as those provisions contain nothing about foxes, but relate only to game, and as sect. 31 has no application here, the point supposed to arise under sect. 35 cannot arise at all. It is not argued now that the appellants had any reasonable

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claim of interest in the land such as would oust the magistrates' jurisdiction, so we come to what is the real question in this case—viz., whether the respondent was, under the circumstances, justified in resisting the entry on "The Nineteen Acres" after he had forbidden the entry and it was persisted in. It has been popularly supposed that foxhunting may be exercised over the lands of any person without his consent, and even against his will, and, in support of this argument, the case of *Gundry v. Feltham* (*ubi sup.*) has been cited. I am of opinion that no such right exists. Foxhunting is, no doubt, a most valuable and interesting sport, but it must be carried on in subordination to the general rights of mankind and the ordinary and well-established laws of property, according to which you cannot go on to a man's land without his leave and against his will. Questions of this kind do not often arise, because in the great majority of cases reasonable terms are made with those upon whose land it is necessary to go, and compensation is provided for any damage done; but when such questions do arise they must be treated according to the ordinary rules of law. As far as I am aware, there is no law which allows a whole field of foxhunters to ride over a man's grounds or fields against his will. Such a supposition arises from a misunderstanding of *Gundry v. Feltham* (*ubi sup.*); but that case is different to the present one, for there the plaintiff admitted upon the pleadings that what was done was "the only way and means" of killing and destroying the fox, and, indeed, Buller, J. bases his judgment upon that very ground; and that is the only point which *Gundry v. Feltham* decides, and, no doubt, where it is admitted that no other means exist for destroying the fox, such a defence may prevail. But that decision afterwards came under the consideration of a very great authority in the case of the *Earl of Essex v. Capel* (*ubi sup.*), decided by Lord Ellenborough when sitting at Nisi Prius, but he had had his attention called to the case previously, and so had had an opportunity of looking into the authorities upon the subject. In the case of the *Earl of Essex v. Capel* the evidence showed clearly that foxhunting was pursued for the excitement and accompaniments of the chase, although incidentally a fox might be killed; and Lord Ellenborough, during the course of the case, pointed out that there was a very great distinction between foxhunting pursued as a pleasure and foxhunting pursued for the good of the common weal and in order merely to destroy a noxious animal; and he goes on to say that there is very considerable doubt whether that even would justify a trespass, as it was a doctrine that was probably based on a mere *obiter dictum* of Brooke, J. (Year Book 12 Hen. 8, pl. 9), which was supposed to decide a point upon which it had no bearing whatever. The dictum of Lord Ellenborough appears to me to be perfectly correct, but it is not necessary for me to decide now whether the pursuit of a fox for the sole purpose of killing a noxious animal would justify a trespass; it is enough for me to show that the supposed authority of the case in the Year Books and of *Gundry v. Feltham* (*ubi sup.*) does not conflict with the decision of Lord Ellenborough. For these reasons, I am of opinion that a man has a perfect right to forbid a field of foxhunters entering upon his land in pursuit of pleasure, and if they persist

in doing so he is justified in endeavouring to prevent their entry. In this case the conviction was right, and the appeal must be dismissed.

MELLOE, J.—I am of the same opinion. I was unaware that the 1 & 2 Will. 4, c. 32, had defined game for the purposes of that Act. If the word "game" had included foxes the application of sect. 31 might have had unpleasant consequences, from which foxhunters could only have been extricated by the terms of sect. 35; but, under any circumstances, sect. 35 could only apply to the previous provisions of the Act, and could not justify a trespass in the course of hunting a fox. That question has been fully discussed by Lord Coleridge, and with his observations I entirely agree. Mr. Cole did not argue that the sole object, or the main object, of foxhunting was to destroy a noxious animal, and no one can suppose that ladies and gentlemen of position go down to Melton to kill vermin. I entirely concur with Lord Coleridge, that the authority of Lord Ellenborough is not only consistent with law, but with all experience and common sense. We are justified, therefore, in saying the conviction must stand.

Appeal dismissed with costs.

Solicitors for appellants, *Kingdon and Cotton*, for *Jolliffe*, *Crewkerne*.

Solicitors for respondent, *Reed and Lovell*, for *Reed and Cook*, *Bridgwater*.

COMMON PLEAS DIVISION.

Nov. 18 and 25, 1878.

(Before GROVE, J.)

BENT V. THE WAKEFIELD AND BARNSELY UNION BANK. (a)

Reward for information leading to apprehension of criminal—Surrender of criminal—Information of surrender and confession sent by constable—Communication of material facts for first time—Public policy.

A reward was offered to any person giving such information to the superintendent of police at D. as should lead to the apprehension of G. G. gave himself up to the chief constable at E. who, after searching the Police Gazette, and satisfying himself as to G.'s identity, telegraphed to the superintendent at D., "Do you hold warrant for the apprehension of G. for forgery?" and received a telegram in return, "I still hold warrant for G., and should like him to be apprehended." Upon that the chief constable at E. apprehended and charged him, and he was ultimately convicted.

Held, that the chief constable at E. was not entitled to the reward, G. having himself given the information leading to his apprehension.

THIS was an action tried before Grove J., at the last summer assizes, at Bristol, and reserved by him for further consideration. It was an action brought by the plaintiff, who was the chief constable for Exeter, to recover a reward offered by the defendants for any information that should lead to the apprehension of one William Glover.

The facts proved at the trial are fully set out in the judgment.

Nov. 18.—*A. Charles*, Q.C. (*St. Aubyn* and *Austin* with him) for the plaintiff.—The reward is offered to a person to do a specific thing which has been done. *England v. Davidson* (11 Ad. & E. 356) is

(a) Reported by A. H. BITTLESTON, Esq. Barrister-at-Law.

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an authority in favour of the plaintiff. There are numerous examples of these actions being maintained by constables.

H. T. Cole, Q.C. and Templer for the defendant.—Such an action as this is against public policy. The case of *England v. Davidson*, cited on the other side, is really in our favour. Lord Denman C.J. says there: "I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law unless the grounds for so deciding were very clear." This was clearly a case within his duty; he was bound to apprehend Glover. [GROVE J.—I should like some authority for that; he is entitled to do it, but is he bound to?] Upon the undisputed facts of this case, the plaintiff did nothing to earn the reward; nobody can be entitled to it. [GROVE J.—Bent was a carrier of information to Airton which led to Glover's apprehension.] The criminal gave the information himself. In Comyn's Digest it is laid down that a constable may arrest on suspicion. The result showed that he ought to have arrested Glover, and if he did not, he can take no advantage by not having done so. In *Cowles v. Dunbar* (2 C. & B. 565) Abbott C.J. says, "A constable is obliged to act if there is a reasonable charge of felony." They cited also

Smith v. Moore, 1 C. B. 488;

Thatcher v. England, 3 C. B. 254;

Lancaster v. Walsh, 4 M. & W. 16;

Snowdon upon Constables, p. 152.

A. Charles, Q.C. in reply.—The result of *Thatcher v. England* and the other cases cited is that the first person other than the criminal who gives the information is the person entitled to the reward. The head-note to *Thatcher v. England* is: "The defendant, who had been robbed of jewellery, published an advertisement, headed "30*l.* reward," describing the articles stolen, and concluding thus: "The above sum will be paid by the adjutant of the 41st Regiment, on recovery of the property and conviction of the offender, or in proportion to the amount recovered." A., a soldier, on the 10th June, informed his sergeant that B. had admitted to him that he was the party who had committed the robbery, and the sergeant gave information at the police station. On the 14th the plaintiff, a police constable, learning from one C. that B. was to be met with at a certain place, went there and apprehended him. The plaintiff, by his activity and perseverance, afterwards succeeded in tracing and recovering nearly the whole of the property, and in procuring evidence to convict B.: Held, that the plaintiff was not, but (per Tindal, C.J., and Cresswell, J.) that A. was, the party entitled to the reward." [GROVE J.—The distinction is between information given to the authorities or the person offering the reward, and mere conversation with casual persons.] In *Smith v. Moore* (*ubi sup.*) the prisoner was in custody; here the fact whether he was in custody or not is in dispute; but eliminate that, and the two cases are on all fours. It is admitted that Airton could not claim the reward; but that Bent could is clear, if he had not been a constable, and that makes no difference. Referring to the advertisement, which constitutes the terms of the contract here, Bent was the "person or persons giving such information to Mr. W. Airton, superintendent of police, Dewsbury, or to Mr. W. Halls, superintendent of police,

Wakefield, as" led "to the apprehension of the said William Glover." [GROVE J.—Suppose one Jones had given information to Bent, and then Bent had written to Airton, would not Jones have been entitled to the reward?] Probably in that case Bent would be the agent of Jones. A police constable is protected in arresting a criminal on suspicion—a layman is not protected. [GROVE J.—Here the man yields himself up to the law.]

Our. adv. vult.

Nov. 25.—GROVE, J.—This case was tried before me at Bristol, at the last summer assize. It was an action for a reward of 200*l.*, offered in a published handbill by the defendants in the following terms:—"200*l.* Whereas, on the 26th June last, William Glover, shoddy and mungo dealer, of Ossett, absconded from Ossett, after committing various forgeries on several manufacturing firms in the West Riding of Yorkshire: Notice is hereby given that the above reward will be paid to any person or persons giving such information to Mr. W. Airton, superintendent of police, Dewsbury, or to Mr. W. Halls, superintendent of police, Wakefield, as will lead to the apprehension of the said William Glover.—West Riding Police Office, Wakefield, 27th July 1877." The plaintiff's case, on which my judgment must be founded, was shortly stated as follows:—On the 30th Nov. 1877 a person presented himself at the police office, Exeter, and on the plaintiff, the chief constable for Exeter, being sent for, the man, who was in fact Glover, said, according to the plaintiff's evidence, "You hold a warrant for me: I am wanted for forgery." The plaintiff asked his name, and who he was. He said, "You know already, and hold the warrant." Some further conversation took place. The plaintiff said he appeared out of his mind, and told him he had been drinking, and recommended him to go to an hotel. The plaintiff left him in a private room, searched the *Police Gazette*, and found the name "William Glover wanted for forgery." He got him to take off his hat, and said, "I satisfied myself, after reading the *Police Gazette*, when he took his hat off." The plaintiff then telegraphed to Mr. Airton, superintendent, at Dewsbury, "Do you hold warrant for the apprehension of William Glover for forgery? Wire back. Answer paid;" and received a telegram in return, "I still hold warrant for Glover, and should like him to be apprehended." Upon that the plaintiff apprehended and charged him, and he was ultimately convicted. For the defendants evidence was given to prove that Glover gave his name before the telegram was sent; and also that he was taken into custody before it was sent. I left these two questions to the jury, and they found that Glover was not in custody before the telegrams; but could not agree, and, after being locked up, were discharged as to the first question—counsel agreeing that they would accept the finding on the second for the purposes of the case. The point reserved and argued before me on further consideration was, whether or not the plaintiff was entitled to the reward. For the plaintiff it was argued that he was the person to be taken to have given the information leading to the apprehension, within the meaning of the handbill. For the defendants, that the criminal, Glover, had given the information himself; and, secondly, that, on grounds of public policy, the plaintiff was not entitled to the

reward. I am of opinion that the defendants are entitled to judgment. It was not contended that the mere fact of being the person who first communicated with Airton would be sufficient alone to entitle the plaintiff to succeed, supposing the information to have been given to the plaintiff by other than the criminal himself; indeed, the very able and learned counsel for the plaintiff said, in answer to me, though I do not wish and ought not to tie him to his admission, that, if Glover had given information to Airton, Airton would have been entitled to the reward. I think he could hardly have avoided such admission. Airton and Halls, it seems to me, are persons mentioned as proper to be communicated with, but if the information had been given direct to those offering the reward, and had led to the apprehension, I should consider that sufficient. The criminal himself, and not the constable, was, I think, here the person who gave the information which led to the apprehension. In *Lancaster v. Walsh* (4 M. & W. 16), where no person was named to receive the information, but the reward was to be given "on application to the defendant," Parke, B., says: "It seems to me that any communication to the constable whose duty it was to search for the offender was within the terms of the handbill, although there was no proof of a communication to the defendant himself." In the same case it is held by the same learned judge that "the party who first gave the information, and he alone, is to have the benefit." And Alderson, B., says: "Information means the communication of material facts for the first time." It appears to me that in the present case the first information given to a person authorised to act was that given by the criminal himself; and although he, on grounds of public policy, might not be entitled to the reward, still, where a constable, who may apprehend a criminal, is the mere channel of communication, and only makes inquiries for the purpose of satisfying himself, he is not the person giving the information within the true meaning of the advertisement: the apprehension is not the consequence of the constable's information, but of the criminal surrendering himself to justice. To use the words of Tindal, C.J. in *Thatcher v. England* (3 C. B. 254, 263), "the clue once found, the plaintiff in apprehending Walker did no more than his ordinary duty." It was argued that, in the case of *Thatcher v. England* (*ubi sup.*), the first information was given by the criminal, and yet the person who communicated that information was held to be the party entitled. But there the communication by the criminal was not to any one authorised to act in apprehending or procuring his apprehension, but to a person whom seemingly he considered a friend, for the purpose of borrowing money to enable him to go to London to dispose of the property stolen. The communication by the criminal there was not in the nature of information to be acted upon for the purpose of his apprehension, and, had the person to whom it was made kept the secret, would not have led to the conviction. In that case it was also held that, though the first police constable to whom the communication was made by his activity and perseverance succeeded in tracing and recovering nearly the whole of the property, and in procuring evidence to convict the thief, he was not entitled to the reward. The cases mainly relied on for the plaintiff were *England v. Davidson* (11

Ad. & E. 856), and *Smith v. Moore* (1 C. B. 438). The first of these cases bears more on the question of public policy than on the point to which I have hitherto adverted. It was there held, on demurrer, that the fact of the person giving the information being a constable did not necessarily disentitle him on the ground of want of consideration, it being his duty to discover and apprehend felons, or on grounds of public policy. In that case, the averments in the declaration were more general, viz., that the plaintiff did give such information as led to the conviction, and in the plea that the plaintiff was and is a constable of the district, and that it was his duty to give every information which might lead to the conviction, and to apprehend him. The short judgment of the court, delivered by Lord Denman, is as follows: "I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear." All that that case decides is that a constable, as such, is not disentitled to a reward of this description, or necessarily disentitled as against public policy. In *Smith v. Moore* (*ubi sup.*) the plaintiff, a police constable then temporarily suspended, apprehended a burglar, who, after his apprehension, voluntarily confessed; the constable was held entitled to the reward. There is in that case the obvious distinction from the present, that the confession was made after apprehension effected by the person claiming the reward, and who by his suspicions, and apprehending on the strength of them, had already done much, and in the judgment of the court enough to earn it. On the question of public policy I am bound by the case of *England v. Davidson* (*ubi sup.*) so far as the judgment in that case extends; and although there may be some distinction as to this point between that case and the present, yet, in deciding a case on the ground of public policy, the decision should be based on some broad principle, and one capable of general application. I am unable to see any general principle other than that argued in *England v. Davidson* (*ubi sup.*), viz., that a constable is bound by his duty, the duty of his office, to seek for criminals, and to use his utmost efforts to bring them to justice. There are strong arguments of expediency, touching the administration of justice and the interests of the State, why constables should not be allowed to receive rewards. The expectation of rewards would offer great temptation to delay an active search, by which delay the criminal might escape, or, in a case like the present, to delay taking into custody a criminal who gives himself up, so that the constable might appear to use exertions to procure complete information and for that to claim the reward. There would also be a temptation, particularly to those constables in the detective service, to look to bribes or to seek promises of reward from persons anxious to recover their property, and unless such were offered to be inert in their efforts. But, although the judgment in *England v. Davidson* (*ubi sup.*) does not enter upon these questions, I must assume they were present to the minds of the judges who decided that case. Whatever my own opinion may be, it seems to me that I cannot without over-subtle refinement apply to this case any general principle of public policy which is not involved in that case, and that

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the decision, if it is to be reviewed, must be reviewed in a court of appeal. The first point is sufficient to decide this case; and I give judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for the plaintiff, *Clarke, Rawlins, and Clarke*, for *H. D. Barton*, Exeter.

Solicitors for defendants, *Torr, Janeway, and Co.*, for *Stewart and Son*, Wakefield.

EXCHEQUER DIVISION.

Tuesday, Nov. 26, 1878.

(Before KELLY, C.B. and CLEASBY, B.)

BLAKELEY v. BAKER AND ANOTHER. (a)

Negligence — Insufficiency of fence — Excavation adjoining a highway — General Highways Act (5 & 6 Will. 4, c. 50), s. 70.

The defendant, a contractor for the construction of a railway line, made an excavation within five yards of, and fenced it off from, a highway. Plaintiff's horse, attached to a cart containing a load of a ton weight, came into contact with the fence, which gave way, and the horse was killed by the fall into the excavation.

Held, that the fence was sufficient within the requirements of sect. 70 of the General Highways Act 1835, and that there was no legal duty imposed upon the defendant to construct a fence of such strength as to withstand such a shock as that described.

CASE stated by J. W. de L. Giffard, Esq., judge of the Dewsbury County Court.

1. This was an action to recover 50*l.* damages for the loss of a horse killed through the alleged negligence of the defendants, and was tried at the County Court of Yorkshire, holden at Dewsbury on the 11th July 1878.

2. The defendants, in the month of March 1878 were engaged in constructing a branch line belonging to the Great Northern Railway which was through a portion of the borough of Dewsbury. In the necessary course of constructing the railway the defendants had made an excavation about twenty feet deep near to a public highway called Crackenedge-lane.

3. The defendants had erected a wooden fence between the excavation and the said highway. The fence was made of uprights three or four inches thick and about eight inches wide placed at irregular distances varying from five to nine feet. The cross pieces were inch floor boards (some of the materials were produced in court and shown to the jury). There was no curbing on the fence side of the road. Fourteen feet intervened between the said fence and the edge of the said excavation.

4. The said highway is on an incline; the inclination at the point opposite the excavation and for some distance further up the hill being one foot in ten, and the inclination from the fence down to the excavation is one foot in twelve.

5. On the 14th March last, two carts belonging to the plaintiff, drawn by one horse in each, and in charge of only one man, were proceeding up the hill along the said highway. The carts contained each a ton of coal, and were fastened one to the other by a chain from the back of the leading cart to the head of the horse drawing the second cart.

6. The carts had completely passed the point where the excavation had been made, and the carter and leading cart had safely proceeded about ten yards beyond it up the hill when the leading horse stumbled. In trying to recover itself it fell. The jerk of the fall caused the leading cart to strike the horse immediately following it in the mouth, and the connecting chain broke. The second horse began at once to back down the hill. The carter, who at the moment was endeavouring to raise the first horse, ran back to catch hold of the second horse by the rein, but he was unable to do so, and when about two yards from the fence he touched it with his whip. The horse swerved across the road, bringing the cart to which it was attached with its back pointing towards the fence, and as the horse was unable to resist the weight the cart came into contact with and broke through the fence, and both the horse and cart were precipitated to the bottom of the excavation. The horse was killed by the fall.

7. It was admitted that the accident would not have happened if the leading horse had not slipped and fallen.

8. It was alleged by the plaintiff's witnesses that the fence was improperly constructed, being insufficiently strong, and this was the ground upon which the defendants were sought to be made responsible.

9. At the close of the plaintiff's case it was submitted on the part of the defendants that there was no case to go to the jury, for even admitting that the fence was insufficiently strong, that fact was not the cause of the accident, the carts having safely passed the fence, and proceeded for some distance beyond it, and that further the plaintiff by his own evidence had shown that he had been guilty of contributory negligence.

10. The County Court judge refused to withdraw the case from the jury, and left the following points for their consideration: (1) If you are of opinion that the fence erected by the defendants was sufficiently strong to afford protection to the public against what, having regard to the situation and character of the ground, might reasonably be expected to happen, your verdict must be for the defendants. (2) If you are of opinion that the fence was not sufficiently strong to prevent danger, but should also be of opinion that the plaintiff in any way contributed to the accident either by not having with the carts a sufficient number of men or horses, or otherwise, then your verdict must be for the defendants. (3) If you should be of opinion that the fence was not strong enough to protect the public from danger, and that the plaintiff in no way contributed to the accident, then your verdict must be for the plaintiff, in which case it is admitted the amount must be 50*l.*

11. The jury found a verdict for the plaintiff for 50*l.* damages.

The question for the decision of the court was whether or not there was a case to go to the jury on behalf of the plaintiff. If there was a case, the verdict to stand; if there was no case, the verdict to be for the defendants.

A copy of the notes of the County Court judge were annexed to and formed part of the case. The evidence went to show that the fence was totally inadequate to meet such a shock as that to which it was subjected, and the nature of which is described in the case.

(a) Reported by A. M. TAILLOR, Esq., Barrister-at-Law.

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Cave, Q.C. (with him *Bigham*) for the appellants.—The facts are simple. All that was incumbent upon us was to intimate to the public a line of demarcation. The right to excavate where we did is undoubted. The excavation was some distance from the highway, and that being so, there was no legal necessity to erect a fence at all; and if the court is against us on this point there was no obligation on our part to erect such a fence as to withstand such an attack as this. [CLEASBY, B.—Did the excavation under the circumstances constitute a public nuisance?] If the excavation were so near the highway that a horse naturally swerving would fall into it, this would constitute it a public nuisance. [KELLY, C.B.—If your argument is correct, it goes to show that no fence was necessary at all.] At all events, no fence of such a character to withstand such a shock as the fence in question was subjected to was necessary. Assuming that there was an obligation to fence, is it necessary to fence in such a way as not only to mark the proper line of path, but also to prevent the intrusion of a thing, such as a loaded cart impelled by a horse? The respondent, moreover, was guilty of contributory negligence; the primary cause of the accident was the fall of the leading horse, and the subsequent acts of the respondent's servant hastened the catastrophe. He cited

Hardcastle v. The South Yorkshire Railway Company, 28 L. J. N. S. 139, Ex.; 4 Hurl. & N. 67;

Hounsell v. Smyth, 29 L. J. N. S. 203, C. P.; 7 C. B. N. S. 731;

Binks v. The South Yorkshire Railway and River Dun Company, 32 L. J. N. S. 26, Q. B.; 3 B. & S. 244;

Forbes for the respondent.—This is a special case, and the finding of the jury at the trial on questions of fact must be accepted, and no fresh point can now be imported by the appellants. The question of contributory negligence was distinctly and pointedly left to them by the learned County Court judge, and the verdict has distinctly negatived any suggestion on this head. By the General Highways Act (5 & 6 Will. 4, c. 50), s. 70, it is enacted "that from and after the commencement of this Act it shall not be lawful for any person to sink any pit or shaft . . . within the distance of twenty-five yards . . . from any part of any carriageway or cartway, unless such pit or shaft . . . shall be . . . behind some wall or fence sufficient to conceal or screen the same from the said carriageway or cartway, so that the same may not be dangerous to passengers, horses, or cattle, &c." [CLEASBY, B.—This is not a pit or shaft."] Surely this excavation is in the nature of "a pit," and if so, being sunk within five yards of the highway, the appellants were clearly liable (Add. on Torts, 3rd ed., pp. 163-6). Besides, this contention was never raised before the County Court judge. The Legislature could never have intended to confine the term to "coal pits" and such like shafts. My opponents are placed on the horns of an awkward dilemma. If they had intended to raise a point of law, they omitted to raise the point when before the County Court judge; and if there had been any mistake in regard to the facts they are out of court here, for they should then have moved for a new trial. The question here involved is one of fact and not of law, and it is not competent for the court to review the facts. It is submitted by the other side that the question as to the sufficiency of the fence is one of law; but

this is really always one of fact, and should be left to the jury. The jury have found their verdict after a view in court of the woodwork of this fence, and we are concluded by that verdict. He cited

Lawrence v. Jenkins, 28 L. T. Rep. N. S. 406; L. Rep. 8 Q. B. 274; 42 L. J. N. S. 147, Q. B.

Cave, Q.C. was not called upon to reply.

KELLY, C.B.—It would be an outrage on all the principles of law and justice if we were to hold in such a case as the foregoing that there was any legal duty imposed upon the appellants to construct a fence of such a degree of solidity and strength as to resist the impact of a horse and loaded cart, as described in the case. The learned judge should have directed the jury to this effect. There can be no doubt that the fence erected by the appellants was a sufficient one within the terms of sect. 70 of the General Highways Act, and some fence was necessary, as the excavation was within the limits prescribed by the section. The question should never have been submitted to the capricious finding of a jury.

CLEASBY, B.—The defendant in the action had sufficiently fenced the *locus in quo* of the excavation, and no allegation of a want of conforming on his part to the requirements of the General Highways Act of 1835 can be sustained for a moment. The position of the parties ought to have been reversed, and the appellants here should have brought their action against the respondent for the damage done to their fence.

Judgment for the defendant.

Solicitors for the appellants, *Stevens and Co.*

Solicitor for the respondent, *Ibberson, Dewsbury*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Tuesday, Nov. 26, 1878.

(Before the Right Honourable the PRESIDENT.)

GROVE v. GROVE. (a)

Appeal from decision of magistrates—Alimony—Custody of children—Matrimonial Causes Act 1878 (41 Vict. c. 19), s. 4.

THIS was the first appeal from a magistrates' decision under the 4th section of the Matrimonial Causes Act 1878 (41 Vict. c. 19).

Sect. 4 enacts:

If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of the statute twenty-fourth and twenty-fifth of Victoria, chapter one hundred, section forty-three, upon his wife, the court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty; and such order may further provide:

- (1.) That the husband shall pay to his wife such weekly sum as the court or magistrate may consider to be in accordance with his means, and with any means which the wife may have for her support, and the payment of any sum of money so ordered shall be enforceable, and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation; and the court or magistrate by whom any such order for payment of money shall be made, shall

(a) Reported by L. D. POWLES, Esq., Barrister-at-Law.

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have power from time to time to vary the same on the application of either the husband or the wife, upon proof that the means of the husband or wife have been altered in amount since the original order, or any subsequent order varying it shall have been made;

- (2.) That the legal custody of any children of the marriage under the age of ten years shall, in the discretion of the court or magistrate be given to the wife.

Provided always, that no order for payment of money by the husband, or for the custody of children by the wife, shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned; and that any order for payment of money or for the custody of children may be discharged by the court or magistrate by whom such order was made upon proof that the wife has since the making thereof been guilty of adultery; and provided also, that all orders made under this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice.

James Grove the appellant in the present case was a currier, carrying on business at Leamington, who had been convicted by the local bench on the 11th Sept. last, of an aggravated assault upon his wife, Jane Ann Grove. The magistrates had made an order under the above section of the Matrimonial Causes Act 1878 for alimony at the rate of 3*l.* a week, and giving the wife the legal custody of the only child of the marriage. The order for alimony was based upon evidence given at the hearing as to the defendant's income. The present appeal was brought by the defendant, who sought to set aside the order as to alimony on the ground that the amount awarded to the wife was excessive, that the amount fixed upon by the magistrates as a fair estimate of the defendant's annual income was against the weight of evidence. It was further sought by the appellant's counsel to introduce words into the order limiting the duration of the wife's custody of the child to the age of ten years. The words of the Act being "any children of the marriage under the age of ten years." Further application on behalf of the appellant for time to file further affidavits was refused.

Middleton, for the appellant.

Inderwick, Q.C., for the respondent.

The PRESIDENT (Sir James Hannen).—This is the first occasion on which I have had to review a decision of the magistrates under the Matrimonial Causes Act of the recent session. It would be unfortunate if it were often necessary for me to investigate decisions by magistrates under this Act, especially as it confers upon them a peculiar jurisdiction for the express purpose of cheapening proceedings. The machinery upon which I have to act in the present case is most imperfect, and it appears to me that the proper course would have been to ask the magistrates at the time for an adjournment for the purpose of producing further evidence. Even now, after he has had the opportunity of stating his case in an exact and formal manner, the appellant admits a net annual income of 235*l.*, apart from his business. In calculating the amount of profit derived from his business, it is obviously right to allow a considerable margin for the defendant's conscience, and, after making such deductions as he pleases, the defendant only says that his business does not produce 150*l.* per annum. Taking it at 140*l.*, this sum, added to 235*l.*, would make an annual income of 375*l.* It appears that he has two places of business, and that his books are kept in an irregular manner.

The magistrates (with a knowledge of the local circumstances of the case that I cannot possibly have) have come to the conclusion that his annual income is 100*l.* more than he puts it at. I must, therefore, reject his application. The order for the custody of the children will have the effect given it by the Legislature, and no other. Any change in the property of the wife will be a subject for an application to the magistrates who made the order. The appeal must be dismissed with costs.

Solicitors for the appellant, *Field and Roscoe* (for *Field*, Leamington).

Solicitors for the respondent, *Burton, Yeales, and Hart* (for *Overell and Son*, Leamington).

QUEEN'S BENCH DIVISION.

March 5 and Nov. 30, 1878.

(Before COCKBURN, C.J. and MELLOR, J.)

SMITH (app.) v. JUSTICES OF HEREFORD (resps.). (a)

Alehouse licence—Omission to use licence—Renewal—Discretion of justices—9 Geo. 4, c. 61—32 & 33 Vict. c. 27, ss. 8 and 19—35 & 36 Vict. c. 94, s. 42.

The appellant had for nine years, from a period before the passing of the Wine and Beerhouse Act 1869, held an alehouse licence under 9 Geo. 4, c. 61, in respect of his premises, but had not during that period carried on any trade in intoxicating liquors, nor had taken out any licence to do so from the Excise until the last two months of the term of his last year's licence. Upon application for renewal of his certificate, which was objected to by the police under 35 & 36 Vict. c. 94, s. 42, the licensing justices refused; and upon appeal the quarter sessions decided that this refusal was right, provided that this was not a renewal of an old licence, or that the justices had power to refuse to renew this alehouse licence upon grounds other than those mentioned in sect. 8 of the Wine and Beerhouse Act 1869.

Held, upon a case stated, that there was nothing in the circumstances of this case to prevent the appellant from applying for a renewal of his certificate; but that sect. 19 of the Wine and Beerhouse Act 1869 had no application to an alehouse licence, and that the discretion of the justices in refusing a renewal of any such licence was not limited to the grounds specified in sect. 8 of that Act.

This case was stated pursuant to the order of the court of quarter sessions for the county of Hereford, made on the 16th Oct. 1877.

The appellant has for many years owned and occupied, and now owns and occupies, premises known as the Rising Sun, in the parish of Peterstow, in the division of Harewood's End, Herefordshire.

The appellant has for many years previously to 1868 held a full licence for the sale of intoxicating liquors by retail upon the said premises.

The appellant annually (and in accordance with the statutes for the time being in force in that behalf) applied for and obtained from the licensing justices an annual licence authorising him to apply for and hold any of the excise licences which might be held by a publican for the sale by retail of intoxicating liquors on the said premises prior

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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and up to the general annual licensing session, 1877.

The appellant during the nine years from 1868 to 31st Aug. 1877, did not avail himself of the authority so granted, and did not take out any excise licence for the sale of liquor by retail, and did not in fact sell liquors upon the said premises, nor were the said house or premises during such period kept or used as an inn.

Upon the 31st Aug. 1877, the appellant duly took out all the excise licences, and paid the duty thereon rateably for the proportion of the year ending the 11th Oct. 1877, remaining unexpired, and from that time during the following month of September sold exciseable liquors upon the said premises.

The appellant, in the month of Aug. 1877, duly received from the respondents (pursuant to the 9 Geo. 4, c. 6, s. 2) notice that the general annual licensing meeting would be held on the 3rd Sept. 1877; no notice of opposition to the grant or renewal of the appellant's licence was given to or received by the appellant prior to the 3rd Sept. 1877, but formal notice in writing was served on the appellant by the respondents before the 17th Sept. 1877.

On the said 3rd Sept. 1877, at the general annual licensing meeting, when the said justices entered upon the business of granting and renewing licences, the grant or renewal of the appellant's licence for the ensuing year was objected to by the police.

The appellant was present, and was told by the chairman of the justices that his case would be taken at an adjournment of the said meeting on the 17th Sept. 1877.

On the 17th Sept. 1877 the appellant and his solicitor attended the adjourned annual licensing meeting, and applied for a grant or renewal of his licence.

The police opposed the application, and gave evidence on oath in support of all the three grounds of objection stated in the written notice which had been served upon him since the meeting of the justices on the 3rd Sept.

These three objections were (1) that there were other licensed premises near to the appellant's house; (2) that the appellant had not for nine years or thereabouts taken out or held any excise licences, or in any manner used his house and premises as licensed premises, or sold intoxicating liquors thereupon; (3) that the appellant was not a fit and proper person to hold a licence for the sale of intoxicating liquors, having been many times convicted of summary offences.

The respondent justices, after hearing the evidence, refused to grant or renew the licence.

Against such refusal of the said justices the appellant appealed to the next ensuing quarter sessions, when the court heard the evidence tendered, which was to the same effect as that given before the general annual licensing meeting, and was in substance as follows, viz.:

That the appellant had omitted up to the 31st Aug. last to take out any excise licence for the premises during the last nine years, though he had during those nine years annually obtained the justices' certificate; and also secondly, that the premises in question during that time had not been kept as an inn; and, thirdly, that there were several other licensed houses within a short distance of the appellant's house, and that the district

was a rural one with a small population, and that there were five such public-houses within two miles, of which two were within one mile of the appellant's house.

The said court of quarter sessions was of opinion that the facts did not disclose any grounds for refusing the licence upon the ground of the appellant's character, but considered that the respondent justices in this appeal had the right to refuse the licence, and accordingly dismissed the appeal with costs subject to this case.

The question for the opinion of the court was whether, in view of the interval of time above mentioned during which no excise licence had been taken out by the said appellant, and throughout which years the appellant had never served the public with intoxicating liquor, this was in law an application to the magistrates for the renewal of a licence, or an application for the grant of a new licence.

If the court should be of opinion that this was in law an application for a renewal of a licence, then the order of the court of quarter sessions was to be quashed, the licence was to be renewed, and the appeal to be allowed with costs.

If the court should be of opinion that this was in law an application for a new licence then the order of the court of quarter sessions was to be affirmed.

March 5.—*T. S. Pritchard* argued for the respondents in support of the judgment of the quarter sessions. Although the question asked is whether this was the renewal of an old licence or the grant of a new one, it matters not what may be the answer, because the licensing justices have full discretion to refuse either a new grant or a renewal of an alehouse licence under 9 Geo. 4, c. 61. [COCKBURN, C.J.—It does not appear that the refusal to renew this licence, if it be not a new one, would be the result of the justices' discretion.] The case then must go back to the justices, if this be not a new licence; but there are authorities which tend to show that, under the circumstances, the appellant could obtain only a new licence:

Hargreaves v. Dawson, 24 L. T. Rep. N. S. 420;
Reg. v. Justices of Lancashire, L. Rep. 6 Q. B. 97;
Reg. v. Curson, L. Rep. 8 Q. B. 400;
Ex parte Tarbath, 31 L. T. Rep. 513.

A. T. Lawrence for the appellant.—The only question asked is whether this would be a renewal of an old licence if the justices granted the appellant's application. In that case they would have no discretion to refuse, except upon the grounds mentioned in the 8th section of the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27). By sect. 19 of that Act, where a licence is in force on the 1st May 1869, with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, a certificate cannot be refused on any other ground. This licence was in force on that day. [COCKBURN, C.J.—But it was not a mere licence for the sale of beer, cider, and wine.] The appellant was a licensed person under the Act, and had a vested interest, of which he could not be deprived, except upon some ground provided by the statutes. [COCKBURN, C.J.—Sect. 42 of the Licensing Act 1872 (35 & 36 Vict. c. 94) deals with renewals, and concludes, "Subject as aforesaid, licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore." Renewals of these alehouse licences

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were previously in the unlimited direction of the justices, and this section says nothing about them.] That section imports all conditions as to renewals which are contained in the previous Acts; and amongst them we find, in sect. 19 of the Act of 1869, that no old licences are to be discontinued except upon specified grounds. This, although a larger licence than those expressly mentioned in that section, includes liberty to sell by retail, beer, cider, and wine to be consumed on the premises. This 19th section therefore must surely have been meant to apply to an alehouse licence, as well as to more limited licences.

COCKBURN, C.J.—We think that this case is ambiguously stated, and it is difficult to know what is meant to be asked. All we can do is to state what the justices were authorised to do. It is clear from the 42nd section of the Licensing Act 1872, that the justices have the same discretion to refuse the renewal of a licence as they had before that Act. If this had been a certificate for a beer-house, then, according to the 19th section of the 32 & 33 Vict. c. 27, the justices would have had to confine their refusal to certain grounds there specified. But this was the case of the general licence authorised by the Act 9 Geo. 4, c. 61, and the qualifications of the Wine and Beerhouse Act do not apply. According to the 9 Geo. 4, c. 61, the justices had the same discretion to refuse a renewal as they had to refuse a grant of a new licence. The justices seem therefore to have missed the real point of the case, which was whether they had this discretion, and they need not have troubled this court with the irrelevant questions they seem to have put. All we can do is to remit the case with our opinion that the justices had a discretion in the matter.

MELLOR, J.—I object altogether to this mode of stating a case for the opinion of this court, and would have been disposed to remit the case that it might be restated. I have great difficulty in finding out what was the real question the quarter sessions wanted us to decide. I agree with the Lord Chief Justice that our best course is to remit the case with our opinion that the justices had a discretion in dealing with the application, and that they should deal with the case as if no case had been stated.

COCKBURN, C.J.—At the same time we may say that we think that this was the case of an application for a renewal of the licence—not for a new licence.

Nov. 30.—The justices at quarter sessions found, in obedience to the order of the court, that the respondent justices had rightly exercised their discretion in refusing the renewal of the appellant's certificate.

COCKBURN, C.J. and MELLOR, J., upon application of counsel, refused to hear any further argument, and directed judgment for the respondents.

Solicitors for appellant, *White and Son*, for *Garrold*, Hereford.

Solicitor for respondents, *Thomas Fortune*, for *Minett, Son*, and *Piddocke*, Ross.

Monday, Nov. 11, 1878.

(Before COCKBURN, C.J. and MELLOR, J.)

REG. v. LEE. (a)

District church—Metropolis—Incumbent—Dangerous structure—Owner—58 Geo. 3, c. 45, ss. 70 and 71—18 & 19 Vict. c. 122, ss. 3 and 30, and Part II.

The defendant was incumbent of a district church in the metropolis, built under the provisions of the Church Building Act 1818, by which repairs of the churches are to be made by rates in the districts, in like manner as in cases of repairs of churches by parishes. Part of the tower fell upon a passer-by, and the tower was duly repaired by the Metropolitan Board of Works, in pursuance of Part 2 of the Metropolitan Building Act 1855 concerning dangerous structures. A stipendiary magistrate refused to grant a warrant of distress for the cost of these repairs upon the incumbent.

Held, upon a rule for mandamus, that the incumbent, not being in the receipt of rent or profits from the church, was not the "owner" within the meaning of the Act; and that he was not therefore liable for these repairs.

THIS was a rule nisi, obtained at the instance of the Metropolitan Board of Works, calling upon the Rev. F. G. Lee, D.D., incumbent of All Saints Church, Lower Marsh, Lambeth, and also calling upon one of the metropolitan police magistrates, to show cause why a mandamus should not issue to the said magistrate commanding him to issue a distress warrant against the said F. G. Lee for the recovery of 105*l.* 19*s.* 5*d.* and 2*s.* costs, incurred by the said board in repairing the tower of his church.

This church was built in 1847 under the provisions of the Church Building Act 1818 (58 Geo. 3, c. 45), by sect. 70 of which it is enacted:

That the repairs of all such district churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the district, in like manner as in case of repairs of churches by parishes; and every such district shall be deemed in law a separate and distinct parish for that purpose, and the repairs of all chapels not made district churches shall be made by the parish in or for which the chapels shall be built.

By sect. 71,

Each district shall for ever hereafter, i.e., after twenty years from the consecration of the district church, make, raise, levy, collect, and apply separate and distinct rates for the repairs of the church or churches or chapels of the district as if a separate parish.

The defendant had been called upon by the board to repair the tower of his church, a passer-by having, in May 1876, been injured by the fall of part of it. It had been duly certified by the board surveyor to be in a dangerous state. The defendant denied his liability, and the board executed the necessary work themselves.

A stipendiary magistrate had made an order for payment upon the defendant as owner, but another stipendiary magistrate had refused to make the order to levy the expenses of the work which the board applied for, and the court had discharged a rule nisi under 11 & 12 Vict. c. 44, s. 5 to compel the latter to do so; but, on the 1st Aug. 1878, they granted this rule nisi for a mandamus, in order, if necessary and desirable, to raise the question on appeal.

The defendant had been admitted as incum-

(a) Reported by M. W. McKILLAR, Esq., Barrister-at-Law.

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bent of this district in 1867, before the abolition of church rates by 31 & 32 Vict. c. 109; in him was vested the freehold of the church, and he was entitled, besides his stipend, to surplice fees and pew rents. The pew rents, however, had been foregone by his predecessor, and he had not received any.

By the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122) s. 3:

"Public building" shall mean every building used as a church, chapel, or other place of public worship.

"Owner" shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement, other than as a tenant from year to year or for any less term, or a tenant at will.

By sect. 30:

Every public building shall, throughout this Act be deemed to be included in the term building and be subject to all the provisions of this Act, in the same manner as if it were a building erected for a purpose other than a public purpose.

By sect. 69:

Whenever it is made known to the commissioners hereinafter named that any structure (including in such expression any building, wall, or other structure, and anything affixed to or projecting from any building, wall, or other structure) is in a dangerous state, such commissioners shall require a survey of such structure to be made by the district surveyor, or by some other competent surveyor, and it shall also be the duty of the district surveyor to make known to the said commissioners any information he may receive with respect to any structure being in such state as aforesaid.

By sect. 71:

Upon the completion of his survey, the surveyor employed shall certify to the said commissioners his opinion as to the state of any such structure as aforesaid.

By sect. 72:

If such certificate is to the effect that such structure is not in a dangerous state, no further proceedings shall be had in respect thereof, but if it is to the effect that the same is in a dangerous state, the commissioners shall cause the same to be shored up, or otherwise secured, and a proper board or fence to be put up for the protection of passengers, and shall cause notice in writing to be given to the owner or occupier of such structure, requiring him forthwith to take down, secure, or repair the same, as the case requires.

By sect. 73:

If the owner or occupier, to whom notice is given as last aforesaid, fails to comply, as speedily as the nature of the case permits, with the requisition of such notice, the said commissioners may make complaint thereof before a justice of the peace; and it shall be lawful for such justice to order the owner, or on his default, the occupier, of any such structure to take down, repair, or otherwise secure, to the satisfaction of the surveyor who made such survey as aforesaid, or of such other surveyor as the said commissioners may appoint, such structure or such part thereof as appears to him to be in a dangerous state, within a time to be fixed by such justice; and in case the same is not taken down, repaired, or otherwise secured within the time so limited, the said commissioners may, with all convenient speed, cause all, or so much of such structure as is in a dangerous condition, to be taken down, repaired, or otherwise secured, in such manner as may be requisite; and all expenses incurred by the said commissioners in respect of any dangerous structure, by virtue of the second part of this Act, shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs.

By sect. 74:

If such owner cannot be found, or if, on demand, he refuses or neglects to pay the aforesaid expenses, the said commissioners, after giving three months' notice of their intention to do so, by posting a printed or written

notice in a conspicuous place on the structure in respect of which, or of part of which, they have incurred expense, or on the land whereon it stands, may sell such structure and they shall, after deducting from the proceeds of such sale the amount of all expenses incurred by them, restore the surplus (if any) to the owner.

The defendant showed cause in person.—Although the interpretation clause of the Metropolitan Building Act 1855 applies the words "public building" to a church for some purposes, yet it cannot be contended that the Board of Works can sell a church under sect. 74, and hand over the surplus to the incumbent. It does not follow, therefore, upon the interpretation clause that the second part of the Act concerning dangerous structures in any way applies to churches. And even if it does so apply, the incumbent is not in any sense the owner of a church: in this case he receives no rents nor profits, his stipend (which was said to be very small) does not depend upon it, he had no power without a faculty to interfere with the structure, and, since the abolition of church rates, he has no means of obtaining funds to meet this claim.

F. M. White, Q.C. and *Biron* supported the rule.—The terms of the Act are explicit, and if this liability does not fall upon the defendant, all churches, whose structure becomes dangerous, must be repaired at the cost of the general rates of the metropolis. Clearly, before the abolition of church rates, the parishioners would have been compelled to make good the cost of these repairs (*Gosling v. Veley*, 4 H. of L. Cas. 679); and now it rests upon the incumbent to obtain voluntary contributions for the same purposes. He is, within the definition, the owner of the structure; absolute beneficial ownership is not necessary (*Bowditch v. Wakefield Local Board*, L. Rep. 6 Q. B. 567); the Ecclesiastical Commissioners are not the owners (*Angell v. Paddington Vestry*, L. Rep. 3 Q. B. 714); and by 8 & 9 Vict. c. 70, the freehold of the church is vested in the defendant.

COCKBURN, C.J.—I am of opinion that this rule must be discharged; not on the ground that a church is not a "building" within the Act, because sect. 3 declares that "public building shall mean every building used as a church, chapel, or other place of public worship;" but on the ground that there is another question, namely, whether the defendant is the "owner" of a building within the meaning of the term owner in the statute; and I cannot bring my mind to the conclusion that he is. At the time the statute was passed it was generally believed, not only that the parishioners were liable to be rated for the maintenance of the fabric of the church of the parish, but that there was a machinery by which they might assess themselves. But it turned out that the machinery was ineffectual, and consequently church rates were no longer levied. It cannot be intended that the burden of repairing the fabric of the church, in which the clergyman has only a life interest at most, and in which the parishioners have quite as great an interest as he, should fall on the incumbent and not on the parishioners. If this were intended by the Legislature it would be said in express terms, but it is not said. The Legislature, no doubt, intended to bring churches under the Metropolitan Board of Works in this Act, by classing them among public buildings, for the safety of which

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the board were enabled to take certain measures in the interests of the public, and they thought there would be no difficulty in carrying this out. But when they come to give further explanation of what is meant by the term "owner," then they make it clear that an incumbent is not such a person as is intended by owner, or made as such liable to defray the costs of repair. An owner is a person who gets the rents of the premises. Tried by this test the defendant is not the owner. Then is he in occupation of the building? Not more so than the parishioners who go to the church. The sections, therefore, of the Act itself, sects. 69 to 74 inclusive, clearly show, in my opinion, that the clergyman cannot be considered as owner or occupier of the church. And then there is this consideration staring one in the face, that to hold this gentleman liable for the repairs of this church would be a flagrant injustice. Such it would be to turn round on the clergyman to fix him with this liability, simply because the old machinery has failed and the parishioners will not assess themselves; and we ought not to strain the terms of the Act to bring him within them, when he is not expressly within them, and when it was never intended that he should be. I do not look at the circumstances of the case dwelt on by the defendant, that it is a poor living; for it might be a rich one, and the question would be just the same; but I decide the case on the ground that it certainly was not in contemplation, when the Act was passed, that the clergyman instead of the parishioners should repair the fabric of the church. I do not find anything in the statute which compels me to hold the defendant liable, and the rule for a *mandamus* must be discharged.

MELLOR, J.—I am of the same opinion. I also beg to say that I do not base my opinion on the circumstances stated by the defendant as to his resources and means. But they affect me to this extent, that I must see my way very clearly before I concur in a judgment which would compel a distress to be made upon the defendant's goods. Looking, therefore, to see if the words of the Act are express, I find in sect. 3, "Public building shall mean every building used as a church, chapel, or other place of public worship." Now this *prima facie* includes all churches no doubt, but then I am not satisfied that the defendant is the "owner" of the church within the definition of owner given in the interpretation section. In that I read that "owner" is to apply to every person in possession or receipt of the whole or of any part of the rents or profits of any land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will. And it appears to me that the defendant does not satisfy any of those words; while looking at the other clauses as to remedies provided in the case of dangerous structures, especially to sect. 73, I cannot help thinking that it would be a very strong thing to hold that the defendant, who could not obey the directions given in that sect. 73, is yet liable to be proceeded against by distress, and that the case is so clearly made out against him that I am obliged to make this rule absolute. I quite agree that in former times the parishioners could be compelled to repair the fabric by means of excommunication and other spiritual censures which are no longer available. This machinery having failed, and church rates, except as voluntary

offerings, having been abolished, it is, I think, an additional reason why, unless absolutely compelled to say that this is within the Act, I should not hold the clergyman to be liable as owner. On all these grounds, thinking that the case is not sufficiently brought within the express meaning of the statute, I decline to be a party to making the rule absolute for a *mandamus*.

Rule discharged with costs.

Solicitor for the Board of Works, B. Ward.

Monday, Dec. 9, 1878.

(Before MELLOR and MANISTY, JJ.)

Ex parte THE UNITED PATRIOTS' NATIONAL BENEFIT SOCIETY; *Re* HOLT. (a)

Friendly society—Summary jurisdiction—Disputes to be settled by arbitration—38 & 39 Vict. c. 60, ss. 22, 30.

A friendly society which did not receive contributions by means of collectors at a greater distance than ten miles from its registered office, had provided by its rules for the settlement of disputes by arbitration.

Held, that, notwithstanding sect. 22 of the Friendly Societies Act 1875, the summary jurisdiction created by sect. 30, sub-sect. 10, applied to a disputed claim by the personal representative of a deceased member.

THIS was a motion by way of appeal against a refusal of Field J. to grant a prohibition to restrain further proceedings upon an order made by a stipendiary magistrate of Birmingham.

Alfred Holt, the applicant to the magistrate, was the personal representative of Thomas Holt, a deceased member of a friendly society, called the United Patriots' National Benefit Society. The application was for an order of payment upon the society for 14*l.*, the funeral allowance due upon Thomas Holt's death, according to his contributions, and the society's tables, but the claim for which was resisted by the society.

The 34th of the society's rules provided that all disputes arising between the society and the members or persons claiming through members, should be determined by arbitration in the manner therein described. The society did not receive contributions by means of collectors at a greater distance than ten miles from the registered office of the society.

By sect. 4 of the Friendly Societies Act 1875 (38 & 39 Vict. c. 60):

"Industrial assurance company" means any company as defined by the Life Assurance Companies Act 1870, which grants assurances on any one life for a less sum than 20*l.*, and which receives premiums or contributions in Great Britain or Ireland by means of collectors at less periodical intervals than two months.

By sect. 22:

Every dispute between a member or person claiming through a member, or under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction; and application for the enforcement thereof may be made to the County Court.

By sect. 30:

The provisions of the present section apply only to friendly societies, and except as after-mentioned indus-

(a) Reported by M. W. MCKELLAR, Esq., Barrister-at-Law.

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trial assurance companies receiving contributions by means of collectors at a greater distance than ten miles from the registered office of the society.

Sub-sect. (1) requires a society to deliver copies of rules and policies to members.

Sub-sect. (8) requires a society to keep open for inspection its balance-sheet.

Sub-sect. (9) requires a society to have its annual returns certified by an accountant.

By sub-sect. (10) :

In all disputes between a society and any member of person insured, or any person claiming through a member or person insured, or under the rules, such member or person may, notwithstanding any provisions of the rules of such society to the contrary, apply to the County Court, or to the court of summary jurisdiction for the place where such member or other person resides, and such court may settle such dispute in manner herein provided.

By sub-sect. (13) :

All the provisions of the present section apply to societies existing at the commencement of this Act, and shall be contained in the rules of all future societies to which this section applies ; and any act or omission which by virtue of this and any other section of this Act would be an offence on the part of the registered society shall be an offence on the part of any other society to which this Act applies, and of any officer of such society bound to fulfil the duty (if any), whereof such offence is a breach. The word "society" in the present section shall, except in provisions one, eight, and nine, include all industrial assurance companies, but nothing in the present section contained shall apply to any assurance with any such company, the premiums in respect of which are receivable at greater periodical intervals than two months.

The order applied for having been made, the society took out a summons before Field, J. to prohibit the magistrate, on the ground that he had no jurisdiction. The society now appealed against the dismissal of this summons.

Charles, Q.C. and *Austin* argued for the society. —This is admittedly a friendly, and not an industrial society ; but the application of sect. 30 is limited only to societies of either kind which receive contributions by means of collectors at a greater distance than ten miles from the registered office of the society. The words of limitation cannot relate only to industrial assurance companies, for such a construction would deprive all friendly societies of the power of enforcing their rules concerning the settlement of disputes. Sect. 22 applies to this claim, and the magistrate has no power to interfere.

Wood Hill for the claimant.—If the 13th sub-section be read with the introductory words of this sect. 30, it will be seen that the limitation of application relates only to industrial and not to friendly societies. Sub-sect. 10 is expressly rendered applicable to industrial assurance companies, wherever they receive contributions ; it never could have been intended to deprive members of friendly societies of the same remedies in disputes as are given to other similar societies. This, too, is the natural interpretation of the words at the beginning of the section.

Charles, Q.C. in reply.

Mellor, J.—I have been very much perplexed by the various provisions of this Act, which are apparently inconsistent with one another ; but, on the whole, I have come to the conclusion that the construction contended for by the person claiming this money is right. I cannot help thinking that sect. 30 intends that all friendly societies should be within sub-sect. 10, and that certain indus-

trial societies, but not all, should also be within it. That being so, the intention was that persons having questions with such societies should have recourse to the summary jurisdiction provided in sub-sect. 10 for their settlement. This seems to have been the view of my brother Field at chambers, and I think this application, to reverse his order, must be dismissed.

Manisty, J.—I am of the same opinion. I think that the decision of my brother Field should be affirmed. Looking at the interpretation clause in sect. 4, I think it appears that the Legislature had in mind two sets of societies, and it will be observed that part of the definition of an industrial assurance company is, that it is one which receives premiums or contributions by means of collectors, while a friendly society is spoken of in other parts as supported by voluntary subscriptions. Now the word subscription is not found in sect. 30. Then the general provisions which occur throughout the Act must be read subject to any limiting enactments having reference to the particular class of society. The general rule in sect. 22 is thus, as I think, qualified by the words in sect. 30. That sect. 30 was intended to qualify something must be conceded, and the only question really is, to what extent it qualifies sect. 22. If it be read in the ordinary grammatical sense of the word, friendly societies generally seem to be within the section ; had the intention been to convey a different meaning, the draughtsman would, I think, probably have worded it thus : "The provisions of this present section apply only to friendly societies receiving contributions by means of collectors at a greater distance than ten miles from the registered office of the society, and, except as after mentioned, to industrial assurance companies receiving contributions in like manner." Tried, therefore, by this test, the words of the section as it stands are inapt for the construction sought to be placed upon them by the appellants, and I think that the other construction, which accords with the form of the language, is not unreasonable, and expresses the intention in limitation of the general rule to confer on friendly societies and their members the option of resorting to a court of summary jurisdiction for the settlement of disputes. The clause "except as after mentioned," may, I think, be satisfied by the words at the end of sub-sect. 13, but it is not necessary in the present case to decide that point ; for I agree in thinking that there was no ground for prohibiting the magistrate here, as having acted without jurisdiction over this friendly society.

Appeal dismissed.

Solicitor for appellants, the society, *J. King*.

Solicitor for respondent, *James Neal*, for *J. Hemmant*, Birmingham.

Thursday, Dec. 3, 1878.

(Before *Mellor* and *Manisty, JJ.*)

THE LEICESTER WATERWORKS COMPANY v. THE ASSESSMENT COMMITTEE OF THE BARROW-ON-SOAR UNION AND NUTTALL AND SHEFFIELD. (a)

Poor law—Assessment committee—Appeal against valuation—Reference to arbitration—Action for costs—Committee not liable—25 & 26 Vict. c. 103, ss. 1, 2, 28.

An assessment committee cannot be sued for any

(a) Reported by *A. H. Potter, Esq., Barrister-at-Law.*

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expenses incurred by it when acting in accordance with its statutory powers, as it is merely a select body of the guardians acting for and on behalf of the whole board, and the board alone has power to administer the funds of the union.

In 1871 and 1872 certain appeals had been brought by the plaintiffs against rates made upon the assessment of their works. The assessment committee, in the name of the guardians, appeared as respondents to such appeals. Whilst the appeals were pending it was agreed between the plaintiffs and the assessment committee that the appeals should be respited, and the valuation settled by arbitration. An agreement to this effect was entered into and signed by N., the chairman of the assessment committee, "for and on behalf of the committee," of which S. was the vice-chairman. The costs of the proceedings were left in the discretion of the arbitrator. The award was in favour of the plaintiffs, and the costs were ordered to be paid by "the other party." The plaintiffs had been compelled, in the first instance, to pay the costs in order to take up the award. They now claimed to recover the costs so paid from the respective defendants.

Held, that the defendants were not liable, as they merely acted on behalf of the guardians, who were "the other party" to the reference.

Held, also, that a reference to arbitration did not come within sect. 20 of 25 & 26 Vict. c. 103.

SPECIAL CASE.

This was a case stated for the opinion of the court as follows:—

1. The plaintiffs are a company having powers to supply water to Leicester and other places.

2. In the year 1872 the guardians of Barrow-on-Soar Union, under and in pursuance of the statute 25 & 26 Vict. c. 103, s. 2, duly appointed an assessment committee for that union. Such committee consisted of twelve members. The defendant William Nuttall was a member of such assessment committee so appointed in 1872, and was the chairman of such committee, and the defendant John Sheffield was also a member of such committee in the year 1872.

3. In 1871 and 1872 certain appeals had been brought by the plaintiffs, and were all pending, against rates made upon the assessment of the plaintiffs' works in and passing through several parishes in the Barrow-on-Soar Union. The guardians of the said union duly gave their consent to the assessment committee to appear and defend such appeals, and thereupon the said assessment committee for the year 1872, in pursuance of 27 & 28 Vict. c. 39, s. 2, appeared in the name of the said guardians as respondents to such appeals.

4. While such appeals were pending the following memorandum was made and signed, namely:

Leicester Waterworks Company's Office.

8th June 1872.

At a meeting of the committee of directors of the Leicester Waterworks Company and the Assessment Committee of the Barrow-upon-Soar Union, comprising Messieurs Ellis, chairman, Harris, vice-chairman, and Hodges on behalf of the directors of the Waterworks Company, and Messieurs William Nuttall, chairman, Sheffield, vice-chairman, Thomas Nuttall, Camm, Matte, Wright, Cuffling, Cocks, on the part of the guardians of such union, it was unanimously agreed that all questions in relation to the rating of the above-named company's works and mains comprised in and passing

through the several parishes of the said union be submitted to Mr. Thomas Hawksley on the part of the Waterworks Company, and to Mr. Corbett on behalf of the said guardians, with a view to their adjusting the same, and in case of their failing so to do with power to appoint an umpire, whose decision shall be final. This arrangement is subject to confirmation by the board of directors of the said waterworks company. That pending these negotiations the appeals entered by the waterworks company against the said rating, if necessary, be further respited, and in case it should be ultimately necessary to proceed with such appeals, no further notices thereof shall be required, nor any objection taken for want of form or otherwise, it being understood that the notices of appeal shall be taken as applying to the present assessment.

E. S. ELLIS, on behalf of the directors of the Leicester Waterworks Company.
To Mr. Nuttall, on behalf of the Assessment Committee of the Barrow-on-Soar Union.

5. On this arrangement being confirmed, an agreement of submission was drawn up, and was, with the consent of the said guardians of the Barrow-upon-Soar Union, signed for and on behalf of the assessment committee of the said union by the defendant William Nuttall as chairman for and on behalf of the assessment committee for the year 1872. Such agreement was headed,

Memorandum of an agreement made and entered into this 29th day of June 1872 between the Leicester Waterworks Company of the one part, and the assessment committee of the Barrow-upon-Soar Union in the county of Leicester, for and on behalf of the board of guardians of such union, of the other part.

And after stating the questions at issue, and the powers to be exercised by the umpire, provided that

The costs of all parties connected with the preparation of this agreement and of the reference hereby agreed upon, and of the certificate or award to be made by the said arbitrators or umpire, shall be in the discretion of the said arbitrators or umpire who, shall also decide and give directions as to the making of such alterations (if any) as shall by the decision of the said arbitrators or umpire be rendered necessary to be made in the amount at which the said Leicester Waterworks Company have been or may be assessed in respect of all rates laid by the overseers of any parish within the said union upon the works of the said Leicester Waterworks Company before the making of the certificate or award of the said arbitrators or umpire, and also as to the sum or sums of money (if any) to be repaid or allowed to the said Leicester Waterworks Company by the overseers of any such parish in respect of any rate which has been or may be paid by the said Leicester Waterworks Company, and in which the assessment of the works of the said Leicester Waterworks Company shall be in excess of the amount at which the same shall be severally assessed by the said arbitrators or umpire.

6. No judge's order, or order of sessions, was applied for or obtained by either party ordering or authorising such reference.

7. After determining the question of the assessment the umpire's award continued as follows:—"Now I do hereby further award and determine that the said company be repaid by the overseers of the said respective parishes out of the next effective rate or rates for the said parishes respectively, the differences between the rates as assessed upon the amounts so above awarded by me, and the rates as assessed upon amounts of rateable value so respectively entered in the rate books." "And I further award, determine, and direct that the costs of the said company connected with the preparation of the said agreement of reference, and of the reference, and of this my award be borne and paid by the other party to the said agreement of reference; and that if the said company shall have paid any of such costs, the same shall be repaid

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to them by the said other party to the said agreement."

8. While negotiations were pending, and while the appeals were pending, poor rates were continuously being laid by the several parishes, and the plaintiffs' property assessed in respect of the same. But for the agreement in the 4th paragraph mentioned the plaintiffs would have had to appeal against each rate, both to the assessment committee and to the quarter sessions. Each appeal to the quarter sessions would have had to be respited from time to time until a decision was finally arrived at, and very large expenses would have been thereby incurred both by the plaintiffs and the defendants.

9. The umpire duly advised the solicitors to both parties on the 2nd Feb. 1874 that the award was ready, and accordingly the plaintiffs on the 4th Feb. 1874, paid the sum of 372*l.* 18*s.* 9*d.* for the umpire's charges. The award was not then formally completed, but was returned for completion, and completed on the 7th Feb. 1874.

10. Mr. Goode, who at that time was and still is solicitor both to the Barrow-on-Soar Union and to the assessment committee for the time being of such union, on the 5th day of February 1874 wrote and sent a letter to the plaintiffs' solicitor, which was received on the 6th day of February, 1874, and was as follows :

Barrow-upon-Soar Union.

Day of Fortnightly Meeting, Tuesday.

WILLIAM WHITE GOODE, Clerk to the Union.

Loughborough, 5th Feb. 1874.

Leicester Waterworks Company.

Dear Sir,—I have received a letter from Trollope and Winckworth that this award is ready on payment of the fees, viz., £372 18*s.* 9*d.*, which please take up for the appellants, on behalf of respondents I cannot.

Yours truly,

(Signed) WM. WHITE GOODE.

J. B. Haxby, Esq., Solicitor, Leicester.

11. A copy of the award was sent by the plaintiffs' solicitor to Mr. Goode on the 12th day of Feb. 1874, with a letter, of which the following is a copy :

11, Belvoir-street, Leicester,

February 12th, 1874.

Leicester Waterworks Company and the Assessment Committee of the Barrow-upon-Soar Union.

I beg herewith to send you in your official capacity of Clerk to the Assessment Committee an examined copy of the award of Mr. Hunt. I have paid the sum of 372*l.* 18*s.* 9*d.* on taking up this award, which amount I find is ordered to be paid by your clients, the respondents, and of which I have to require repayment from them at once. As soon as the next quarter sessions are over, and the order of sessions made upon the several appeals in accordance with the decision set out in the award, I will send you my bill of costs, which has also to be discharged by your clients. In the mean time I shall be glad to hear from you with cheques for the amounts ordered by the award to be repaid by the several parishes to the appellants in respect of the amounts for rates paid by them to such parishes under protest pending the decision in this case, and which amounts are set out in the award.

I am, dear Sir, yours truly,

(Signed) JOS. B. HAXBY.

W. W. Goode, Esq.

The repayment not being made to the plaintiffs as requested, the award was, on the application of the plaintiffs, made a rule of court on the 21st Nov. 1874, and a copy of such rule and of plaintiffs' costs was duly served on Mr. Goode on the 16th Jan. 1875.

12. The plaintiffs' costs in the matter of the reference were taxed at 26*l.* 2*s.* 2*d.*, and a letter

was sent on the 19th June 1875 to Mr. Goode, informing him thereof, and requesting payment.

13. The award has been acted upon by both parties, and the terms of it carried out so far as relates to the altering of the several valuations, and to the refunding of the various rates overpaid under protest by the plaintiffs. The award was by consent taken as the basis of settlement of the rateable value by the court of quarter sessions on the hearing of the appeals.

14. The Barrow-on-Soar Union duly, and in pursuance of the statute in that behalf, appointed an assessment committee in and for each of the years 1873, 1874, 1875, and 1876. In each of these years the assessment committee was differently constituted. The defendant William Nuttall was a member of such committee in each of the above years. He is no longer a member of the said committee, or of the said board of guardians. The defendant Sheffield was a member of such committee in the year 1872.

15. The assessment committee in all their proceedings with reference to the rates, appeal, and arbitration, were acting by and with the consent and approval of the guardians of the said union.

16. In an interview between the solicitors to the plaintiffs and defendants, it was arranged that the latter should take the opinion of the Local Government Board as to the defendants repaying the amount paid by the plaintiffs for the umpire's costs. Application was made for repayment by the defendants on the 10th June 1875. On the 16th Nov. 1875 a letter was sent to Mr. Goode demanding payment of the sum of 399*l.* 7*s.* 11*d.* due under Mr. Hunt's award for costs, and on the same day a letter to the same effect was sent to Mr. Nuttall. The following reply was received from Mr. Nuttall, namely :

South Croxton,

Nov. 25th, 1875.

Dear Sir,—I beg to acknowledge the receipt of your letter of the 16th inst., with regard to the payment of costs due to the Leicester Waterworks Company from the Barrow-upon-Soar Union under an award of Mr. Hunt. I laid the case before the board on Tuesday last, and it seems there is a difficulty about the payment of them, so we instructed Mr. Goode to write to the Local Government Board in London for their advice about the matter. So I hope no steps will be taken pending their answer. I am, Sir, yours truly,

(Signed) WILLIAM NUTTALL.

To J. B. Haxby, Esq.

In consequence of this request the plaintiffs did not then enforce payment for the sums for which this action is brought. The defendants however did not apply to the Poor Law Board for any extension of time for payment, and in consequence thereof no extension of time was made. These repeated applications not having been complied with, and repayment being still withheld, the writ in this action was issued on the 17th Feb. 1876. No order has been made by the Local Government Board extending the time for payment of the plaintiffs' claim.

17. No notice of action was given previously to the commencement of this action.

18. The plaintiffs have not been repaid any part of the amount so paid by them for the umpire's costs, nor have they been paid any part of their own taxed costs.

19. The plaintiffs have been put to other costs

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in consequence of the award not having been fully carried out with regard to the repayment of rates and in respect of other proceedings consequent thereon.

The questions for the opinion of the court are, First, whether under the above circumstances the defendants on the record of this action, some or one of them, are liable to repay to the plaintiffs the amount paid on taking up the award?

Secondly, whether the defendants on the record, some or one of them, are liable to pay the plaintiffs the amount of their taxed costs in connection with the reference?

Thirdly, whether the plaintiffs can recover from the defendants on the record, some or one of them, any damages under the circumstances hereinbefore stated? Such damages, if recoverable, to be settled by arbitration.

Merewether, Q.C. and Sills for the plaintiffs.—The assessment committee are liable for these costs, and this action is maintainable. They have entered into an agreement for arbitration, and they enjoy the fruits of that arbitration. But by one of the terms of the award they must pay the costs. They cannot avail themselves of one part of the award and reject the rest. The result of appointing an arbitrator was exactly the same as if they had employed an individual valuer. The 20th and 26th sections of 25 & 26 Vict. c. 103 give them expressly such a power, and by the 37th section of the same Act they may provide for the expenses they incur. It was unnecessary to have the authority of the guardians for taking this step, their consent and approval was all that was necessary. The guardians are not liable for this payment; the assessment committee is the sole intermediary between the creditor and the various parishes, and no doubt the parishes are ultimately liable: (27 & 28 Vict. c. 39.) The provision of 22 & 23 Vict. c. 49, which limits the time in which an action may be brought against guardians, is not applicable to this case, as it is clear from the correspondence that the defendants are alone responsible for the delay that has occurred. Moreover, if the assessment committee is not liable as a body or *quasi* corporation, they are liable individually for what they have done. At all events Nuttall and Sheffield are bound by their signatures:

Cherry v. The Bank of Australasia, 21 L. T. Rep. 866; L. Rep. 3 P. C. 24;

Bottomley v. Fisher, 11 H. & C. 21; 6 L. T. Rep. 688;

They also cited

Kirby v. Banister, 5 B. & Ad. 1069.

Marshall Griffith, Q.C. for the assessment committee.—It is impossible to sue the assessment committee *qua* committee. They are not a corporation, nor yet a *quasi* corporation. If the committee contracted at all they did so as the agents of the guardians; there is no case on record where any assessment committee has ever been treated as defendants, and the reason for that probably is that they are a fluctuating body changing from year to year. They have, moreover, no funds under their control from which they could pay these expenses. In 27 & 28 Vict. c. 39, which deals with expenditure of this kind, the assessment committee is never mentioned at all—all the provisions there apply either to the parishes or to the board of guardians. The action here should have been against the board, but the time for bringing such an action has elapsed, and

the plaintiffs want to get over the difficulty occasioned thereby by means of the present action. The agreements entered into between the parties show that the guardians were all along regarded as the responsible parties, and it is impossible for the plaintiffs to turn round now and try to fix the liability on the assessment committee.

Pitt Lewis and Glen for the other defendants.—No personal liability attaches to Nuttall or Sheffield, as it is clear they were acting for the committee, and it is found by the case (par. 15) that they did not act *ultra vires*:

Lindus v. Melrose, 3 H. & N. 177; 31 L. T. Rep. O. S. 86;

Alexander v. Siner, L. Rep. 4 Ex. 102; 20 L. T. Rep. 38.

But even if they did act *ultra vires*, their powers were defined by law, and the plaintiffs ought to have known the extent of those powers:

Rashdall v. Ford, L. Rep. 2 Eq. 750; 14 L. T. Rep. 790.

In *Cherry v. Bank of Australasia* (*ubi sup.*) there was a distinct misrepresentation of fact, but there is nothing of the kind here. The wrong course has been adopted; the proper procedure would have been under Baines's Act (12 & 13 Vict. c. 45), ss. 12, 13. Under these circumstances no one is liable for these costs. They also cited

Beattie v. Lord Ebury, 30 L. T. Rep. 581; L. Rep. 7 H. L. 102;

Thorpe v. Cole, 1 M. & W. 531.

MELLOR, J.—This is a case between the Leicester Waterworks Company and the Assessment Committee of the Barrow-on-Soar Union, and Mr. Nuttall, the chairman of the committee, is also made a defendant to the action. Now, the case arises in this way. The plaintiffs are the Waterworks Company of Leicester, and their works, which are necessary for the supply of the town, run through various parishes of the Barrow Union, and differences have arisen as to the value at which these works should be assessed for the payment of the poor rate. It appears to me that there can be no doubt that, under such circumstances, it would be a prudent and wise course for the parties if *sui juris* to meet together, and to come to some agreement as to the sum at which the property in question should be rated, rather than endeavour to arrive at that conclusion by a series of costly appeals. Here it was determined, and wisely determined, as it appears to me, that the rateable value of these works should be ascertained by some competent person—a course which might reasonably be calculated to save great expense. Accordingly a meeting took place between the waterworks company, as represented by their chairman, and the assessment committee of the Barrow-on-Soar Union, and at this meeting it was agreed that, pending negotiations, the appeals, of which several had been entered, should be respite, and ultimately the two parties entered into the agreement, which is dated the 29th June 1872, which purports to be made between the Leicester Waterworks Company of the one part, and the assessment committee of the Barrow-upon-Soar Union in the county of Leicester, for and on behalf of the board of guardians of such union, of the other part; and this agreement was signed by Mr. Ellis, the chairman of the water company, and by Mr. Nuttall on behalf of the assessment committee. In this agreement it was recited that differences had arisen with regard to the rating of the works and

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mains of the company, and that it had been agreed to submit the whole question to arbitration. This was accordingly done, and, by an agreement of submission, the parties bound themselves to abide the award of the arbitrators as to costs. Subsequently the reference was held, and an award was made in favour of the waterworks company, and certain expenses which the umpire charged became payable by the opposite party, that is, apparently by the assessment committee or the board of guardians, who had incurred the expenses in the first instance. The award having been made, and the amount of the expenses ascertained, an action has been brought against the assessment committee, and Mr. Nuttall and Mr. Sheffield, who appear to have been the chairman and vice-chairman of that committee. The question for us to determine is, whether such an action will lie either against the committee or against these gentlemen who signed on behalf of the committee. I am of opinion that it will not. In the first place, who form the assessment committee, and how is it constituted? By 25 & 26 Vict. c. 103, s. 2, it is enacted that the board of guardians of every union shall in every year appoint from among themselves any number, not less than six or more than twelve, to be a committee, to be called the assessment committee of the union, and the duties cast upon the committee are to investigate and supervise the valuations made in accordance with the Act. Now we may assume that this committee was duly elected in the manner prescribed by the Act, and that upon it devolved the duties there mentioned; still they were guardians, for they were a part of the guardians elected out of the larger body, because a smaller number would, with greater propriety and greater ease, perform the duties required by the Act of Parliament, which include the hearing of objections to the valuation list, and the making of alterations and corrections in the same. It has been contended by Mr. Merewether that under sect. 20, which enacts that the committee may, with the consent of the guardians, appoint or employ a person to revise and value the rateable hereditaments comprised in the valuation list, or may take such other means as they may think necessary for ascertaining the correctness thereof; the assessment committee could refer a question of value to arbitrators in the same way as they would refer it to an ordinary valuer. But it appears to me that the object of the section is to obtain a valuation list which may be useful for the future, and that it does not give the committee power to refer the valuation of any particular property against which an appeal may have been lodged to the arbitration of persons that may be agreed upon between them and the appellants—that, to my mind, is clearly not contemplated by the section. I cannot help thinking that the true course in a case of this kind would have been to have proceeded under Baines's Act (12 & 13 Vict. c. 45), then the arbitration proceedings would first have obtained the authority of a judge's order. That has not been done here. The question therefore arises whether the assessment committee had power to incur the expenses of arbitration without taking the course I have suggested, and, if not, whether the expenses have been so incurred as to render the committee personally liable for them. I think not, for the contract they have entered into for arbitration expressly states that

they were acting on behalf of the guardians of the union, and no doubt, as they acted for the guardians, the guardians were relied upon to discharge any expenses incurred under the agreement. I am of opinion, therefore, that they have never acted in such a way as to render themselves personally liable. Nor is the committee liable *qua* assessment committee, for it is not a corporation—it is merely a body selected from amongst the guardians to perform certain acts which are entailed upon them by the sections of 25 & 26 Vict. c. 103. It has no funds of its own. The funds of the union, which are administered by the guardians, are the only means available for discharging liabilities incurred by the assessment committee. The guardians therefore can alone be liable, and if sued in time, and it appears that the committee acted with their assent, they no doubt might be bound to pay these costs. That being so, it is scarcely necessary to go further than to say that neither the assessment committee collectively nor individually, nor Mr. Nuttall nor Mr. Sheffield is liable for the costs of the arbitration. Unfortunately it happens that, although these expenses have been most wisely incurred with a view to save great expense, the assessment committee were not *en* *juris*, but were acting under the authority of an Act of Parliament, and it is provided, as I have before said, that their expenses are to come from the funds of the union, which must be administered by the guardians and not by any select body of such guardians. Unfortunately, however, the time within which the claim could have been made against the guardians had been allowed to elapse; for by the provisions of 22 & 23 Vict. c. 49, the period within which actions may be brought against boards of guardians is strictly limited, and in this case no proceedings had been taken before that period had elapsed. By the 4th section of that Act the time is in certain cases extended, but that is to enable the guardians to make payments to a man who has used all due diligence in prosecuting his claim, and where nevertheless he has been unable to bring the case to a conclusion from delays over which he had no control; but I think that that section is not applicable in this case, and I confess I am sorry, because everything here has been done in a *bona fide* manner by both parties. I regret very much, therefore, that under the circumstance of this case I think that no one is liable. On all these grounds I am of opinion that there was no liability on the part of the assessment committee, or of Mr. Nuttall or of Mr. Sheffield, though there may have been on the part of the guardians. The questions submitted to us must therefore be answered in the negative.

MANISTY, J.—I am also of opinion that these three questions should be answered in the negative. I do not think it is necessary, after the careful manner in which my brother Mellor has recapitulated the facts of this case, to go over them again. This is not an action by a person who has been employed by the assessment committee to make a valuation. This is not an action by employed against employer, but by one of two parties to a contract against the other, and is founded on a contract as to how the costs of an arbitration entered into between the parties should be paid. The only question before us is, who are the parties to the submission to reference; and that will appear from the agreements of the

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8th June 1872 and the 29th June 1872. Who are the parties to those agreements? The waterworks company no doubt on the one part—not their chairman, who only acted in a representative capacity, just as Mr. Nuttall did for the assessment committee; and the assessment committee for the board of guardians on the other part. Having ascertained, without reference in any way to the validity of the contract, that the parties to the contract were on the one part the Leicester Waterworks Company, and the guardians of the union on the other part, it appears to me that we have almost entirely disposed of the whole case. It has been contended that we must look simply at the signatures; but, as far as I understand the authorities, it is necessary to look at the whole document and at the signature as part of it. To my mind the intention of the parties is very clearly expressed in the document itself. It purports to be an agreement entered into "between the Leicester Waterworks Company of the one part and the assessment committee of the Barrow-on-Soar Union, in the county of Leicester, for and on behalf of the board of guardians of such union, on the other part." The Leicester Waterworks Company are the one party, and the guardians the "other party" referred to in the award who are to pay these costs. The costs are in the arbitrator's discretion; he decides they are to be paid by the "other party," and upon looking into the matter we find that the other party is the board of guardians—it is with their consent that the assessment committee entered into the contract, and it was made on their behalf, and by the terms of the agreement they are to pay these costs. It follows, therefore, that neither collectively nor individually can the assessment committee be sued—it is not a corporation, so that we do not know what the term "assessment committee" really means. Whether an action might be maintained against the guardians I cannot say, though I have my opinion upon the point. I am strongly of opinion that the 20th section of the Assessment Act of 1872 gives no power to refer the question of a valuation to an arbitrator, whose decision was to be final. That appears to be the purport of the agreement, but that intention should have been carried out under the provisions of Baines's Act. If the question were as to the liability of the guardians, I should require time to consider it. But here clearly the Statute of Limitations has no bearing upon the question at issue, so it is needless to discuss it.

Judgment for the defendants with costs.

Solicitors for the plaintiffs, *Paterson, Snow, and Bloxam*, for *Haxby*, Leicester.

Solicitor for the defendants, *C. T. Maunder*, for *Goode*, Leicester.

Saturday, Dec. 21, 1878.

(Before LUSH, J.)

LAX v. THE MAYOR AND CORPORATION OF
DARLINGTON. (a)

Negligence—Public market—Liability of lord of market for misfeasance—Frequentation of market not a mere licensee.

The defendants were the owners of a market which is held for the sale of cattle at D. In the market

place defendants had erected spiked railings round a statue which had been placed there. This railing the jury found was dangerous for cattle with a propensity for leaping. A cow which the plaintiff had brought to market attempted to jump the railings, and was killed in so doing. The plaintiff sought to recover from the defendants the value of the cow.

Held, that the defendants were liable, as, by erecting the railings, they had done a wrongful act, whereby a safe market had been rendered unsafe; and that the plaintiff had not been guilty of contributory negligence, inasmuch as, having paid toll for the use of the market there, he was not a mere licensee placing his cattle at his own risk, but was entitled to a safe standing place for them.

FURTHER CONSIDERATION.

This was an action tried before Lush, [J., at Newcastle, whereby plaintiff sought to recover compensation for the loss of a cow which had been killed by attempting to jump certain spiked railings erected by the defendants in the market place of Darlington. It was contended on the part of the defendants that the plaintiff was a mere licensee who was bound to take the market as he found it; that the danger was not concealed, and therefore the plaintiff should have guarded against it, and that there was no obligation upon the defendants to make the market absolutely safe.

Cave, Q.C. and *Edge* for plaintiff.

Herschell, Q.C. and *Shield* for defendants.

The following written judgment was delivered by LUSH, J.—This action is brought to recover compensation for the loss of a cow, which came to its death from an attempt to leap over a spiked fence, placed by the defendants round a statue which they had erected in the market place of Darlington. The defendants are the owners of the market which is held for the sale of cattle, and the plaintiff had for many years brought his cattle there for sale. The market is held in the public street. The plaintiff had regularly occupied with his cattle a given site, for which he paid toll, and the statue had been erected near to that site between two and three years before the accident happened. The only point contested at the trial was, whether the spiked railing was or was not of sufficient height from the ground. The top of the spikes was 2ft. 6in. from the stone in which the bars were set, and this the jury found was insufficient, and the railing being spiked, was consequently dangerous to cattle having a propensity to leaping. It was not contended that the plaintiff was guilty of any negligence in not properly looking after or managing his herd. The point made at the trial, and which has since been argued before me, was that the corporation was under no obligation to have the fence of such a height as that cattle could not or would not be tempted to leap it; that the plaintiff was a licensee who must take the market as he found it; that there was plenty of room for him to stand his cattle elsewhere (which for aught that appeared was the fact); and that as the danger was not concealed, but one obvious and apparent, he placed the cattle there at his peril. I am of opinion that neither of these objections is tenable. The franchise of a market, like that of a port, is granted for the benefit of the public, and everyone has as good a right to frequent the market for selling and buying the marketable commodities as

(a) Reported by A. H. POYSEN, Esq., Barrister-at-Law.

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he has to traverse a public highway. The grantee of a market, especially when he takes a toll for his own benefit, does, I think, incur an obligation to maintain the market in a state reasonably fit for the purpose for which it was granted. (See the observations of Bayley, J., in *Prince v. Lewis*, 5 B. & C. 371.) I see no reason why, if he erects in the market place which he appropriates to the market any dangerous obstruction which causes danger to the property or the persons of those who frequent the market for a lawful purpose, he should not be liable to an indictment as much as the person who places a dangerous obstruction in a public highway. Of course, where the danger is, as it was in this case, obvious and apparent, a person who heedlessly and without reasonable care to avoid it incurs damage, cannot maintain any action, because he is the author of his own wrong. But he is not a contributor to his own wrong by going to the market. The owner or the person who, in legal phraseology, is lord of the market, has no right to say to him, "You might have gone to some other market, and as you chose to come here with your cattle, you elected to run the risk." Nor can the owner of a port excuse himself for erecting a dangerous obstruction to the navigation by saying to the shipowner, "You might have gone to some other port." The subject using a port or a market is not a mere licensee, he is exercising a right as one of the public for whose benefit the port or the market was erected, and is entitled to have a free and safe passage in the one case, and a safe standing place in the other. I was impressed at the time with an argument urged by Mr. Herschell. Suppose, he said, that the market was situate on the bank of a river or lake, is the man responsible if the cattle brought there run into the water and drown themselves? If the specific spot were designated in the charter by which the market was granted, so that the grantee had no option to hold it elsewhere, I am inclined to think he would, even in that case, be bound to fence for the protection of cattle; but if no place was designated, and he voluntarily selected so dangerous a spot, I should say certainly he would. This case, however, does not require that question to be answered. The charge against the corporation is of misfeasance, not of nonfeasance. The erection which constituted the danger in this case was an artificial erection by them, by which they rendered a safe market an unsafe one; that was a wrongful act. Nor do I think it is competent to the defendants to object that the plaintiff chose to continue standing his cattle in the place he had been accustomed to use long before the statue was erected. Every part of a market place is open to buyers and sellers, subject to the reasonable control and regulation of the lord of the market, and the selection of the spot in question was as much the act of the corporation as of the plaintiff, for they regularly charged and received toll for the use of that specific site. Besides, it is impossible to say that the damage would not have happened if the herd of which the cow formed part had been stationed at some other part. But whether it would or not is not in my judgment material. The defendants had done a wrongful act in placing the spiked rails in the cattle market so low as to be dangerous to the cattle; this was the immediate cause of the injury, and they cannot say the plaintiff was guilty of negligence in using that part of the

market which they assigned to him, though it was in proximity to the danger, he not being guilty of any negligence which immediately conduced to the accident. See *Clayards v. Dethick* (12 Q. B. 439; 11 L. T. Rep., O. S. 222); *Thompson v. North-Eastern Railway Company* (2 B. & S. 106; 6 L. T. Rep. 127; 31 L. J. Q. B. 194.) I therefore give judgment for the plaintiff for the agreed amount—22l. 14s. 6d., and costs.

Solicitors for plaintiff, *Chester, Urquhart, and Co.*

Solicitor for defendants, *Scott Lawson*, agent for *Dunn and Watson*, *Darlington*.

COMMON PLEAS DIVISION.

Wednesday, Nov. 6, 1878.

(Before GROVE and DENMAN, JJ.)

HARGREAVES v. SCOTT AND ANOTHER. (a)

Costs, taxation of—Municipal election petition—Counsel's fees—Discretion of master—35 & 36 Vict. c. 60, s. 19, sub-sect. 2.

The Court will not interfere with the master's taxation of counsel's fees, unless there is ground for thinking that he has not exercised a reasonable and fair discretion.

THIS was an appeal from a decision of Field, J., upholding the master's taxation of the costs of a municipal election petition. A Queen's counsel had been taken specially down to Carlisle, and he received 100 guineas with his brief, and a refresher of 25 guineas on each of the five days that the case lasted. His junior received 35 guineas with his brief, and a refresher of 15 guineas per day. On taxation, the master reduced the fee on the Queen's counsel's brief to 25 guineas, with refreshers of 15 guineas per day; and on the junior's brief to 15 guineas, and refreshers of 10 guineas per day. The master had appended to his allocatur a note to the effect that he had exercised his discretion according to the practice.

Day, Q.C. for the appellant.—The Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60), s. 19, sub-sect. 2, enacts that "the costs may be taxed in the prescribed manner, but according to the same principles as costs between attorney and client in a suit in the High Court of Chancery." All costs which can be recovered by an attorney from his client can be recovered as costs between attorney and client in a suit in the High Court of Chancery. All costs reasonably incurred by the attorney can be recovered by him from his client. It is submitted that the fees that have been disallowed were costs reasonably incurred by the attorney. In *Hill v. Peel* (the Southampton case) (L. Rep. 5 O. P. 172), Bovill, C. J. says that the meaning of a like provision in the Parliamentary Elections Act is, that the parties are entitled to "an indemnity for all costs that are reasonably incurred by them in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over caution or over anxiety as to any particular case, or from considerations of any special importance arising from the rank, position, wealth, or character of either of the parties, or any special desire on his part to insure success." In that case the brief was very voluminous, and contained instructions for the

(a) Reported by A. H. BITTLETON, Esq., Barrister-at-Law.

examination of eight-five witnesses on behalf of the respondent. The leading counsel received with his brief 200 guineas, and 50 guineas each day for refreshers, besides consultation fees; the master allowed only 100 guineas with the brief, and 25 guineas each day for refreshers, to include consultation fees. The junior counsel received 150 guineas with his brief, and 30 guineas each day for refreshers, besides consultation fees; the master allowed only 75 guineas with the brief, and 15 guineas each day for refreshers, to include consultation fees. Bovill, C.J., in giving judgment, said: "The Southampton case appears to us to stand upon a somewhat different footing. The master seems to have allowed the fees in that case rather as in accordance with a general rule than upon a due consideration of the circumstances of the particular case; and, looking to the affidavits and voluminous briefs in that particular case, we think it will be more satisfactory that the case should be re-considered by him, and upon the principles which we have laid down." In the present case the brief contained about 200 sheets, and there were 160 witnesses examined.

Willis, Q.C. (F. Turner with him) in support of the master's taxation. He cited

Tyllett v. Stracey, 22 L. T. Rep. N. S. 101; L. Rep. 5 C. P. 185; 39 L. J. 93, C. P.

GROVE, J.—I see no reason for interfering with the discretion of the master in this case, which has been held by the judge at chambers to have been rightly exercised. Each of these cases depends on its own facts. This was a municipal election petition. Of course such a case may involve difficult questions of law, as may any case that comes before a revising barrister or a County Court judge. But it seems to me that we must look at the general nature of such cases. Considering that this was a municipal election petition, I do not see that the master has plainly exercised a wrong discretion. If I had been asked what would be the reasonable fees to give in this case, I should have said fifty guineas on the brief and fifteen guineas refresher. Practically that is what the master has allowed, as I never heard of a refresher being given before a case has begun. What I understand the master to say, is what one would expect him to say,—I do not lay down any hard and fast rule as to what fees are to be allowed in municipal election petitions, but I have allowed what, according to the practice, is reasonable.

DENMAN, J.—I see no ground for thinking that in this case the master did not exercise a reasonable and fair discretion.

Appeal dismissed with costs.

Solicitors for the appellant, *Matthews and Grootham*.

Solicitor for the respondents, *W. Hunter*.

Friday, Nov. 22, 1878.

(Before GROVE and DENMAN, JJ.)

REDDISH v. HITCHINOR. (a)

Magistrates' clerk — Fees — Liability of person giving prisoner into custody—5 Geo. 4, c. 83, ss. 4, 6—5 & 6 Will. 4, c. 76, ss. 78, 92.

An inhabitant of a borough, who gives into the custody of a police constable suspected persons,

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

and gives evidence against them before the borough magistrates, is not liable to the clerk of the magistrates for his fees in respect of the conviction of such persons, under the Vagrant Act, as rogues and vagabonds.

Semble, that the borough fund is liable for such fees.

THE plaintiff, who is clerk to the borough magistrates at Stockport, sued the defendant (the station master of the London and North-Western Railway Company at Stockport), in the County Court of Cheshire, holden at Stockport, for 22s., the amount of fees to which he claimed to be entitled as magistrates' clerk under the following circumstances:—On the 18th Jan. last the defendant, whilst station master at the said railway station at Stockport, gave two persons into the custody of a police constable on the charge of picking pockets at such station. The defendant followed them to the police office, and afterwards appeared and gave evidence as prosecutor before the borough magistrates, who convicted the prisoners under the Vagrant Act (5 Geo. 4, c. 83) of the offence of frequenting a place of public resort with the intent to commit a felony. In respect of such conviction the plaintiff claimed, as such magistrates' clerk, to be entitled to the fees the subject of this action. The plaintiff is paid a salary, but he receives all the fees that are payable by virtue of his office as magistrates' clerk, out of which he retains the amount of his salary, and pays the balance to the borough fund. The County Court judge found a verdict for the plaintiff for 15s., according to the schedule of fees of justices' clerks made by the justices with the approval of the Secretary of State. A rule nisi was afterwards obtained on behalf of the defendant to set aside this verdict, against which

F. Clerk, for the plaintiff, now showed cause.—The defendant is liable to pay the fees of the magistrates' clerk. In Oke's Magisterial Synopsis (p. 109, 12th edit.), it is laid down that "the party liable to the clerks to the justices, however appointed, for the amount of their fees allowed or sanctioned for the particular business, is, except where otherwise directed by statute, the person who made the application or instituted the proceedings in respect of which the fee is due, and the proper way is not to give any credit, but insist upon the payment at the time, and refuse to do the act required until payment." In *Reg. v. Coles* (8 Q. B. 82), Coleridge, J. says: "Whoever wants the thing in respect of which the fee is made payable, must pay the fee; the prosecutor if he takes out a warrant, the defendant if he enters an appearance." In *Wray v. Chapman* (19 L. J. Rep. 155, M.C.) the same learned judge says: "It must be admitted that ordinarily the clerks have a right to fees for their services, and ordinarily the party applying is bound to pay these fees." He also cited

Reg. v. Mayor of Gloucester, 5 Q. B. 962.

Collins, Q.C., in support of the rule, referred to 5 Geo. 4, c. 83, ss. 4, 6, which provide (*inter alia*) that "every suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or place adjacent, with intent to commit felony . . . shall be deemed a rogue and vagabond" (s. 4); and "that it shall be lawful for any per-

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son whatsoever to apprehend any person who shall be found offending against this Act, and forthwith to take and convey him or her before some justice of the peace, to be dealt with in such manner as is hereinbefore directed, or to deliver him or her to any constable or other peace officer of the place where he or she shall have been apprehended, to be so taken and conveyed as aforesaid; and in case any constable or other peace officer shall refuse or wilfully neglect to take such offender into his custody, and to take and convey him or her before some justice of the peace . . . he shall on conviction be punished in such manner as is hereinafter directed" (s. 6). He also cited

Reg. v. Inhabitants of Chelmsford, 5 Q. B. 56.

[He was stopped by the Court.]

GROVE, J.—I am of opinion that this rule should be made absolute. Looking only at the provisions of the Vagrant Act (5 Geo. 4, c. 83), I do not think that the defendant in this case would be liable for the fees payable to the magistrates' clerk. The defendant is not a constable, he is to be considered only as a witness after having given the prisoners to a constable; I do not see, therefore, how he could be held liable in this action. But further, I think that the 78th and 92nd sections of the Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76) apply here, and that the borough fund is liable for these fees. That Act provides, by sect. 78, "that it shall be lawful for any constable during the time of his being on duty, to apprehend all idle and disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of intention to commit a felony, and to deliver any person so apprehended into the custody of the constable appointed under this Act, who shall be in attendance at the nearest watch-house, in order that such person may be secured until he can be brought before a justice of the peace, to be dealt with according to law, &c.," and by sect. 92, that the borough fund "shall be applied towards the payment of" certain specified expenses, and "all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this Act." The fees which are sought to be recovered in this action were expenses incurred in carrying the Municipal Corporations Act 1835, into effect, and therefore the case is within that Act. On these grounds I think that the defendant is not liable.

LINDLEY, J.—I am of the same opinion. It may be that the plaintiff can recover these fees, as has been suggested by my brother Grove; but I do not see how he can recover them from the defendant. No doubt, a person who wants anything to be done for him by the justices' clerk must pay him his fees; but here the defendant did not employ the plaintiff—he simply gave the prisoners into custody, and left the law to take its course.

Rule absolute.

Solicitor for the plaintiff, *E. Reddish*.

Solicitor for the defendant, *R. F. Roberts*.

Thursday, Nov. 28, 1878.

(Before Lord COLERIDGE, C.J., GROVE and LINDLEY, JJ.)

BENNETT v. ATKINS. (a)

APPEAL FROM REVISING BARRISTER.

Parliament—Borough vote—Payment of rates by landlord—Allowance of deductions—Notice in writing—Condition precedent—Waiver—32 & 33 Vict. c. 41, ss. 3, 4, 7—30 & 31 Vict. c. 102, s. 3.

The Poor Rate Assessment and Collection Act 1869 provides that (sect. 4) "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which sect. 3 of this Act extends, situate within such parish, shall be rated to the poor rate in respect to such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon, and so long as such order shall be in force, the following enactments shall have effect: 1. The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of 15 per cent. from the amount of the rate. 2. If the owner of one or more such rateable hereditaments shall give notice to the overseers, in writing, that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly; and allow to him a further abatement or deduction not exceeding 15 per cent. from the amount of the rate during the time he is so rated." (Sect. 7) "Every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor rate."

Held, that a notice in writing by the owner that he was willing to be rated in respect of his hereditaments, whether occupied or not, was a condition precedent to the overseers allowing him an abatement further than 15 per cent. from the amount of the rate, and could not be waived by the overseers. Where, therefore, in the absence of such notice the owner had been allowed an abatement of 25 per cent. from the full amount of rate paid by ordinary occupiers:

Held, that, that allowance not being one which the overseers were empowered to make, the payment of such rate by the owner could not be deemed a payment of the full rate by the occupier for the purpose of preserving to the occupier the franchise.

CONSOLIDATED appeal from the decision of the revising barrister appointed to revise the list of voters for the borough of New Windsor. The respondent duly objected to the name of the appellant being retained on the list of voters for the parish of Clewer, in the said borough. The description of the appellant on the said list was as follows: Bennett, Charles, 91, Victoria-cottages, house, 91, Victoria-cottages. The appellant occupied during the qualifying period a house, No. 91, Victoria-cottages, and he stated that by agreement

(a) Reported by A. H. BRYLSTON, Esq., Barrister-at-Law.

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with the owner of the house the owner paid the poor rate thereon.

The rating of the said house, No. 91, Victoria-cottages, was as follows :

Parish of Clewer. Rate made in the month of October 1877. No. 263; name of occupier, Bennett, Charles; name of owner, R. R. Gardner; description of property rated, cottage; name or situation of property, 91, Victoria-cottages; estimated extent, three perches; gross estimated rental, 10*l.*; rateable value, 8*l.*; rate at 6*d.* in the pound, 4*s.*; amount of rate assessed upon and payable by the owner instead of the occupier by virtue of the statute or statutes in that behalf, 3*s.*; allowed to owner, 1*s.*; total amount to be collected, 2*l.* 9*s.* 6*d.* (bracketed with other names); amount actually collected, 2*l.* 9*s.* 6*d.*

The assistant overseer of the parish of Clewer produced the minute book of the vestry of the parish of Clewer, from which it appeared that, at a vestry meeting of that parish, held the 11th Nov. 1869, it was proposed by Mr. Foster, seconded by Mr. George, and ordered, that the owners of all rateable hereditaments in that parish to which the 4th section of the Poor Rate Assessment and Collection Act 1869 applied, be rated to the Poor Rate in respect of such rateable hereditaments, instead of the occupiers; under which order of the vestry owners of property were entitled to an allowance of 15 per cent. from the full amount of rate payable by ordinary occupiers. The assistant overseer stated that neither he nor the overseers had received any notice in writing, as required by the 4th section, sub-sect. 2, of the Poor Rate Assessment and Collection Act 1869, from the owner of the cottage No. 91, Victoria-cottages, that he was willing to be rated and to pay the rates made in respect of the said cottage, whether the same was occupied or not; and, although such notice had not been given, the owner had been allowed a further abatement or deduction of 10 per cent., making together an allowance of 25 per cent. from the full amount of rate paid by ordinary occupiers. It was objected to the appellant's right to be on the list of voters that the extra 10 per cent. was illegal, as no notice in writing had been given by the owner to the overseers that he was willing to be rated and pay the rates in respect of cottage No. 91, Victoria-cottages, whether the same was occupied or not, and that he had not paid an equal amount of rate in the pound to that paid by an ordinary occupier, as required by the People's Representation Act 1867, sect. 3, sub-sect. 4.

On behalf of the appellant it was contended that the rate having been paid by the owner, he being rated instead of the occupier, pursuant to the order in vestry, such payment by the owner must be considered as that of the occupier, by virtue of the 7th section of the Poor Rate Assessment and Collection Act 1869. The revising barrister held that there was no proof or evidence that any written notice had ever been given by the owner to the overseers, as required by sect. 4, sub-sect. 2, of the Poor Rate Assessment and Collection Act 1869, to entitle him to the further abatement or deduction of 10 per cent., that had been allowed to the owner by the overseers, and therefore the owner was not entitled to the extra deduction of 10 per cent., and the extra allowance of 10 per cent. allowed by the overseers to the owner was an illegal allowance; and that the appellant had not therefore, on or before the 20th July last, *bond fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of

all poor rates that had become payable by him in respect of the premises occupied by him up to the preceding 5th Jan.; and the revising barrister expunged the name of the appellant from the said list. Sect. 4, sub-sect. 2, of the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41) is as follows:

The vestry of any parish may, from time to time, order that the owners of [rateable hereditaments of a certain value] situate within such parish, shall be rated to the poor rate in respect to such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon, and so long as such order shall be in force, the following enactments shall have effect [*inter alia*, sub-sect. 2]:

If the owner of one or more rateable hereditaments shall give notice to the overseers, in writing, that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly; and allow to him a further abatement or deduction not exceeding 15 per centum from the amount of the rate during the time he is so rated.

Sect. 7 of the same Act is as follows:

Every payment of a rate by the occupier, notwithstanding the amount thereof may be deducted from his rent as herein provided, and every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier, or with the overseers, to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which, as regards rating, depends upon the payment of the poor rate.

The 3rd section, sub-sect. 4 of the Representation of the People Act 1867 (30 & 31 Vict. c. 102) is as follows:

Every man shall, in and after the year one thousand eight hundred and sixty-eight, be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows; (that is to say) [*inter alia*, sub-sect. 4] Has on or before the twentieth day of July in the same year *bond fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him up to the preceding fifth day of January [in respect of the premises occupied by him].

If the court should be of opinion that the amount paid by the owner, after deducting the extra allowance of 10 per cent., was a legal amount without any notice being given to the overseers, and was a sufficient payment of the rate by the appellant within the meaning of the 4th section of the People's Representation Act 1867, sub-sect. 3, the name of the appellant was to be inserted in the said list. The names of 230 other persons whose qualifications were similar to those of the appellant, and who were objected to on the same ground, were also expunged by the revising barrister, and their appeals were consolidated with the principal case.

The *Solicitor-General* (Lewis Coward with him) for the appellant.—The question is whether the absence of notice in writing to the overseers makes the deduction of the extra allowance of 10 per cent. illegal. The object of the Poor Rate Assessment and Collection Act 1869 was to allow the parish to enter into arrangements with the owners of certain houses, by which the rates shall be paid by the owner instead of by the occupier. As a consideration for the owner doing so, 15 per cent. is to be allowed him for collecting the rate from the tenant, in the shape of rent, so saving the parish the trouble of collecting it;

C.P. Div.]

BENNETT v. ATKINS.

[C.P. Div.]

and as a further consideration, if the owner will undertake to pay the rate, whether the house be vacant or not, an additional deduction not exceeding 15 per cent. is to be allowed him. Can the mere omission of a notice in writing disfranchise the tenant, who is no party to the arrangement between the parish and the owner, and cannot, therefore, tell whether the statute has been complied with or not? The giving of the written notice may be waived. The consideration for the deduction is not the giving of the notice, but the agreeing to pay the rate whether the house be vacant or not. [LINDLEY, J.—You say that the decision of the revising barrister amounts to this, that the notice cannot be waived.] Yes. He cited

Reg. v. The Mayor, &c., of Kidderminster, 20 L. J. 281, Q. B.

Kingdon, Q.C. for the respondent.—The question is, whether a notice in writing is not a condition precedent to the authority to make the allowance. A notice in writing is very necessary to protect the overseers and parish. It is not, therefore, a mere formal requirement. And it is not the less necessary to be in writing because it happens to be preliminary to an agreement. The section says, "If the owner . . . shall give notice to the overseers, in writing . . . the overseers shall . . . allow to him a further abatement," &c., which is equivalent to, No abatement shall be allowed, unless there is notice in writing. Why should that provision not be enforced, if it can be shown to have a reasonable ground, viz., to protect the overseers and parish? *Durant v. Withers* (2 Hop. & Colt. 202; L. Rep. 9 C. P. 257) is practically the same case as this. The deduction made in this case was unauthorised by the statute, and was consequently not one which is referred to in the 7th section as an allowance the overseers are empowered to make, and does not therefore come within the protection of that section.

The *Solicitor-General* in reply. — Here the notice was expressly waived. [LINDLEY, J.—Has a parish overseer, acting on behalf of the parish, power to waive such a notice? Lord COLERIDGE, C.J.—There need be no agreement here; a notice alone is necessary under this section. A rich man might not care whether any further deduction was made or not, and might make no agreement. What power has the overseer to rate unequally? Only the power given him by this statute. But the notice here is merely preliminary. Deductions authorised to be made are any deductions made by agreement between the owner and the parish, subject to a limit as to the amount. [COLERIDGE, C.J.—The statute might easily have said so. GROVE, J.—By sect. 3 there may be a voluntary agreement between the owner and the parish that the owner shall be liable for the poor rates, and shall pay them whether the hereditament is occupied or not, and that the parish shall allow him a commission on the amount; and such agreement is to be "in writing." Surely that is not optional. And if that is not, why should the provision that the notice is to be in writing be optional? The words "in writing" would become meaningless.] The whole purview of the Act shows that the intention of the Legislature was to preserve the franchise to the occupier, where the owner agrees to pay the rates. By sect. 8 the occupier may pay them and deduct the

amount from his rent, where the owner has omitted to pay, after agreeing or becoming liable to do so. By sect. 19, the overseers are to insert the name of the occupier in the rate book, whether the rate is collected from the owner or occupier, and the occupier, notwithstanding his name has been omitted, is to be entitled to every qualification and franchise depending upon rating in the same manner as if his name had not been so omitted. If the full rate has not been paid, then notice of the rate in arrear should have been given to the occupier, for, by sect. 10, "Section twenty-eight of the Representation of the People Act 1867, with respect to notice to be given of rates in arrear, shall apply to occupiers of premises capable of conferring the parliamentary franchise, although the owners of such premises have become liable for the rates assessed thereon under the provisions of this Act." He cited

Flather v. Boodle, Hop. & Phil. 238; 11 L. T. Rep. N. S. 630.

Lord COLERIDGE, C.J.—The question whether the deduction in this case was properly allowed depends on what is the correct construction of sect. 3, sub-sect. 4, of 32 & 33 Vict. c. 41, which enacts as follows: [reads the section, *vide sup.*] It might be urged that the person affected was the occupier and not the owner, and that to take away the franchise from the former would be punishing him for what it was out of his power to prevent. The courts, however, have nothing to do with the effect of an Act of Parliament; their only function is to construe it, and Parliament can then make any alteration which may seem desirable. But there is another answer to such a contention; the Act gives the voter certain privileges depending on rating which he would otherwise not have been entitled to, and as he gets the benefit he must accept the accompanying burden. I am of opinion that, according to the correct construction of the Act, our judgment must be for the respondent. Sect. 4 provides that the owner of occupied tenements of a certain value may be compulsorily rated instead of the occupiers, and sub-sect. 2 allows an extra deduction where the owner gives a notice in writing of his willingness to be rated in respect of unoccupied tenements. In my opinion the notice here mentioned must be in writing just as much as the voluntary agreement for the same purpose, mentioned in the preceding section (sect. 3), must be in writing; and I think that its being so is a condition precedent to allowing the deduction. The words of the Act are plain, conferring a power on the overseers in a particular event, which event has not arisen. As to the contention that the overseers had power to waive the notice in writing, there is nothing in the Act to warrant it, and, as the overseers occupy a public character, there are good reasons why they should not have such a power given them. This view is supported by sect. 7, which says that the occupier shall be entitled to the franchise when the owner pays the rates, notwithstanding any allowance which the overseers are "empowered to make." The word "empowered" must mean legally empowered. The Act says that rating may be unequal under certain conditions, and, those conditions not having been complied with, the overseers were not empowered to allow the abatement, and the decision of the revising barrister ought to be affirmed.

GROVE, J.—I am also of opinion that the decision of the revising barrister ought to be affirmed. For a long time during the argument I was of a different opinion, the reason being that I thought that it was assumed by the learned counsel on both sides that the agreement, mentioned in the 3rd section of the Act, might be a verbal agreement. Looking only to the words at the beginning of that section as to the hereditaments to which it is to apply, and, passing over the intermediate words, to those at the end, "the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding 25 per cent. on the amount thereof," the agreement there referred to might be a verbal one. If that had been the case, then it might be contended that sects. 7 and 8 would preserve the franchise to the occupier wherever there was an understanding that the owner should pay the rates, and would not depend upon any preliminary matter such as a notice having been given in writing. If the agreement in the 3rd section need not be in writing, then the 7th section says that "every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise," &c. Now, if the words "agreed to" there referred to a verbal agreement, it would show that the substance and not the formalities were to be looked to, and that, therefore, the notice in writing was a preliminary, and its absence could not affect the franchise of the voter. But, upon reading the 3rd section through, I find that the agreement there provided for is expressly to be "in writing." So that it was the intention of the Legislature that there should be in the one case a definite agreement in writing, in the other a definite notice in writing, before any deduction is made by the overseers. That that is the construction of sect. 3 is clear. The words are: "In case . . . the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may," &c. There can be no "such agreement" except the agreement previously mentioned which is to be in writing. In that way, all the words of the sections become sensible, and read into one another. The fair reading of the 3rd section, is that if the overseers are willing they may enter into an agreement in writing with the owner, for any term not less than one year from the date of such agreement, to allow him a commission in consideration of his becoming liable for the rates. On any other construction, you give no meaning to the words "such" and "in writing." Then sect. 4, sub-sect. 1, enacts that "the overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of 15 per cent. from the amount of the rate." And by sub-sect. 2, "If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is will-

ing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding 15 per cent. from the amount of the rate during the time he is so rated." Under the 3rd section, it is optional with the overseers to agree or not, and the agreement must be in writing. Under the 4th section, all that the overseers are to do is imperative, except as to the amount of the abatement which they will allow, and the notice by the owner is required to be in writing. In the first instance, where the matter is optional, there is to be an agreement in writing; in the second, where it is imperative, the owner is to give a notice in writing. The notice becomes much more, therefore, than a mere preliminary, or a merely formal matter, its object being to enable the overseers to have a voucher for the abatement which they are compelled to allow. "The overseers shall . . . allow," &c., but, on a condition, viz., that "the owner . . . shall give notice to the overseers in writing;" that is a substantive requisite, and one to which a meaning can be attached. I think such a requisite as that cannot be waived by a parish officer acting on behalf of the parish.

LINDLEY, J.—I am of the same opinion. The question is, whether the landlord has paid the rates in such a manner as to entitle the occupier to vote. That depends upon two questions: first, upon the true construction of the Act of Parliament (32 & 33 Vict. c. 41); and, secondly, upon the power of the overseers to waive the notice in writing by the owner provided for by that Act. As to the first point, I do not think that there can be any doubt. I have heard no explanation of the words "willing to enter into an agreement in writing" in the 3rd section; but I can have no doubt that the subsequent words of that section, "from the date of such agreement," refer to an agreement in writing. Then, by sect. 4, a "notice in writing" is clearly to be given by the owner before any allowance is made to him by the overseers. But it does not follow to my mind that such a notice could not be waived. Apart from the power of waiving, the provision is quite clear; and additional light is thrown upon sects. 3 and 4 by sect. 7. Then, as to the second question, whether it is competent for the overseers to waive the giving of a notice in writing, at first I certainly thought that this might be waived, and that the giving of the notice in writing was merely preliminary, and could be dispensed with. But the answer to that is, that the overseers are not acting for themselves, but are public officers. Unless they could in every case produce either an agreement in writing or else a notice in writing, the parish for which they act might be involved in endless disputes and endless lawsuits. It is true that in *Leonard v. Alloways* (48 L. J. 81, C. P.), we held the other day that overseers could waive compliance with the condition of 6 Vict. c. 18, s. 5, as to sending in a claim before the 20th July; but the language is very different here, and I am of opinion that the overseers cannot waive this matter, and that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitor for appellant, *C. T. Phillips*; for respondent, *T. Durant*, agent for *B. C. Durant*, Windsor.

CT. OF APP.]

REG. v. OVERSEERS OF WALSALL AND OTHERS.

[CT. OF APP.]

Supreme Court of Judicature.

COURT OF APPEAL

SITTINGS AT WESTMINSTER.

Dec. 9 and 10, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

REG. on the prosecution of THE LONDON AND NORTH-WESTERN RAILWAY COMPANY v. THE OVERSEERS OF THE TOWNSHIP OF THE FOREIGN OF WALSALL AND OTHERS. (a)

Rating—Public Health—Borough—Town council—Local Acts—Public Health Act 1872 (35 & 36 Vict. c. 79), ss. 7, 16—Sanitary Law Amendment Act 1874 (37 & 38 Vict. c. 89), s. 3—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 207, 211.

By a private Act, passed in 1848, Improvement Commissioners were appointed with powers to carry out certain improvements for sanitary purposes in a district comprising part of the municipal borough of Walsall and part of the town of Walsall outside the borough. The Act gave the commissioners power to levy a rate for defraying the expenses incurred in carrying the Act into execution, and provided that the occupiers of land used as a public railway in the district should be assessed at one-fourth only of its annual value. The Public Health Act 1872 made boroughs urban sanitary districts, and the council of a borough the urban sanitary authority; and by sect. 7 (and sect. 3 of the Sanitary Law Amendment Act 1874) all the powers, duties, and obligations with respect to sanitary purposes of bodies having jurisdiction under a local Act were transferred to the urban sanitary authority of the district.

Sect. 16 of the Act of 1872 provides that all expenses incurred or payable by an urban sanitary authority under the Sanitary Acts shall, where the Local Government Acts were not in force at the passing of the Act, be defrayed, in the case of the council of a borough, out of the borough fund or borough rate.

By sect. 207 of the Public Health Act 1875 all expenses incurred or payable by an urban authority in the execution of the Act . . . shall be charged on and defrayed out of the district fund and general district rate leviable by them under the Act, except that, if in any district the expenses incurred by an urban authority, being the council of a borough, in the execution of the Sanitary Acts, were at the time of the passing of the Act payable out of the borough fund or borough rate, then the expenses incurred by that authority in the execution of the Act shall be charged on and defrayed out of the borough fund or borough rate. Sect. 211 provides that the occupiers of land used as a railway shall be assessed at one-fourth only of its annual value. By an Act passed on the 13th July 1876 the boundaries of the municipal borough of Walsall were enlarged and made to include that part of the commissioners' district which was previously outside the borough, and the corporation was declared to be the sanitary authority throughout the borough as extended. The appellants were the occupiers of a railway within the limits of the extended borough. On

the 1st Dec. 1876 the corporation made a borough rate to provide for sanitary expenses, and assessed the appellants at the full rateable value of their land.

Held (affirming the decision of the Queen's Bench Division, Mellor and Lush, J.J.), that the corporation, in respect of sanitary purposes within the extended borough, had only power to make a general district rate, and to assess the appellants at one-fourth of the net annual value of their land used as railway.

APPEAL from a decision of the Queen's Bench Division.

This was a case stated on an appeal against a borough rate laid on that part of the foreign of Walsall which is situate within the municipal borough of Walsall.

The Queen's Bench Division affirmed the order of the court of quarter sessions.

The case is reported and the special case set out 35 L. T. Rep. N. S. 626.

The town council appealed, and the case came on for hearing on Feb. 5, 1878, when the objection was taken for the railway company that no appeal would lie from the decision of the Queen's Bench Division. The Court of Appeal (Cockburn, C.J., Bramwell, Brett, and Cotton, L.JJ.) took time to consider, and on the 18th May delivered judgment, holding (Bramwell and Cotton, L.JJ. dissenting) that no appeal would lie (reported 36 L. T. Rep. N. S. 665). The town council appealed from this decision to the House of Lords, and they reversed the judgment of the Court of Appeal, and remitted the case to the Court of Appeal for hearing. (The case in the House of Lords is reported 39 L. T. Rep. N. S. 453.)

Herschell, Q.C. and Anettie for the corporation (the appellants).

Bosanquet and N. Nevill for the London and North-Western Railway Company (the respondents).

The arguments were the same as in the court below, and sufficiently appear in the judgments (post).

BRAMWELL, L.J.—I think this judgment should be affirmed. I speak with great reserve and hesitation on the subject, because of one's utter unfamiliarity with the subject-matter of cases like this, which come on appeal from magistrates at quarter sessions, and involve a consideration of the proceedings of bodies such as local boards and sanitary authorities. The question, as far as I understand it, turns first upon the 207th section of the Act of 1875, which says that "all expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged and defrayed out of the district fund or general district rate leviable by them under this Act, subject to the following exceptions." So far the section would comprise the present case, unless any one of the exceptions applies. Now, it is said to be within this exception: "That if in any district the expenses incurred by an urban authority, being the council of a borough, in the execution of the Sanitary Acts, were, at the time of the passing of this Act, payable out of the borough fund or borough rate, then the expenses incurred by that authority in the execution of this Act shall be charged on or defrayed out of the borough fund or borough rate." That provision, of course, requires it to be ascertained whether

(a) Reported by W. APPLTON, Esq., Barrister-at-Law.

at the time of the passing of the Act of 1875, these expenses were payable out of the borough rate. Now, I am of opinion that they were not, and upon this ground: that the joint effect of sects. 7 and 16 of the Act of 1872 is, either that the power of the commissioners to make rates for the district marked blue remained up to 1875, and that the town council had no power to make any rate for sanitary purposes within that district, or that the town council only succeeded to and got the power which the commissioners had before—that is to say, the power to make a rate for sanitary purposes within the area of the commissioners' district. That is the conclusion I have come to. That difficulties might certainly arise before the Act of 1875 came into force I can well imagine; but there is this in favour of my conclusion—and it is a consideration which may be fairly borne in mind in considering this question—that the construction contended for by the town council would shift the burden which previously existed, and would heighten and augment the obligations of the defendants, who are the owners of such property as is referred to in the exemption clauses relied upon by the railway company, in ease of the burden upon the other ratepayers. No reason can be given why that should be done, and I cannot but think upon the general view of the Acts of Parliament that it was not intended to be done. I think that the intention of the Legislature in passing the 207th section was that, where the borough rate had previously borne the whole of the sanitary expenses, it was to continue to do so; but where it had borne none, or only a part of them, it was not to bear any of them, or only to bear that part of them, in future, but a district rate was to be made. If the borough rate had borne some only of these expenses it would be just and reasonable that it should bear those only in the future, because otherwise it might happen that there would be an unjust shifting of liability. Whether it was right in the first instance to have certain property assessable at one-fourth of its real value is a question we have not to inquire into. It had been done for years, and property in the borough had consequently obtained an increased value. The effect of the construction suggested by the appellants would be to make the property specified in sect. 40 of the private Act of less comparative value than it was before. No reason has been given why this should be done, and I do not think the Legislature intended to do it.

BRETT, L.J.—It seems to me that, in order that the plaintiffs may succeed in this case, we must find that in the present existing borough of Walsall the expenses in respect of sanitary matters can only be provided for by a general district rate, and that no part of them is payable out of the borough fund. I am quite aware that the question is not brought before us exactly in that form; but that would have been the form of the plaintiffs' objection if the parties had not come to an agreement. The proper application would then have been to quash the borough rate, but by arrangement the parties do not ask that the rate should be quashed, but they confine themselves to asking for a judgment which shall decide whether or not the plaintiffs are only liable to be rated to the extent of one-fourth of the net annual value of their railway within the borough. Nevertheless it seems to me that, in order to work this case out,

we must hold that all sanitary expenses within the whole borough of Walsall, including the added part, are payable out of a general district rate, and not out of the borough fund, and I am of opinion that they are so payable. Now, I shall venture to take the case in an inverse way to that in which the Lord Justice has taken it. It seems to me that in the borough of Walsall from 1848 to 1872 there were two authorities. One was the town council acting for the whole borough, which at that time included all the part marked blue on the map, and not the pink part which was within the commissioners' district, and has since been added to the borough; and the other was the body composed of the Improvement Commissioners who acted for the blue part and the pink. Now, the town council at that time might, and I suppose did, form or make a borough fund by making a borough rate; but that would be done under the Municipal Corporations Act and for the purposes of that Act, and those purposes only. They had nothing to do with sanitary expenses. At that time the only real town within the borough was that which was contained in the blue part, the part of the borough comprised in the commissioners' district. The town extended beyond the borough that was contained in the blue to the pink, the part added to the borough in 1876, but by the local Act of 1848 there were commissioners to act for that which was the real town, namely, the blue and not the pink. By other statutes which were incorporated with that Act of 1848 they had the control, not only for all sanitary purposes, but for other purposes which generally are now incorporated into Sanitary Acts. In respect therefore of the sanitary purposes and the sanitary expenses by virtue of the incorporation of the other Acts with the Act of 1848, these commissioners were the persons to provide for the sanitary expenses, and they did so by levying a district rate; that is to say, they provided for them by levying a rate upon the blue and pink districts. But that rate, by the section of the Act of 1848, with regard to the property of railway companies, gave them what has been called a limitation; that is, that a rate levied in order to raise that fund under the Act of 1848 was, with regard to railways, to be levied only upon one-fourth of the net annual value. That seems to me to have been the state of things from Dec. 1848 to Jan. 1872, and then the general Public Health Act of 1872 was passed. Now I agree with the judges of the Queen's Bench Division, that it is not necessary to consider whether the commissioners remained as the sanitary authority within the blue and pink part of the district under the Act of 1872, or whether their authority was given within the blue district to the town council. If they still remained the authority within the blue district, it seems to me that they would remain the authority in respect of the sanitary expenses incurred in the blue and pink districts; but if they were not, and if their authority passed to the town council with respect to the blue part, it seems to me that, although their authority passed, the same power which they had was merely transferred, and that I think follows from the words which are contained in sect. 7 of the Act of 1872, or rather it may be said in sect. 3 of the Act of 1874, which is an exposition and explanation of sect. 7 of the Act of 1872. The words of sect. 3 are, "All the powers, rights, duties, capacities, liabilities, and obligations of the

authority having jurisdiction under a local Act in the district of an urban sanitary authority at the time of passing of the principal Act, so far as they or any of them related to such purposes, not "were altered," but "were transferred to and became attached to the urban sanitary authority." That is to say, all the powers, in this borough, of the commissioners within the blue part, are transferred to and become attached to, upon the hypothesis, the town council. If the powers of the commissioners—the powers which they had when in the blue part—were only to make a district rate and to make a district rate containing, with respect to railways, the limitation for which the plaintiffs contend, then those powers only passed. If that be true, the state of the borough of Walsall from 1872 to 1875 was this: The town council was still the authority to make the borough fund—that is, the borough fund proper—applicable to the purposes of a borough fund under the Municipal Corporations Act. They were the municipal authorities and also the sanitary authority throughout the whole borough. With regard to the parts of the borough which were not within the blue (the part of the borough contained within the commissioners' district), they were the sanitary authorities under the Act of 1872, irrespective of the Act of 1848, and they would have the power within that part of the borough of the sanitary authority not circumscribed by the local Act of 1848; but as to that part of the borough which was within the blue, and which after all was the main built part of the borough, and therefore the portion in respect to which the sanitary expenses would be the largest, they were, upon the hypothesis, the sanitary authority, but they only had the power of the commissioners transferred to them by sect. 3. Therefore, within the blue part they would not have the larger authority, but only the authority of the commissioners—that is, to levy a district rate for sanitary purposes. So that in the borough of Walsall at that time you still had only a borough fund and a district rate—a borough rate throughout the whole borough for municipal purposes proper, and a borough rate liable to pay the sanitary expenses incurred in a part of the borough not within the blue part or old district of the commissioners; but you had a district rate for sanitary purposes to be laid and applied by the town council within the blue part. Now, it is obvious that such a state of things must have brought about the greatest possible difficulty, and it would seem a forcible argument to say that those difficulties were insurmountable, and that they were so great that we ought not to suppose that the Legislature meant them to exist, and that, therefore, we ought to put a different interpretation on the statute. But it seems to me sect. 33 or the statute of 1872 gives a key to the whole difficulty, and I agree with my learned brethren in the Divisional Court of Queen's Bench that that section is of the greatest importance. Sect. 43 is of importance as concerning the continued existence of the local Act; but sect. 33 has this importance to my mind, that it was a mode by which the difficulties might have been met. It gives power to the Local Government Board to interfere, and if an application had been made to the Local Government Board in London by the inhabitants of Walsall, and it had been shown to them that the Act of 1848,

if it was allowed to exist in its full force, made it almost impossible for the town council to meet the sanitary expenses of the whole borough, then the Local Government Board might have altered and repealed the local Act of 1848, but if they had so repealed it justice would have required that they should have repealed it on terms. At all events there was a power, and that power might have been called into play, but it never was. Therefore the difficulty remains, no doubt, but that difficulty might have been met. Now, that was the state of the borough, as it seems to me, up to the year 1875. Then it has been admitted that the plaintiffs' contention is right unless the case of the borough of Walsall is brought within the first exception of the 207th section of the Act of 1875; and unless the case is brought within that exception it is within the general enactment with which the 207th section begins. If it is within the general enactment, then all the expenses incurred or payable by the urban authority in the execution of the Act of 1875—that is, by the town council—are to be charged on and defrayed out of the district fund and general district rate. Now, to my mind, the circumstances necessary to bring it within the exception to the Act of 1875 are wanting; and I therefore think that it is not within the first exception. If it is not, but is within the general enactment of the 207th section, then in the borough of Walsall after the passing of the Act of 1875, all sanitary expenses are to be paid out of a district fund or general district rate to be made according to that statute. After the Act of 1875 the state of the borough of Walsall was this: The town council was the only sanitary authority. The town council under the Municipal Corporations Act was the sanitary authority for the whole borough and it could raise a borough fund for municipal purposes under the Municipal Corporations Act, as it always could, but throughout the whole borough it was bound to pay the expenses incurred by sanitary proceedings out of a district fund and general district rate; that is to say, it was bound to make a rate upon the whole borough in respect of sanitary purposes. Then, by sect. 211 of the same statute, if there was to be a general district fund and general district rate for the whole borough, there was also to be the limitation with regard to rating railways throughout the whole borough. Now, as to the question under the Act of 1875, it seems to me that the borough rate made by the defendants was bad, and in strict law ought to be quashed, and that there ought to have been in respect of all sanitary purposes a general district rate, and that under that district rate this railway, in respect of its whole length throughout the whole borough, ought only to be liable to be rated on one-fourth of the net annual value. Then comes the Act of 1876, which puts the borough into the pink part. Now, I do not think Mr. Nevill's argument in respect of sect. 15 of that statute is applicable, because sect. 15, whatever may be the decision on the point we have now to decide, cannot help the argument of it at all. But what the Act of 1876 does is to put the pink part into the borough and to make everything done in the pink part come within the rules, regulations, and laws applicable to the whole borough; so that with regard to the whole borough of Walsall, including the pink part, it seems to me the town council, as

the town council, and being also the sanitary authority, were required to make a general rate throughout, and that there must be, or ought to be a general district rate, out of which such sanitary expenses in respect of the whole borough ought to be paid. I therefore think this judgment is right.

COTTON, L.J.—The question we have to consider by arrangement between the parties is this, how ought the expenses incurred under the Public Health Act of 1875 to be provided for? But for that arrangement the question would be whether or no the rate made in the year 1877 as a borough rate was, or was not good in consequence of it having been made for the purpose of providing for expenses under the Public Health Act 1875. Now that question really depends on the 207th, 209th, 210th, and 211th sections of the Act of 1875, because the rate is made and must be supported under those sections. Sect. 207 contains a general enactment as to how the expenses incurred under the Act, and in respect of the powers given by the Act, are to be met, and it constitutes in the borough that which I suppose was new at that time, namely, a distinct fund, and in addition to that it directs that the district rate shall be leviable, and that all the expenses incurred in the exercise of the powers given by the Act shall be paid out of the district fund in aid of the general district rate which the subsequent sections gave power to raise, unless the case is brought within the exceptions which are afterwards mentioned; and that general district rate was a rate which, as regards the railway companies and other particular owners of property, was only to be assessed on one-fourth the value of their property, whereas the rate which has been made upon them has been assessed upon the full value. Now, it was not contended that the case came within any of the exceptions mentioned in the 207th section unless it came within the first. I think it was said in argument on behalf of the corporation, and it is certainly my opinion, that that exception does apply unless the expenses incurred for sanitary purposes as an entirety were, at the time when the Act of 1875 came into operation, paid or payable out of the borough fund. This throws us back for the purpose of seeing what ought to have been the state of things when the Act of 1875 was passed. In the year 1848 the private Act was passed which gave the commissioners powers which no one up to that time had of exercising a certain sanitary authority within particular districts; and for the purpose of providing for the expenses of sanitary works there was given to them by the Act of 1848 power to raise a district rate, and for that purpose railway companies and other owners of special property were to be assessed at one-fourth only of the net annual value of their property. Now, the district over which the commissioners had jurisdiction was partly within, and partly without, the borough of Walsall. The private Act remained in force up to the year 1872, and at that time the Improvement Commissioners were the only persons authorised to construct sanitary works in the district, and the rate which they could raise under the private Act was the only mode by which they could provide for sanitary expenses. Up to 1872 it is perfectly clear that the railway company were entitled to the exception in their favour of being rated only at one-fourth. And it

lies upon those who contend that between 1872 and 1875 their right in that respect was taken away to show in what way it was taken away. Now, the Public Health Act 1875, as I understand it, did this: it made the town council the urban sanitary authority within the whole borough, but including part only of the district which had been within the jurisdiction of the Improvement Commissioners, and it transferred to and vested in the town council the power which had been previously exercised by the commissioners within so much of their district as was within the borough, and within the jurisdiction of the urban sanitary authority constituted under the Act of 1872. It certainly did not put an end to the power of the Improvement Commissioners, because one of the general sections, the third subsection of the 4th section, clearly says that their powers were to extend over that portion of their district not included within the district coming under the Acts of 1872, and in the 7th section of the Act of 1872, and the interpretation clause of the Act of 1874, it is not said that they are to come under any private Act, within the limits of the authority of the urban sanitary authority, nor does it say that similar powers were to be given to the urban sanitary authority, but that the powers and duties of the Improvement Commissioners were to be transferred to the urban sanitary authority constituted under the Act of 1872; so that my interpretation of the Act certainly is not that the Improvement Commissioners were, after the Act of 1872, themselves to exercise the power as regards this blue district which they had previously exercised, but that their powers were to be transferred to and vested in the new urban sanitary authority, and they took those powers, as is shown both by the 7th section of the Act of 1872 and by the 3rd section of the Act 1874, with all the obligations attaching. It is after all the Act of 1872 which says that all the powers, rights, duties, capacities, liabilities, and obligations shall be transferred, so that this town council has obtained a portion of this district which had formerly been within the power of the district commissioners subject to the obligations of the commissioners, one of which was that they were only to rate railway companies and certain other owners of property specified at one-fourth of their full value. So far I should say we have got at nothing that can by possibility take away the exemption or privilege given to the owners of certain particular kinds of property. One matter which was relied on for the corporation was sect. 16 of the Act of 1872, and I agree that the proviso in that section is one which it is not very easy to construe; but I think one must remember this, that it is a rule of construction that if a particular benefit is given by a statute to a particular person you must not deprive him of the benefit that the statute has given without clear words in a subsequent Act to take it away from him. I think it is a very reasonable interpretation and construction of this proviso, that, where there had been a body exercising sanitary powers, and providing for the expenses which in the former state of things would have been raised and paid in a particular way, those expenses must still be so raised and paid. It was urged on behalf of the appellants that, provided the urban sanitary authority had, before the passing of this Act, the power to make a district rate to meet the expenses,

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and if the town council which is constituted and made the urban sanitary authority under the Act of 1872, had the power, then this sect. 16 would apply. That could not be so here, because the urban sanitary authority—that is the town council—never had power within the district to raise this rate at the time the Act of 1872 was passed, because it never had any sanitary power, and therefore never had any power to raise a district rate or any other rate for sanitary purposes. You must really not, I think, construe it in that way without strong necessity. If you take it literally probably the proviso cannot apply at all, because the urban sanitary authority never could have existed before the Act; it was a creation of the Act, and I think the reasonable interpretation is, not that which was alleged on the part of the town council, but that which I have mentioned, namely, that, where anybody had previously exercised the power now given to the urban sanitary authority to provide for these expenses by this general district rate, they should still be so provided for. That was the state of things which existed down to the Act of 1875, and at the date of that Act there was, as regards the blue district, the portion of the borough formerly within the power of the district commissioners, power to pay the expenses such as could be incurred under the Act of 1848, not out of the borough fund but out of another fund, and *ex hypothesi* they could not be paid out of the borough fund if the exemption (that privilege of the railway company) had not been taken away; because as regards the borough rate there was no power to assess them at less than their full value. The borough rate, as was conceded on both sides, would be made upon all owners of property equally at the full value of the property which they held, and if the exemption of the railway company had not been taken away (and I have stated my reason for thinking it had not been) then of necessity it could not be that the expenses at the time of the passing of the Act of 1875, as an entirety, had been provided for out of the borough rate, because, as regards a part of these expenses, the railway company were entitled to exemption. It comes then to this that, at the time of the Act of 1875 being passed, there was a part (and that is quite sufficient) of these expenses in respect of which the railway company had a right to say, "We are entitled to exemption." That part therefore could not be a matter to be paid and provided for out of the borough fund, because the first exception of sect. 207 of the Act of 1875 must be that, in making the general district rate, the owners of all railways and other works specified in the Act of 1848 are to be assessed at one-fourth only of the full value of their property.

Judgment affirmed.

Solicitors for appellants, *Sharpe, Parker, Pritchard, and Sharpe*, for *Wilkinson and Gillespie*, Walsall.

Solicitor for respondents, *B. F. Roberts*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Dec. 14 and 16, 1878.

(Before JESSEL, M.R.)

ATTORNEY-GENERAL v. MAYOR, &c. OF BRECON. (a)

Municipal corporation—Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), s. 92—Application of borough fund—Opposing Bill in Parliament.

A municipal corporation is justified in using the borough fund for the purpose of opposing a Bill in Parliament whereby its existence, property, or privileges are sought to be imperilled or diminished, both by virtue of the 92nd section of the Municipal Corporations Act 1835, by which the employment of the borough fund is authorised in payment of "all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act," and by virtue of the general law by which the owners of property in trust are authorised to be reimbursed out of the trust estate for any expenses necessarily incurred for its protection or otherwise.

THIS was an information to restrain the mayor and corporation of Brecon from applying the funds of the corporation in opposing a Bill promoted by the Brecon Markets Company, whereby it was alleged that the existence, property, and privileges of the corporation were likely to be injured.

The facts of this case sufficiently appear in the judgment.

The question turned partly on the construction of the 92nd section of the Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), whereby the disposition of corporate property and the appropriation of the corporate income are to be regulated. The object and drift of the section sufficiently appear in the judgment, as also the following sections of the Act for incorporating the Brecon Markets Company, viz., ss. 21, 43, 65, 80, 82, 89, and 90; Local and Personal Acts, 25 & 26 Vict. cxxxvi.; and the 8th section of the Act to amend the Brecon Markets Act 1862; Local Acts, 41 & 42 Vict. c. clxxvii.

Whitehorne and Maonaghten for the Attorney-General.

Ince, Q.C. and B. S. Wright for the corporation.

The cases and arguments sufficiently appear in the judgment.

JESSEL, M.R.—The case before me is one of a very special character. As far as I know it has never occurred before, and I do not think it is very probable it will very often occur again; but still it raises important questions both as regards the meaning of public Acts of Parliament, and as regards the general law. In the first place, there is no doubt that the Municipal Corporation Acts were intended to impose great restrictions on the dealings by municipal corporations with the corporate funds. In substance, whatever the words used were, the Municipal Corporations Act reduced municipal corporations from the position of owners of property to the position of trustees of property. Instead of having the power which they possessed and abused, before the passing of

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

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the Act, of disposing of the property pretty well in any way the corporations thought fit, they were restricted to certain definite purposes as pointed out by the 92nd and other sections of the Act, the 92nd being the principal section, and the others merely ancillary. In substance, as I said before, they were reduced to the position of trustees. The 92nd section provided for certain expenses which, in the case of the borough funds not showing a surplus over what I will call the ordinary expenses of the borough, were restricted to expenses necessary for carrying the purposes of the Act into execution. Probably some definite word might have been used; for the word "necessary" like most other words in the language, has only a relative meaning, and that may be necessary in one case which is not in another, and you cannot lay down any absolute rule of what is necessary. Those are the words of the Act. Now it is manifest, the moment you read the Act, that if you read "purposes" merely for express purposes, you would have left the corporation in this position, that they could not even defend their property or their very existence against attack. If, therefore, it was said that the word "purposes" is to be read in the narrowest form, namely, the purposes expressed in the Act, this would follow: that if an action of ejectment were brought against the corporation, or what is now called "an action for recovery of land," to get from them the whole of their landed property, they would not be justified under the Municipal Corporations Act in incurring the costs of defending that action. That, of course, is too extravagant, and you must therefore assume that there is to be found somewhere, either under the word "purposes," as mentioned in the 92nd section, or under the general law, a provision for such a case as that. Again, if a proceeding were taken to destroy their charter of incorporation either directly or indirectly, it would be absurd to say that the corporation were not entitled to resist those proceedings, and not the less if these proceedings were by Bills in Parliament instead of by proceedings in a court of law. That is, that Acts threatening the existence of the corporation itself must be resisted, and must be resisted, of course, at the expense of the corporation. Then again, if you read the word "purposes" in the narrow and restricted view, it would be difficult to find any such purpose expressed in the Act; but you must either read it in the larger way, or else you must assume that the Legislature intended that the ordinary rights of corporations in defending themselves against attack, whether by action at law or by Bill in Parliament, or otherwise, were reserved to them. It does not appear to me to be very material to consider which is the proper view to take, because they both conduct you to the same conclusion: that is, the first view makes it implied in the words to be found in the Act of Parliament, that there must be a mode of construction which includes such objects; the second says, the Act of Parliament reserves the ordinary rights of persons and corporations to defend themselves. That being so, and independently of the recent Act of Parliament, what is the principle on which these corporations should be allowed to defend themselves? There are decisions which, as I said before, go expressly to defending their property from attack, and defending their existence from attack. Does it

not go further? If their existence, which is not a simple existence for the purpose of affixing a seal, but for the purpose of the government of the town, is interfered with—that is, if their duties and rights of government are interfered with—their existence is to that extent interfered with, though it is not the actual existence of a corporation. It is the existence of their corporate powers which in fact altogether go to make up their existence; and it appears to me that, on the same principle, a corporation, when attacked, shall have the right to defend itself. Supposing the corporation has a power to regulate the fairs and markets within the borough, and an individual, as lord of the manor, claims the right to control the regulations of the fairs and markets, then it is clear it is in the nature of property, a right to levy tolls. But suppose a company is instituted to take possession of the fairs and markets, and levy the tolls, and take them out of the hands of the corporation, and promotes a Bill in Parliament for the purpose, then it is also quite clear. But suppose there is no property in the corporation at all, but merely a right to regulate the fairs and markets—that is to prescribe the places where the fairs and markets shall be held, to prescribe the tolls that shall be taken in respect of them, and to prescribe the time at which the fairs and markets are to be held—is it to be supposed that an individual or a company can present a Bill to Parliament for taking away those privileges and duties of the corporation, and that the corporation shall have no power of defending itself even under the Municipal Corporations Act; shall have no right to spend the money necessary for defending its privileges and duties as a corporation? It appears to me that to make that statement shows there is no valid distinction between the right of property, which, after all, is only held by the corporation as trustee for these public purposes, and the powers and privileges forming a larger or smaller share of the government of the town, which are conferred on the corporation, and with which it is sought to interfere. As I said before, it seems to me that on principle you must imply a right in the corporation to defend itself from such an attack. Now, if that is so, it is of very little consequence, as I said before, by what means I arrive at that conclusion. I find the judges in some cases have adopted the one method, that is, they have read it as implied in the term "necessary expenses" in the Act of Parliament; in others they have adopted the second method, and said, "The Act of Parliament must be intended to reserve to the corporation the ordinary rights of corporations." It does not appear to me, as I said before, material; but I think it is quite clear that the decisions go to this—that the right of defending themselves from an attack of this kind extends not merely to property, not merely to their existence in its smallest sense, that is, to the continued existence of the corporation as such, but to existence also in the larger sense, that is, the existence of the corporation with all its rights and privileges, and that an attack on a substantial portion of its privileges, rights, and duties is as much within the provision of the cases as an attack on its property or its mere existence. Now, first of all, as regards authority. The strongest case on the part of the plaintiffs is certainly *Reg. v. The Mayor, &c., of Sheffield* (L. Rep. 6 Q. B.

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652). I by no means say that that case is, in my own opinion, rightly decided, or that I have any occasion for criticising it adversely; but it does not go to the extent contended for on behalf of the plaintiffs. The judgment of the Lord Chief Justice goes very much upon the principle that I have mentioned. He says at p. 657: "With regard to the expenses incurred in opposing the Bill in Parliament, I think it is abundantly clear, and open to no doubt or question, that that was a purpose to which, looking at the words of the section, it was altogether beyond the municipal government, or anything to be done under that Act of Parliament, in a borough without a surplus fund, to apply the borough funds altogether beyond the scope of the municipal government." That is the ground of his decision. I shall show presently in this case it is by no means beyond the scope of the municipal government. Then he goes into the reasons for coming to that conclusion, and justifies it; but he then goes on to comment on certain cases which had been decided, and upon which I must say the judges seem to have come to a different conclusion to a certain extent. I mean the case of *The Attorney-General v. The Corporation of Wigan* (Kay 268). But it is quite plain that the ground of the Lord Chief Justice's discussion is that the Act in question was beyond the scope of the municipal government. Now, when we come to Mr. Justice Blackburn's judgment, in giving his opinion he says this: "These are two separate questions: first, whether they might lawfully and properly do what they did; secondly, whether they might charge the borough fund for the purpose." Then, after explaining the object of Act somewhat in the way that I have stated it, he says this, at p. 663: "Now, can we say as to these two matters, which do concern the interests of the inhabitants, and as to which the town council cannot be considered as impertinent intruders—can we say that these are matters which come within the terms of sect. 92 of the Act, as being expenses necessarily incurred in carrying into effect the provisions of the Municipal Corporations Act? There are some things which are obviously so, though they are not here enumerated. We have already decided more than once that when there is property belonging to the corporation, estates of their own, and anybody attempts to take away those estates, although there is no express enactment, yet the very fact that the corporation are owners of the property which is put into the borough fund, would make any litigation concerning it a purpose for carrying out the objects of the Act within the general terms." So that his decision comes to this: that, inasmuch as the income of the property is applicable to the borough fund, the preservation of that property must be considered a purpose of the Act. This is one way of putting it; but he finds it a purpose of the Act by inference. It is not within the express powers; it consequently comes to this, that any necessary incident to property (and there is no distinction in the world that I can see between "property" and "powers" for this purpose) is a purpose of the Act. Again, I will go back to the illustration which is very germane to this case, the regulations of the markets. The regulation of the market is part of the municipal government of the town; it is part of the rights and privileges enjoyed by the corporation, and it is as much within the judg-

ments of the Lord Chief Justice and Blackburn, J. as actual property in the market itself. It is vested in the corporation for the benefit of the town, as part of the government of the town; and he who seeks to interfere with the privileges and duties connected with the regulations must be resisted, and, of course, resisted at the expense of the corporation. It does not appear to me that that judgment at all prevents a corporation defending an attack upon such a portion of the privileges of a corporation. Now I come to a case which does not appear to have been cited, and I am sorry it was not, in *Reg. v. Sheffield*. It is a case which of course, as far as I am concerned, is of higher authority than the judgment of the Queen's Bench, because it is a judgment of the Lord Chancellor. It is the well-known case of *Bright v. North* (2 Phill. 260). When I come to read that case I find this. There was an Act of Parliament providing for the better conservation of the river Ouse. "The lands adjacent to the banks at each side were divided into six districts, and it was provided that the portion of the banks comprised within each district should be maintained by commissioners appointed from among the owners of lands of a certain quantity within such district by means of funds to be levied by a district rate not exceeding 3s. an acre in each year; and the fund so raised was to be applied in making, doing, constructing, and executing all such works, acts, matters, and things as by such commissioners should from time to time be deemed necessary, proper, or expedient for putting so much of the bank as was situate in their respective districts into, and for maintaining the same in, a permanent state of stability." As I read the report of the case, and as I know from experience, as regards other similar Acts of Parliament, there is no pretence for saying that the ownership of the banks was taken away from landowners and put in the commissioners. They were conservators and nothing more. Now the Lord Chancellor says this: "The commissioners of each district are bound by the Act to protect the lands adjacent to the banks." So they were: they were as much bound to protect the lands adjacent to the banks as to keep the lands in order "from inundation; and they were authorised by the Act to levy a rate on the proprietors of the district for the purpose of defraying these expenses." Again, the lands adjacent to the banks of course did not belong to them. Then it was alleged that the works which were to be undertaken by the promoters of the Bill in Parliament which they were opposing might be injurious to the banks; and the question was, whether the commissioner was authorised, having no special power for this purpose, to oppose the Bill in Parliament. The Lord Chancellor says: "The Bill therefore raises this proposition as to the construction of the Act; that, however injurious the works may be, the commissioners are not authorised to expend one farthing of the money intrusted to their care in preventing them. That being all that is alleged in the pleadings, and the rule being to take the case as strongly against the pleader as his statements will justify, I must assume that the means are likely to be injurious. Now, it is clear that, if actual injury was done and proper measures had been taken by the commissioners to prevent it, they would be entitled to their expenses so incurred. For every trustee is entitled to be

allowed the necessary and proper expenses incurred in protecting the property committed to his care." But, if they have the right to protect the property from immediate direct injury, they must have the same rights where the injury threatened is indirect and probable. Then he goes on: "I wish it to be understood that I proceed entirely on the pleadings, and assume that they state a case in which the works contemplated are likely to be injurious to the banks of this district, and on that assumption, although there is no direct authority in the Act for the application to the proposed purpose, I think it is incident to the powers which are given to the commissioners, and to the duties imposed upon them." It comes therefore to this, that a Bill promoted in Parliament which the commissioners thought would injure the lands might be opposed by them on the ground that it was their duty to protect the banks and the lands adjacent, and not on the ground of their having any right of property either in the banks or in the lands adjoining. It is therefore a decision that a proposed interference by Act of Parliament with the powers of the commissioners and with their duties, is such an interference as fairly entitles them to appear before a committee of either House to oppose the Bill. Now, when we come to look at the case which was very much commented on in the case of *Reg. v. The Corporation of Sheffield*, viz., the case of *The Attorney-General v. The Corporation of Wigan*, which is reported in Kaye's Reports, whatever view we take of the construction of the Act of Parliament put by Wood, V.C., afterwards Lord Chancellor Hatherley, we shall see that he simply founds himself on *Bright v. North*. He does not decide at all on the notion of injury to property. He reasons out in a way which has not been satisfactory to the judges of the Queen's Bench, and, if I may humbly say so, is not altogether satisfactory to me, a power in the corporation to restrain nuisances generally. But having found that power and the duty to stop nuisances generally, he then goes on in this way. He says they have a plain duty of taking care there shall be no nuisance in the town. Now, assuming he is right so far, then I think there is no possible fault to be found with his judgment. The real difficulty in the judgment is, that you cannot find the power, without giving to the restricted words of the section which he commented on a very much larger meaning than they fairly bear. That really is the criticism on the judgment of the Court of Queen's Bench, or at least by three of the judges of that court. But, if you once arrive at the same conclusion as the Vice-Chancellor did, as to the true construction of the section, that there was power to abate nuisances generally, and the duty to prevent it, I think his reasoning is, as he says it is, exactly in accordance with *Bright v. North* (*ubi supra*). He says: "It seems to me very strange to say, if it be a corporate duty to prevent nuisances, and to prevent them by bye-laws, yet if an enormous and gigantic nuisance was about to be perpetuated, and the corporation was to take steps by applying to this court, through the medium of the Attorney-General, for an injunction to restrain such nuisance, that they would not be allowed the costs of such a proceeding." And then he goes on describing this nuisance, of taking away 800,000

gallons of waters: "It would be a strange thing to say in the case of a continued nuisance of that description, although the corporation are under at least a moral obligation to protect the town from all petty nuisances, yet that they shall not lay out a farthing to prevent a large nuisance like that to all the inhabitants of the borough." And so I think it did. That is, if his construction of the previous portions of the Act of Parliament could be supported. Then, as he says, it is a case of duty, which is interfered with by the proposed legislation. It is a case, in effect, of attempted deprivation of the corporation of a part of their powers and duties, and they ought to be entitled to prevent it. I am quite aware that, when the case came on for appeal, the judgment is by no means so clear. The appeal case is reported in 5 De G. M. & G. 52, and Knight Bruce, L.J. says: "The costs in question were incurred by measures which, in effect merely defensive, were taken by the corporation of Wigan, not unsuccessfully or uselessly, for the purpose of preventing or diminishing the mischief to the town of Wigan, that certain intended proceedings (reasonably considered as likely to interfere materially with its drainage, and so to render the air less pure, and cause general inconveniences there) were, not without probable grounds, thought likely to occasion mischief, which (not solely of a public nature) might well have been expected to be also prejudicial to the property of the corporation." Now, although there is no statement in the report in Kaye of any injury being alleged by the bill, I see it was alleged in the argument that the corporation possessed houses and property within the borough likely to be injured, and I gather from this that Knight Bruce, L.J. was not satisfied with the reason of the Vice-Chancellor as to there being a general duty to prevent nuisance imposed on the corporation, and he took hold of this, which does not appear from the report to be in the Bill, that there was a probability of injuring property. Certainly, the judgment proceeds on no other ground, and the same remark may be made as to the shorter, but by no means less clear judgment of Turner, L.J. He says: "The Municipal Corporations Act contains no express provision authorising the application of the funds of corporations to the payment of expenses incidental to the protection of the corporate property. That has been left to the general law which sanctions such expenditure if reasonably and properly incurred." He takes the other view, that is, that the Act is silent, but leaves the general law to take effect, not limiting it to the words "necessary expenditure." "The expenditure in question here was, as it seems to me, incurred *bond fide*, for the protection of the corporation property. My present impression is that it was reasonably and properly incurred." Therefore the judgment in the appeal court proceeds simply on the protection of the corporate property. It does not, as far as I can gather, in the slightest degree touch the judgment in the court below, so far as regards the latter portion; but I think the appeal court doubted whether the former part of it, viz., the proposition that it was a duty of the corporation to restrain nuisances generally, should be supported. Therefore they confined their judgment to the question of property. It seems to me, therefore, looking at the authorities, that whether we take the one view

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or the other, whether we consider that under the words "necessary expenditure," or similar words used under the Act, this incidental expenditure is included; or whether we consider that the general law, as to the rights of trustees defending their property and privileges remains unaffected, that, in either way, if there is an attack by proposed private legislation on the rights, privileges, and duties of a corporation, that corporation is entitled to defend itself before Parliament. Now, before concluding what I have to say as to the law, I should like to say a word or two as to the recent Act of Parliament. As I read that Act of Parliament, it very much increases the responsibility of corporations who choose to act in opposing Bills in Parliament without obtaining the sanction of the ratepayers, because, if unsuccessful, it will be more difficult for them now than it was formerly to show that the expenses ought to have been allowed, inasmuch as they could have readily obtained the sanction which would have protected them from all consequences of want of success. But still I must read the Act as I find it; and I find in the 8th section of the Act these words: "Nothing in this Act shall extend or be construed to alter or affect any special provision," and so forth; "or to take away or diminish any rights or powers now possessed or enjoyed by any governing body, or which are or shall be vested in or exercisable by the inhabitants of any district under any general or special Act." The result therefore is, that if the municipal corporation had a power prior to the passing of this Act to oppose this Bill in Parliament, that power is certainly not taken away, and, to use the words of the Act, diminished by the recent statute. I now come to the circumstances of the case, and I must say I think it is a very strong case, quite distinguishable from all the cases to which I have been referred, because, in this case, the corporation had a special series of powers and duties which were very much interfered with. It is only necessary to say a few words as to the history of this market company and the corporation. It appears that in 1638 an Act of Parliament was passed empowering the corporation to buy lands in the borough of Brecon, and to make markets, and giving them all sorts of authorities and so forth. Then, notwithstanding the powers so conferred on the corporation, this market was not made, or not satisfactorily made; and, in 1862, an Act of Parliament was obtained authorising the company to make a new market place instead of the corporation, and transferring the market place, and the property which the old corporation acquired under the Act of 1838 or otherwise, to the company. Then the markets and fairs, and the market house, market places, and all the works connected with it, are, by the 21st section, vested in the company, i.e., they are taken away from the corporation. Then certain powers are reserved to the corporation which appear to me very important, and certain compensations given. By the 43rd section the sum of 210*l.* a year is by the Act charged on the market places, and the tolls in favour of the corporation, and then by a subsequent section of the Act, sect. 65, the company is empowered with, but not without, the consent of the corporation, to provide and maintain slaughter-houses; and then, by the 80th section, "the company shall not at any time lower, raise, or alter any of the

tolls, rents, stallages, and dues specified in the 3rd and 4th schedules to this Act annexed respectively, without in every case the consent of the corporation. By the 82nd section the company has power to let the markets for three years only. Then by sect. 89, "the company and the corporation from time to time may enter into and carry into effect all such contracts with respect to any of the purposes of this Act, and in accordance with the provisions thereof, and all matters incidental or necessary thereto as they may think fit." Then the 90th section saves the rights of the corporation, except where they are expressly taken away. Well now, in that position of matters, the corporation had both rights and duties; e.g., it was an important power of the corporation that they had a veto on the erection of slaughter-houses. Slaughter-houses are not agreeable things as a general rule, and no doubt it was considered not desirable to vest in a private company the right to put slaughter-houses anywhere they pleased in the town of Brecon. Again, the powers of altering tolls and rates is a very important power as regards the regulation of a market, and that again was not left to the company, but a control was given to the corporation of Brecon. Under these circumstances, the company, not having the power to erect slaughter-houses, or to use them rather, without the assent of the corporation, erected them, and then the corporation refused to assent to the use of the slaughter-houses. And to obtain, amongst other things, the right to use the slaughter-houses they had erected, they presented a Bill to Parliament, and this Bill in Parliament, presented by the company, contained, amongst other clauses, a power to use the slaughter-houses already erected, without any consent of the corporation. That is the 2nd section of the Bill in Parliament. It was for power to them "to use and maintain the slaughter-houses already erected by them on the site selected by the corporation as aforesaid without any further consent from the corporation," and that they should be deemed to be part of the market-place. That was as the Bill was brought in. Then the Bill also proposed that they should have power to lease the market for ten years instead of three, and it also proposed that they should have power to lower the tolls without the assent of the corporation. Lastly, it proposed that they should be empowered to sell the property of the company to the corporation, that the corporation should have borrowing powers conferred on it to raise the money to pay. This Bill the corporation opposed, and not altogether unsuccessfully, because as regards the slaughter-houses the first amendment made was that it should be sent to a referee to certify whether the slaughter-houses were fit for use or not. I am stating it shortly. Then in the House of Commons it was not sent to the named referee, but to a person to be appointed by the Local Government Board—I think at the request of the corporation or of the company—so that, instead of giving the company power to use the slaughter-houses, effect was given to the objection of the corporation that they were not fit for use. For the committee must have come to the conclusion on the evidence that they were not to be used until they were certified to be fit for use by the person nominated. That appears to me to be a very important success—so important that it does not matter whether they did succeed or did not

succeed on all the grounds of their opposition, because on some of the other points they were not so successful. That being so, is it tolerable that an individual or private company shall take away from the corporation the right conferred on it by a private Act of Parliament to object to erection or use of slaughter-houses which the corporation consider unfit or improper for use, and shall say to the corporation, "You shall not be entitled to oppose my Bill in Parliament; I will pass it in spite of you behind your back?" I think such a decision would be perfectly irrational. Such a privilege is a valuable privilege conferred on a corporation. Then there is a minor point, but still that is a very important point. The corporation has a security on the market rates amongst other things—no doubt only for 210%; but the corporation has a right to say, "You shall not lower the market rates without my consent." Is an individual or private company to take the right to lower the market rates, which may actually diminish the property of the company in the 210%? That is a very small point; but it may be a material point. As regards the keeping up of the market, and the welfare of the inhabitants of the town, it by no means follows that lowering the market rates may be beneficial to the town. It may so lower the interest of the company as to prevent the markets being kept in an efficient state; and it appears to me that the privilege or right of the corporation to assent to the lowering of the market rates is one which ought not to be interfered with by any individual or any company without giving the corporation the option of opposing it in Parliament. Then we come to the third ground, which is very important—that the general power of contracting given by the first Act is limited to the purposes of that Act. We have now a new company imposed on the corporation, and a power to buy on the terms fixed by the Act, the power to borrow the money to complete the purchase. I know that it is an option, but a very serious option. Is not the corporation to be heard as to the reasonableness of the terms? They did object to one of the terms. If it is not to be heard this might happen, that it may become very desirable to purchase, and although the terms are not fair terms, the corporation having no other means of purchasing, must purchase on those terms. But if the corporation can be heard before the committee of the House of Commons or the House of Lords, the corporation can then insist on the terms being fair: "Give me the power, but give it me on fair terms." And I think for myself, it is the very heart of the interest of the corporation, if I may say so, that, as to the terms of the purchase, they are entitled to be represented. It is such an interference with the corporation, *qua* corporation, both as regards its rights and duties, and as regards its property, that I cannot imagine it can be fairly said it is not connected with the purposes for which the corporation exists. I say nothing about the three years instead of the ten. That is a very small point. I think I have said enough to show that this is the kind of active interference with the corporation itself, and with its rights, duties, and property, which entirely puts the case out of the class of cases I have been considering. It really comes much closer to the other class of cases, *viz.*, an action to recover

from the corporation a part of its property or to deprive it of a part of its privileges. It appears to me, rightly considered, that the corporation has by law the right to apply its funds in opposing such a Bill as this; and that therefore the information fails, and must be dismissed. I ought to have noticed before an argument addressed to me about the assent of the ratepayers. I did not notice it for this reason. They said a majority of the ratepayers are in favour of the Bill. That may be so now, but the corporation is governed by its town council, which is a representative body of all the ratepayers, and I am not aware of any means by which the town council can be controlled by the ratepayers, except by the system of not re-electing them when their time comes round, which system is very likely to be enforced in the present instance if the town council do not carry out the views of the ratepayers.

Solicitors: *Wilkins, Blyth, and Fanshaw, for Cobb and Tudor, Brecon; Gear and Son, for John Williams, Brecon.*

Jan. 27 and 28, 1879.

(Before MALINS, V.C.)

NEWINGTON LOCAL BOARD v. COTTINGHAM LOCAL BOARD, W. H. WILKINSON, AND THE HULL BOTANIC GARDEN COMPANY (LIMITED). (a)

Local authority—Public Health Act 1875, sect. 22
—*Discharge of contract by statute.*

By a deed, dated 1874, local board A. agreed with local board B. to allow B. to cause the sewers of B. to communicate with a sewer of A., provided that the sewage of other places should not be permitted by B. to pass into the sewers of B., so as to discharge into the sewer of A. Persons in other places constructed sewers, connected with sewers of B., and discharging through them into the sewer of A. B. made no attempt to restrain them. A. claimed an injunction restraining B. and the persons in other places from causing or permitting the flow of sewage from any of such other places into sewers of B., so as to discharge as aforesaid.

On demurrer,

Held, that, by the effect of the Public Health Act 1875, sect. 22, the contract made by the proviso in the deed of 1874 was discharged, and the persons in other places had a right to connect with the sewer of B., without making any application to A.

DEMURRER.

By a deed dated the 18th July 1874, to which the Local Government Board was a party, the Newington Local Board agreed to allow the Cottingham Local Board and the Hull Local Board of Health to cause the sewers of the district of the Cottingham Local Board, and of part of the district of the Hull Local Board of Health, to communicate with a certain outfall sewer of the Newington Local Board's district, to be constructed by that board, for the purpose of the outfall of sewage. The deed contained the following proviso:

Provided always and it is hereby further agreed and declared, that so far as practicable all storm waters from such districts respectively shall be prevented from flowing into the said outfall sewer of the said Newington

Local Board, and that the sewage of any other districts or places shall not be permitted by the said Cottingham Local Board and their successors and the said Hull Local Board of Health and their successors to pass into their respective sewers so as to discharge into the said outfall sewer of the said Newington Local Board without the consent in writing of the said Newington Local Board first had and obtained.

The plaintiffs duly constructed the said outfall drain or main sewer.

Two roads called Princes Avenue and Spring Bank were parts of the boundary of the district of the Cottingham Local Board. Sewers were constructed under each by that board, that under the former discharging into that under the latter, and the latter into the plaintiffs' main sewer. The Hull Botanic Garden Company (Limited), hereinafter called the Hull Garden, owned a piece of land not in the district of the Cottingham Local Board, nor within the part of the district of the Hull Local Board of Health intended to be drained in accordance with the deed of 1874. On part of this land they intended to lay out a lake and build villa residences. They had laid down sewers for draining the piece of land and carrying away the overflow of the lake and the sewage of the villas, which sewers, with the consent of the surveyor of the Cottingham Local Board, they had connected with the sewer under Spring Bank. In spite of the plaintiffs' remonstrances, the Cottingham Local Board and the Hull Garden were allowing these sewers still to remain so connected. Surface water was flowing from the land of the Hull Garden through their sewer into the Spring Bank sewer and thence into the plaintiffs' main sewer. Wilkinson owned land, also not within the above-mentioned district or part of district. He intended to erect buildings on it, and had laid down sewers for draining his land and buildings, and intended to connect them with the sewer under Princes Avenue. He applied to justices to assess the compensation to be paid by him to the Cottingham Local Board on making such connection. The Cottingham Local Board appeared by their clerk, and neither assented to nor opposed the application. The compensation was assessed at 175*l.*, and paid. It was alleged that, if sewers not within the district of the Cottingham Local Board should be connected with such of that board's sewers as discharged into the plaintiffs' main sewer, the main sewer would be overcharged and in great danger of bursting. The plaintiffs had not given any such consent as mentioned in the deed of 1874. They claimed an injunction restraining the defendants from causing or permitting any sewage or surface water, other than any arising in or flowing from the district of the Cottingham Local Board, to flow or pass into any of the sewers of that board, so as to discharge into the plaintiffs' main sewer; and from causing or permitting to be made any new outfall into any of the sewers of the Cottingham Local Board which communicated, either directly or indirectly, with the plaintiffs' main sewer, whereby any surface or sewage water, other than as aforesaid, might flow or pass into any of the sewers of the Cottingham Local Board, so as to discharge into the plaintiffs' main sewer. Each of the defendants demurred.

Higgins, Q.C. and Macnaghten for the Cottingham Local Board.—The proviso does not operate to prevent such communications as at the date of

the deed were authorised by statute to be made (Public Health Act 1848, sect. 43; Sanitary Act 1866, sect. 9), and as are now authorised by sect. 22 of the Public Health Act 1875. At the time of the deed any owner or occupier could as a matter of right connect with the drain; and so now. Having, by reason of the statute, no power to refuse the communication, we have not contravened the clause, for we do not allow what we cannot prevent.

Glassey, Q.C. and W. Hatfield Green for the plaintiffs.—The parties to the deed must take the proviso as qualified by sect. 28 of the Act of 1875. As to the effect of sect. 22, we say an Act only prevents effect from being given to a contract where it makes the execution of the contract impossible:

Baily v. De Crespigny, 19 L. T. Rep. N. S. 681; L. Rep. 4 Q. B. 185.

So far from the contracts being now impracticable, the Act gives the defendants all the power that they can want: (sects. 15, 27, 173, 175.) *Hest v. Gill* (27 L. T. Rep. N. S. 291; L. Rep. 7 Ch. 699), on the effect of threatening, is the same as this case.

Higgins in reply.—The proviso was taken from the Public Health Act 1872, sect. 32. Sect. 28 of the Act of 1875, and the sections of the earlier Acts from which it is borrowed, apply to agreements between local authorities. Sect. 22 of the same Act, and the corresponding sections of earlier Acts, apply to other cases, viz., cases where communication is required by other than local authorities. *Baily v. De Crespigny* is in my favour; for it decides that a covenantor is equally disabled from preventing a third party from doing what he is empowered, or as what he is required by statute to do, and therefore is equally relieved from liability in either case.

J. Pearson, Q.C. and Borthwick, for Wilkinson.—I had only to deal with the Cottingham Local Board, and had nothing to do with any agreement between them and the Newington Local Board. Assume that at the time of the deed there was no enactment equivalent to sect. 22 of the Act of 1875, still, when that Act came, it repealed the agreement in the deed as to Wilkinson:

Brewster v. Kitchell, 1 Salk. 97, 197, 198; 1 Ld. Raym. 317, 321.

Glassey for the plaintiffs.

Ford North, Q.C. and B. B. Rogers, for the Hull Garden.—It is said that the words in sect. 22 of the Act of 1875, "local authority," mean all the local authorities through whose land the sewer passes; but it would be preposterous to suppose that a man opening a sewer has to negotiate with all such authorities; he has only to deal with the one immediately near to him.

Malins, V.C.—The injunction is sought upon the ground of the contract entered into between the two local boards by the deed of the 18th July 1874. The meaning of the proviso, I think, is plain enough, that the Cottingham board are not to give their consent; so far as they can, they are not to permit any persons who have property not within the district to drain into the Cottingham sewer, thereby increasing the quantity of sewage to be thrown into the Newington district, without the consent of the Newington board. [His Lordship then stated the facts above given as to Wilkinson.] As far as Wilkinson is concerned,

there has been no breach of the undertaking according to the express words; because it says that the sewage of any other district or place shall not be permitted by the Cottingham board to flow into their sewer so as to discharge into the Newington sewer. As they have not given their consent, but have remained indifferent, there has not, according to the strict letter of the contract, been any breach of it. They have neither assented nor dissented, but have stood by and allowed the authorities to decide what they thought was right according to the law. In the part of the statement of claim relating to the Hull Garden, there is an allegation of a breach of contract, because the Cottingham board are stated to consent, and consenting is permitting. Under these circumstances it is contended that there has been such a breach of the contract entered into as entitles the plaintiffs to an injunction. To this statement of claim each of the defendants has demurred. The defendants mainly rest their cases on the 22nd section of the Public Health Act 1875, and if that Act does apply, then the plaintiffs are wrong and the defendants right. Before I read the section, I may say it appears that all persons within the local district have an absolute right, under the 21st section, to drain into the sewer, without consent being given, or without any terms being imposed upon them. An owner or occupier of premises within the district is not bound to make any compensation whatever. But the right of Wilkinson and the Hull Garden, who are without the Cottingham district, depends on the 22nd section. It was urged that, whatever may be the effect of the contract of the 18th July 1874, it is superseded by the Act of 1875. On that subject, the law cannot be better put than in *Brewster v. Kitchell* (1 Salk. 198), though it is an old authority: "Where the question is, whether a covenant be repealed by Act of Parliament? this is the difference, viz., where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after, and compels him to do it, the statute repeals the covenant; so, if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, and an Act comes and makes it lawful to do it, such Act of Parliament does not repeal the covenant." That is also followed by the recent case of *Baily v. Crespiigny* (*ubi sup.*). There it was held, "that the defendant was entitled to judgment; for the defendant was discharged from his covenant by the subsequent Act of Parliament, which compelled him to assign to the railway company, and so put it out of his power to perform the covenant, on the principle of the maxim, *lex non cogit ad impossibilia*, and that it could make no difference whether the company were only empowered or were compelled to build the station on the paddock." Now, assuming that in the present case there was a covenant between these parties, originally binding between them, yet, if the Act has authorised every member of the community to do that which the Cottingham board bound themselves by the covenant not to permit anyone to do, when the Act says what the 22nd section of the Act of 1875 says, it seems to me that the case falls strictly and literally within those decisions, that a later Act of Parliament discharges the covenant

between the parties. Mr. Higgins put it correctly, that the defendants could not prevent, and therefore did not permit. That is, they could not prevent the owner from doing it, because Parliament conferred the right upon him; and if they could not prevent him, it is not their permission, but that of the law. Mr. Glasse argued that the covenant is absolutely binding, and that the consequence of a repeal of it would be to throw great inconvenience upon the Newington board, by overcharging their drainage and rendering it impossible for them to work their sewer properly. The answer is, that at the date of the deed of 1874 there already existed the 9th section of the Sanitary Act 1866 and the 32nd section of the Public Health Act 1872, and that in view of those sections, when the Newington board entered into this arrangement, they were bound to consider what under the existing law was the chance of the drainage being increased. They were bound to make their sewer of the size which was calculated, not to dispose only of the actual sewage, but of that sewage which would be added to it in the exercise of that power which then existed and undoubtedly exists under the later Act. It is an inconvenience which they were bound to prepare for. It is the right of every owner without the district to consider what will be most convenient to him. [His Lordship then pointed out that the map showed that the most convenient sewer for the Hull Garden was the sewer of the Cottingham board, which also was the convenient sewer for Wilkinson.] Another topic of Mr. Glasse was that Wilkinson and the Hull Garden were bound to apply, not only to the Cottingham board, but to the Newington board. I cannot agree with that, because the Act gives them this right. [His Lordship read from the 22nd section of the Act of 1875, and continued:] The local authority mentioned in this section is the local authority of the district adjoining; that local authority's is the drain into which the sewage is to be poured, and no other. The section prevented the Cottingham board from objecting to the making of the connection by the other defendants. The question whether the Newington board may be entitled to a portion of the compensation paid by Wilkinson to the Cottingham board is a matter between the two boards that has nothing to do with the questions raised in this action. Therefore it appears to me that the Cottingham board have not done anything which by law they were not bound to do. Wilkinson has done nothing which by law he was not entitled to do, and the same observation applies to the Hull Garden. The three demurrers will be allowed with costs.

Solicitor for the plaintiffs, *O. A. Wright*, agent for *J. R. W. Eldridge*, Hull.

Solicitor for the Cottingham Local Board, *A. R. Oldman*, agent for *J. Seymour Moss*, Hull.

Solicitors for Wilkinson, *Frankish* and *Buchanan*, agents for *Frankish* and *Kingdon*, Hull.

Solicitors for Hull Garden, *Miller*, *Smith*, and *Bell*, agents for *Tenney* and *Dawber*, Hull.

Q.B. Div.]

BELL (app.) v. MORSON (resp.).

[Q.B. Div.]

QUEEN'S BENCH DIVISION.

Wednesday, March 5, 1879.

(Before MELLOR and MANISTY, JJ.)

BELL (app.) v. MORSON (resp.). (a)

Election of guardians—Falsely assuming to act—Voting paper—Conviction—14 & 15 Vict. c. 105, s. 3.

The appellant called at the house of a voter for an election of guardians of the poor during his absence from home, asked for his voting paper, placed the voter's initials against two of the candidates' names, signed his own name as witness to the voter's mark, and got another person who was present to make a cross. The voter was not an illiterate person, and had given no permission or authority to the appellant to write upon the paper. Although this voting paper was allowed by the returning officer at the election, it did not appear how it reached him or what the voter knew about it.

Held, upon a case stated, that these facts were not sufficient to justify a conviction of the appellant under 14 & 15 Vict. c. 105, s. 3, for falsely assuming to act in the name or on the behalf of a person entitled to vote.

THIS was a case stated by justices of the peace in and for the county of Durham, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with the determination upon the question of law, which arose, as hereinafter stated, on the 24th June 1878, at Bishop Auckland, in the said county, the appellant having duly entered into a recognisance to prosecute the appeal.

1. Upon the hearing of a certain information preferred by the respondent against the appellant, under sect. 3 of the Act 14 & 15 Vict. c. 105, that the said appellant between the 7th and the 10th April 1878, at the township of Crook and Billy Row, in the county of Durham, pending the election of guardians of the poor for the said township under the statutes in that behalf, wilfully, fraudulently, and with intent to affect the result of the said election, unlawfully did falsely assume to act in the name and on the behalf of one John Hewitson, being then a person entitled to vote at the said election, contrary to the form of the statute in such case made and provided. The justices convicted the appellant of the said offence, and adjudged him to be imprisoned in Her Majesty's prison at Durham, in the said county, and there to be kept without hard labour for the space of ten days.

2. The following facts were either proved or admitted by the parties:

3. That there was an election of guardians of the poor for the township of Crook and Billy Row aforesaid pending in the month of April last, and that one John Hewitson was a person entitled to vote at the said election.

4. That a voting paper, prepared by the clerk of the guardians, and produced at the hearing, was left at the house of the said John Hewitson, in which paper there was the name of the said John Hewitson as the person being entitled to vote at the said election, together with directions as to the voter filling up and signing the voting paper.

5. That Jane Hewitson, the mother, and Anthony Hewitson, the brother, resided with the

said John Hewitson, and also that the two brothers had worked for several years at a colliery at which the appellant is the overman.

6. That on one day between the 7th and 10th April last the appellant went to the house of the said John Hewitson, that the said John Hewitson was not at home, and that the appellant asked the mother and brother, who were in the house, if the voting paper was filled up, upon which the brother said it was not, whereupon the appellant said he would fill it up for them, and asked for the paper, which was given to him by the mother, and he (the appellant) then, without any further remark and without asking for whom John Hewitson voted, filled up the paper by placing John Hewitson's initials, "J. H.," against the names of Bell and Jones, two of the candidates, and writing the name John Hewitson, as the name of a voter who could not write, at the foot thereof, and signing his own name, "Thomas Bell," as witness to the mark of John Hewitson. Appellant then requested Anthony Hewitson to make a cross at the foot of the voting paper, which he accordingly did in the blank space opposite to where the appellant had written the name of John Hewitson. The appellant then asked the mother and brother if they voted for Bell and Jones, to which Anthony Hewitson, the brother, replied "No," whereupon the appellant said, "It is filled up now," and then went away.

7. The voting paper so prepared and witnessed by the appellant, which was afterwards allowed by the returning officer on taking the poll at the said election, was produced at the hearing before the justices.

8. That John Hewitson had not given any permission or authority to the appellant or Anthony Hewitson to sign his name or mark to the voting paper, and that John Hewitson was not an illiterate man, but that he could write his name.

9. On the part of the appellant, it was contended that the mere preparation by the appellant of the voting paper to receive the mark of the voter was not sufficient in point of law to support a conviction of the appellant for falsely assuming to act in the name or on the behalf of a person entitled to vote.

10. The justices, however, being of opinion that the appellant was well acquainted with the two Hewitsons, and also that he did the act with which he was charged wilfully, fraudulently, and with intent to affect the result of the said election, gave their determination against the appellant in the manner before stated.

11. The question of law upon which the case is stated for the opinion of the court therefore is, whether the preparation and filling up of the voting paper by the appellant by the placing of John Hewitson's initials opposite the names of Bell and Jones, two of the candidates, writing at the foot thereof the name of John Hewitson as the name of a voter who could not write, and signing his own name as witness to the mark of John Hewitson, whilst the mark was placed on the voting paper by Anthony Hewitson at the request of the appellant, who knew that he was not John Hewitson, the person entitled to vote at the said election, is sufficient to support the conviction of the appellant for falsely assuming to act in the name and on the behalf of the said John Hewitson, being then a person entitled to vote at the said election.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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RIDDLELL (app.) v. SPEAR (resp.).

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By 14 & 15 Vict. c. 105, s. 3:

If any person, pending or after the election of any guardian or guardians, shall wilfully, fraudulently, and with intent to affect the result of such election, commit any of the acts following: that is to say, fabricate in whole or in part, alter, deface, destroy, abstract, or purloin any nomination or voting paper used therein; or personate any person entitled to vote at such election; or falsely assume to act in the name or on the behalf of any person so entitled to vote; or interrupt the distribution or collection of the voting papers; or distribute or collect the same under a false pretence of being lawfully authorised to do so; every such person so offending shall for every such offence be liable, upon conviction thereof before two justices, to be imprisoned in the common gaol or house of correction for any period not exceeding three months, with or without hard labour.

Meek argued for the appellant.—This is a conviction for falsely assuming to act in the name or on the behalf of a person entitled to vote; and it is not necessary to consider whether what the appellant did could properly constitute either of the other offences created by the section. There is nothing in the evidence to show any acting in the name or on behalf of John Hewitson; nor, indeed, does it appear that John Hewitson did not ratify and act upon what the appellant wrote. [Stopped by the Court.]

J. Cook, *contra*.—The chief ingredient of the offences under this section is the intention, and the justices have found that the appellant acted in the matter wilfully, fraudulently, and with intent to affect the result of the election. It does not appear that John Hewitson ever knew anything about the paper, either before or after the appellant wrote upon it. The voting papers are called for at the houses of the voters, and it never could have been intended that a vote should be given without any knowledge of it by the voter. The case of *Whiteley v. Chappell* (38 L. J. 51, M.C.) failed as a conviction on the ground that the person whose name was assumed was dead: it is consistent with that decision that this conviction was right.

MELLOR, J.—I think if, upon these facts, the justices had convicted the appellant of fabricating in whole or in part this voting paper, it might have been contended that the evidence was sufficient; but they seem to me to have proceeded on the wrong clause of the section. I see nothing to justify me in thinking that the appellant assumed to act in John Hewitson's name. It would be too much to infer this when it does not appear that John Hewitson was even called as a witness. Moreover it does not appear how the paper reached the returning officer; if the voter himself gave it him, he might have thereby ratified the appellant's fabrication. At all events the evidence is not enough for a conviction under this clause.

MANISTY, J.—I agree; but I think the circumstances come very nearly within the offence charged. Possibly what the appellant did is consistent with innocence. I do not see how the justices could find what is stated in the case without John Hewitson's being called as a witness; and it is amazing that he was not further asked if he had adopted the vote which the appellant had written. I agree that the evidence is not sufficient as it stands.

Judgment for the appellant.

Solicitors for appellant, *Rogerson and Ford*, for J. T. Proud, Bishop Auckland.

Solicitors for respondent, *Scott and Clarke*.

Wednesday, March 5.

(Before MELLOR and MANISTY, JJ.)

RIDDLELL (app.) v. SPEAR (resp.). (a)

Nuisance—Sewer—Consent of occupier—Stoppage
—38 & 39 Vict. c. 55, ss. 94 and 96.

The appellant rented land of the owner of houses and other land in the neighbourhood; and about two years ago the landowner, without the appellant's consent, made a sewer under the land he occupied. Pecuniary compensation was claimed at the time, but during the two years the sewage of several houses passed through the sewer; the appellant, being unable to get satisfaction from his landlord, at length stopped up the sewer, and the local board obtained a conviction against him under sects. 94 and 96 of the Public Health Act 1875, although no nuisance existed on his land.

Held, upon a case stated, that the appellant was a person by whose act the nuisance arose or continued; and that he was rightly convicted.

THIS case was stated for the opinion of the court by two of Her Majesty's justices of the peace for the county of Durham, acting in and for the East Division of Chester Ward in the said county, in pursuance of the statute made and passed in the twentieth and twenty-first years of the reign of Her Majesty Queen Victoria, chapter 43, for the purpose of obtaining the opinion of this court in questions of law which arose as hereinafter stated.

On the 6th April 1878 the respondent, John Spear, of South Shields, in the county of Durham, medical officer of health of the local board of health for the district of Hebburn, in the said county, made a complaint that in or upon certain premises—the Caledonian Hotel, situate in Lyon-street, Hebburn Quay, in the said county, within the district of the said local board of health for the district of Hebburn, in the said county—the following nuisance then existed, the said premises being in such a state as to be a nuisance or injurious to health, arising from the reflux of sewage matter into the cellar of the said premises which are called or known by the name or sign of the Caledonian Hotel, situate at Lyon-street, Hebburn Quay aforesaid; and that the said nuisance was caused by the act, default, or sufferance of the above-named appellant, Edward Riddell, of Lyon-street, Hebburn Quay, in the said county of Durham, by placing an obstruction in the sewer in the locality of the said house and premises; and thereupon a summons was duly issued and served upon the said Edward Riddell, the above-named appellant, requiring him to appear before two of Her Majesty's justices of the peace of the county of Durham and answer the said complaint.

On the 30th April 1878 the said complaint came to be heard at the justice room, Waterloo Vale, South Shields, in the said division and county, when the respondent, by Thomas Grieves Mabane, a solicitor, who is also clerk to the local board of health for the district of Hebburn aforesaid, and the said appellant by his solicitor, appeared before the said justices.

The proceeding was under the Public Health Act 1875, sects. 91 to 111, both inclusive, and sect. 13 was also referred to.

It was satisfactorily proved by Henry Wilson,

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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surveyor to the local board of health of Hebburn, and Richard Hill, the sanitary inspector of the board, that a sewer had existed within the said local board district for draining the Caledonian Hotel in question for at least two years previous to the complaint, and that such sewer belonged to the board, and was part of the main sewerage of the district, and that it drained other properties besides the Caledonian Hotel, and particularly that it drained all Lyon-street.

It was proved that the sewer in question was put in about the year 1873 by Mr. Carr Ellison, the owner of the land whereon the Caledonian Hotel is built, and of the surrounding land, and that the appellant alleged and complained to the local board that he had not received compensation from Mr. Ellison for putting the sewer through land of which the appellant was his tenant. The letter of appellant to the local board, of which the following is a copy, was put in evidence on behalf of the respondent :

Lyon-street, Hebburn, Feb. 7, 1878.

To the Urban Sanitary Authority, Hebburn.

Chairman and Gentlemen,—I respectfully inform you that I have not received payment for putting the sewer down my premises at Jarrow Wood House, a claim for which was forwarded to R. C. Ellison some time ago. If my demand be not complied with within fourteen days from this date I will cut off the sewer from your use. As you will be aware, I never received notice from you or any other party at any time that such sewer was wanted. I shall regret if such course has to be taken by me on account of other people's property, but I see no alternative.—Yours faithfully,

E. RIDDELL.

J. Buchanan, Esq., Chairman.

It was further proved that the appellant between the 7th and 25th Feb. last, stopped up the passage of the sewerage from the Caledonian Hotel, by filling up the sewer at the manhole, thereby preventing the drainage of the Caledonian Hotel flowing through it, and caused such drainage to accumulate in the cellar of the said hotel; that such drainage there became a nuisance injurious to health, and that such nuisance existed at the date alleged by the complaint. The evidence of John Spear, medical officer of health to the said local board, was distinct, that the liquid accumulated in the cellar of the Caledonian Hotel was a nuisance injurious to health, and he also deposed that the appellant had admitted to him that he had stopped up the drain, giving as his reason that the local board had not made any acknowledgment for putting the sewer through his land.

It was further proved that a notice by the sanitary inspector of the local board requiring the appellant to abate the nuisance in question within twenty-four hours was duly served upon him on the 3rd April 1878.

The appellant contended that the summons or complaint ought to be dismissed on all or one of the following grounds :

First, that defendant is in possession of the land under a claim of right, and it was unnecessary therefore to consider his title.

Secondly, that the sewer not constructed by the board and not vested in them.

Thirdly, that the sewer is constructed through defendant's land and drains more than one house, so that it is a sewer which vests in the local board unless it was unlawfully made through defendant's land without his authority and without the local

board having served notice under the Sanitary Acts.

Fourthly, defendant claims the right to prevent the sewage coming upon his land by the means he adopted, and that, as the sewage does not originate on his land, he is not responsible for any nuisance it may cause by its having been prevented by him from coming on to his land. The defendant claims the right to prevent foreign sewage coming upon his land, and is therefore not liable to conviction under sect 96.

In support of appellant's contentions he relied upon the facts proved as above stated, and also upon the following evidence adduced upon cross-examination of Mr. Wilson, wherein he stated as follows :

The local board was constituted two or three months before I was appointed surveyor in July 1873. The sewer was not put in, in consequence of a notice from the board. It is understood by me now to belong to the board, because owners of property put them in and hand them over. I cannot say when this sewer became the property of the board. I am not aware of this sewer being handed over to the board by any formal act. I have not seen Mr. Ellison as to this sewer. I prepared the plan produced. The manhole is 174 yards from the Caledonian Hotel. The manhole is in a field which I understood to be in the occupation of the defendant. The manhole is about 200 yards from the sewer mouth, which is an open field, and discharges itself into defendant's second field. It is about forty yards from the nearest dwelling, and the distance from the mouth to the foreshore (of the river) is 144 yards. All Lyon-street drains into the sewer. Defendant has complained of the sewer being through his land. No reply was given to the letter of the 7th Feb.

The appellant called Michael Pigg as a witness on his behalf, whose evidence was as follows :

Have known land at Jarrow Wood Farm for fourteen years, resided in it ten years. I know Humble by sight. He is a contractor at Gateshead. In Sept. 1874 the sewer was made. I heard George Riddell say to Humble, "By whose authority do you come here?" He replied, "Mr. Carr Ellison." George Riddell is defendant's brother, and they are joint occupiers of the land. George Riddell said they had not any right there; he would treat them as trespassers. I consider the discharge of sewage upon the land a nuisance. It has been complained of.

The justices gave the evidence and contentions on both sides their careful consideration, and were of opinion that it was satisfactorily proved that the sewer was in possession of the local board, and that the appellant was responsible under the Public Health Act 1875.

And on proof there had before them that the said nuisance so complained of did exist on the said premises, and that the same was caused by the act, default, or sufferance of the said Edward Riddell, the appellant, the justices, in pursuance of the Public Health Act 1875, ordered the said appellant within twenty-four hours of the service of their order, or a true copy thereof according to the said Act, to effectually abate the said nuisance by removing the said obstruction in the said sewer, and by cleansing and purifying the said premises situate at Lyon-street, bHebburn Quay, in the said county, and called or known by the sign of the Caledonian Hotel, so that the same should no longer be a nuisance or injurious to health as aforesaid. And they further adjudged the said appellant for his said offence to

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forfeit and pay the sum of ten shillings to be paid and applied according to law, and they also directed that the said appellant should pay the sum of fifteen shillings and sixpence, being the amount of costs incurred up to making of the order for abatement of the said nuisance; and if the said several sums were not paid forthwith they adjudged the said appellant to be imprisoned in the house of correction at the City of Durham, in the county of Durham, for the space of seven days, unless the said several sums and all costs and charges of the commitment and conveying of the said appellant to the said house of correction should be sooner paid.

If the court shall be of opinion that the said order is wrong in point of law, then the said order is to be quashed; but if the court shall be of opinion that the said order was legally and properly made, the same is to stand.

Meek for appellant.—It may be, as the justices have found, that this sewer was vested in the board under sect. 13 of the Public Health Act 1875; but the appellant is not the person under sects. 94 and 96 "by whose act, default, or sufferance the nuisance arises or continues." Sect. 94 continues: "Or, if such person cannot be found," the notice shall be served "on the owner or occupier of the premises on which the nuisance arises." Here the hotel is the premises on which the nuisance arises, and moreover the person by whose default the nuisance arises is Mr. R. C. Ellison, who improperly made the sewer, and not the appellant. An authority for this is *Brown v. Bussell*; *Francourt v. Freeman* (L. Rep. 3 Q. B. 251), where the person whose premises were drained in one case, and the person who constructed the drain in the other, were held to be the persons by whose act respectively the nuisances arose.

Cave, Q.C. and *Cock* appeared for the respondent, but were not heard.

MELLOR, J.—I think our judgment must be for the respondent. There is some difficulty in applying the sections of the Act to this particular case; but the justices have found that this sewer has been vested in the board. Moreover, the sewage passes not only from the hotel, but from the whole street, and has done so for two years past. No doubt the appellant's claim might have been enforced upon Mr. Ellison either before or after the making of the sewer; but he could have no right to stop the sewage after the sewer had become vested in the board. It appears from the cases cited that there is some ground for arguing that Mr. Ellison or the occupier of the hotel might have been proceeded against as well as the appellant; but the ground upon which I based my decision in those cases is quite sufficient to support our judgment for the respondent here. "Suppose it to be a disputed question," I say (L. R. 3 Q. B. at p. 261), "whether an open drain was made through land with the consent of the owner, the public health is not to suffer until this question is determined. The proceedings are to be, in the first instance, against the person whose act causes the nuisance; if he cannot be ascertained, then against the person who has the misfortune to have such a noxious easement on his land." Here the appellant is the person whose act caused the nuisance, and it was within the justices' power to convict as they have done.

MANISTY, J.—I am of the same opinion. If the appellant has any remedy, it can only be against Mr. Ellison, his landlord. He has mistaken his course by stopping up the sewer.

Judgment for respondent.

Solicitor for appellant, *John Scatfe*, for *Duncan* and *Duncan*, South Shields.

Solicitors for respondent, *Iliffe, Russell, Iliffe*, and *Cardall*, for *T. G. Mabane*, South Shields.

HOUSE OF LORDS.

Nov. 8 and 12, 1878.

(Before the LORD CHANCELLOR (Cairns), Lords O'HAGAN and SELBORNE.)

WARD v. HOBBS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Contagious Diseases (Animals) Act—Sale of goods—Implied warranty—Sale "with all faults"—Breach of statutory duty.

The Contagious Diseases (Animals) Act (Stat. 32 & 33 Vict. c. 70) enacts, sect. 57: "If any person exposes in a market or fair, or other public place . . . any animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this Act, unless he shows . . . that he did not know of the same being so affected, and that he could not with reasonable diligence have obtained such knowledge."

Held (affirming the judgment of the court below), that the mere fact of exposing for sale in a market animals which were to the knowledge of the vendor suffering from such disease did not, in the absence of an express warranty, and of any fraud or concealment on the part of the vendor, create an implied warranty under the statute which would make him liable to the purchaser for damages sustained by him in consequence of the condition of the animals.

A breach of a statutory duty does not necessarily give a right of action to the person wronged by such breach.

THIS was an appeal from a judgment of the Court of Appeal (Bramwell, Brett, and Cotton, L.JJ.), reported in 37 L. T. Rep. N. S. 654, and 3 Q. B. Div. 150, reversing a decision of the Queen's Bench Division (Mellor and Lush, JJ.), reported in 36 L. T. Rep. N. S. 511, and 2 Q. B. Div. 331, in favour of the plaintiff.

The plaintiff and defendant were both farmers near Newbury. In Sept. 1875 the defendant sent some pigs to be sold by auction at Newbury market. Among the conditions of sale were the following:

4. The lots, with all faults and errors of description, if any, to be paid for and removed at the buyer's expense immediately after the sale.

6. No warranty will be given by the auctioneer with any lot, and as all lots are open to inspection previous to the commencement of the sale no compensation shall be made in respect of any fault or error of description of any lot in the catalogue.

The plaintiff purchased the pigs for 44l., which was admitted to be a fair price; but immediately after the sale they showed symptoms of typhoid fever, and all but one died, and they infected other pigs of the plaintiff, which also died. The plaintiff then brought this action for the damage he had sustained.

(a) Reported by C. E. MALDEN, Esq. Barrister-at-Law.

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The case was tried before Brett, L.J. at the Berkshire Summer Assizes in 1876, when the jury found a verdict for the plaintiff, finding expressly that the defendant was aware that the pigs were infected with the disease when he sent them to the market.

The learned judge reserved leave to move to enter a verdict for the defendant, but the rule was discharged by the Queen's Bench Division. This decision was reversed by the Court of Appeal, as above mentioned, on the ground that the defendant did not by taking the animals to a public market represent that they were free from disease.

The plaintiff then appealed to the House of Lords.

H. Matthews, Q.C. and *Bros* appeared for the appellant.—The arguments urged appear sufficiently from the judgments of their Lordships. In addition to the cases mentioned in the judgments, the following were cited or referred to in the course of the argument :

Hill v. Balls, 27 L. J. 45, Ex.; 2 H. & N. 299;
Cooks v. Waring, 9 L. T. Rep. N. S. 257; 32 L. J. 362 Ex.;
Reg. v. Bernard, 7 C. & P. 784;
Hill v. Gray, 1 Stark. 434;
Jones v. Bowden, 4 Taunt. 847;
Eichols v. Bannister, 34 L. J. 105, C. P.; 17 C. B. N. S. 708;
Peto v. Blades, 5 Taunt. 657;
Shepherd v. Kain, 5 B. & A. 240;
Blakemore v. Bristol and Exeter Railway Company, 8 E. & B. 1035;
Brass v. Matland, 6 E. & B. 470;
Burnby v. Bollett, 16 M. & W. 644;
Emmerton v. Matthews, 7 H. & N. 586.

Benjamin, Q.C. and *H. D. Greene*, who appeared for the respondent, were not called upon to address the House.

Nov. 12.—Their Lordships gave judgment as follows:

THE LORD CHANCELLOR (Cairns).—My Lords, in this case the respondent sold a certain number of pigs by auction at Newbury market, and the appellant became the purchaser of those pigs at the auction. There were conditions of sale under which they were sold, and the fourth and sixth of those conditions ran in these words: [His Lordship read the conditions set out above, and continued:] It turned out that almost immediately after the sale the pigs, in the hands of the purchaser, showed symptoms of being affected with typhoid fever, a contagious and infectious disease; they rapidly died off, and nearly all of them ultimately died. If the finding of the jury, that the pigs were infected with this disease at the time of the sale, and that the respondent knew it, is a correct inference from the facts of the case, then, beyond all doubt, the respondent was, both morally and legally, highly culpable. But the question is, Is there a right of action on the part of the appellant? In his claim he puts the case in this way: he says that by warranting the pigs to be free from any infectious disease, the defendant induced him to buy them; and then he alleges that "even if the defendant did not warrant the pigs, the plaintiff says that the defendant, either knowingly, or having good reason to believe that the pigs were suffering from an infectious disease, offered them for sale at a certain open and public market held at Newbury, and sold thirty-two of them to the plaintiff for 44l.;" and then he says that "the defendant

knew that the plaintiff was a farmer, and that the pigs would be placed with other pigs, and would also be turned into certain stubble fields." Now with regard to the allegations in the statement of claim, undoubtedly there was no warranty, and the case in that respect is unsupported. As to the other allegation, that simply from the fact of sending the pigs to the market when they were in this state a right of action arises, that was not the ground on which the case was mainly rested at your Lordships' bar. The counsel for the appellant contended that, from what took place at the trial, and afterwards, any technicality founded upon the claim was out of the question, and the appellant might succeed by showing that, on the facts as they were proved, there was any right of action on his part on any ground whatever. The appellant's contention at your Lordships' bar was this, that the respondent had made a representation which was untrue in point of fact, and that the action lay as in the nature of an action for deceit. Now, I apprehend there can be no doubt of this proposition, that if a man expressly states upon a sale that he gives no warranty, and that the goods sold must be taken with all their faults, but goes on to say expressly in addition to that, that so far as he knows, or believes, or has reason to believe, the goods are free from any particular fault, and that the animals (if it be animals that are sold) are free from any disease, if he expressly states that, and if it can afterwards be proved that the animals were tainted with the disease to which he referred, then there can be no doubt that, notwithstanding the negation of warranty, an action would lie for deceit for the false representation. There is no difficulty in reconciling the two express statements—one that he does not warrant, and that the property must be taken with its faults, and the other that, so far as he knows or believes, the article sold is free from a particular fault. Upon that part of the case there can be no controversy. But the question here is, not how two express statements of the kind that I have described are to be made to stand together, but whether, in addition to the express negation of warranty which I have described, there was any other representation at all. Now, any representation in words there clearly was not in this case. The only statement actually made was the one contained in the two conditions of sale which I have read. Beyond that not a word was said, or is alleged to have been said, on the part of the auctioneer; and the respondent never in any way came in contact with the appellant. But what was contended at your Lordships' bar was this, that, although there was no express representation made in words, yet there was conduct on the part of the respondent which amounted to a representation; and it was endeavoured to make that out in this way: it was said the Contagious Diseases (Animals) Act (32 & 33 Vict. c. 70), s. 57, enacts that any person who sends an animal, having at the time upon it an infectious or contagious disease, to any public or open place, shall be guilty of an offence under this Act, unless he shall prove that he was not aware that the animal was so tainted with disease. And it was said, therefore, that the respondent here, from the mere fact of sending his pigs into a public market, must be taken (being of course held to be aware of the law upon the subject) to be representing that he was

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complying with, or, at all events, not infringing the law, and that the animals were not tainted with any infectious or contagious disease. I think it always desirable to abstain, as far as possible, from expressing an opinion upon a case which is not actually the case under consideration, and I desire here to be held free from expressing any opinion as to what, in a case in which there was no negation of warranty, no statement such as I have read from the two conditions of sale in this case, ought to be the law as to a man who sent his pigs to a public market, knowing them at the time to be tainted with disease. I observe that in the case of *Bodger v. Nichols* (28 L. T. Rep. N.S. 441), in the Court of Queen's Bench, Blackburn, J. seems to have thrown out an opinion that, in a case of that kind, there being nothing upon one side in the shape of statement or negation, and there being simply the fact of a man sending diseased animals to a public market to be sold on the other, that must be held to be a representation by conduct that the animals were free from disease, and that the person so sending them might be liable for the consequences of that representation if it turned out to be untrue. I desire, so far as I am concerned, to hold myself unpledged, if such a case had to be considered. But that, as it seems to me, is not the case which your Lordships have now to consider. You have here to consider an actual, clear, unqualified statement in writing, on the one hand, and no statement whatever, even in mere words, on the other hand, but an attempt to raise a conclusion as to an implied statement from conduct. The words of the statement on the one side are perfectly clear; they are that the vendor will not warrant the goods—that they are open to inspection, that the purchaser might inspect them, and that the purchaser must take them with all their faults. Now I hold that, in order to countervail or qualify that, and to cut it down, there must be something as clear in statement in an opposite direction. If there had been that representation in words which I began by supposing, namely, that notwithstanding that negation of warranty, the vendor said that he believed the animals were free from disease, that might be the foundation of an action for deceit; but it seems to me that there is no authority and no principle upon which, in the face of a clear and unqualified statement on the one hand, such as I have described, that the purchaser must take the articles with all their faults, you are to raise, from the mere circumstance of his sending the animals to the market, the implication of a representation on the other hand that the animals were, in the belief of the vendor, free from disease. I therefore, on this part of the case, entirely agree with the unanimous conclusion of the Court of Appeal. But there were some minor points in the case suggested as arguments upon which the appeal might be sustained, and I will refer to them very shortly. The first of them was this: It was said that there was here a breach of statutory duty, and that wherever you have a breach of statutory duty and any person wronged by it, the person wronged has a right of action. Now, I do not stop to consider how far that can be supported as a general proposition. A good deal might be said upon that subject, but it is sufficient to point out to your Lordships that the statutory duty here is of this kind; it is a duty not to send

infected animals into a public place—for an obvious reason, lest they should by contact or neighbourhood taint other animals, and thereby occasion injury to the public. If in that state of things some person had come forward and said, "You, the respondent, sent tainted animals into this public place, and my animals in that public place, by contact or neighbourhood, were infected, and I suffered a loss," then I could understand the argument. But that is not what occurred here. What occurred in the public place was the buying and the selling, and no tainting of other animals, although it is said that after the pigs became the property of the purchaser, and were taken to his farm, they tainted other animals which were there. But that is not the gist of the enactment, and therefore it appears to me that this argument altogether fails. The next point was this: It was said that that which was sold here was not really a lot of pigs, but a mass of disease—of typhoid fever. To that all I can say is, that a pig having typhoid fever appears to me not to lose its identity any more than a man having typhoid fever ceases to be a man; and therefore the thing sold was that which it was professed to sell. Then again it was said that what was sold here was not merely infected by disease, but was a noxious and a dangerous thing, certain not only to be useless in itself, but to be a source of evil and of danger wherever it might be carried, and it was likened to the case of a person selling explosive substances without any warning being given to the purchaser, and without its being known or made clear that the possession of the substance was attended with danger. There again I should not wish to express any opinion as to how far that argument might be urged in a case where there was no express statement upon the subject of the thing sold; it is sufficient to say that it seems to me that where you have an article sold with a statement, not merely that the vendor does not warrant it, but that the purchaser must take it with all its faults, this point really becomes a branch of the first point to which I have referred; and you cannot therefore contend that the purchaser is afterwards to be at liberty to turn round and say, "There was this fault in the article which I bought which makes it a dangerous article for me to become the possessor of." Those were the arguments which your Lordships heard urged with great skill and ingenuity by the counsel for the appellant; but it appears to me that they all failed, and that the decision of the court below ought to be affirmed. I move your Lordships, therefore, that the appeal be dismissed with costs.

Lord O'HAGAN.—My Lords, I do not regard this case as free from difficulty; but, on the whole, I see no sufficient reason for declining to concur with the Court of Appeal. The matter, as presented by the appellant, is of the first impression; no authority supports his contention, and its success would involve the establishment of a new principle, and the recognition of a legal presumption heretofore unknown. The statement of claim relies upon a warranty, but makes no case of deceit, or fraud, or failure of consideration, and contains no averment that the plaintiff was misled by any representation of the defendant. Warranty there was none; but, on the contrary, the conditions of sale expressly declined the giving of any, and purchasers were informed that they might

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make what inspection they pleased before the commencement of the sale, and that no compensation would be given "in respect of any fault or error of description of any lot in the catalogue." The very ingenious and exhaustive argument of the counsel for the appellant addressed itself to several points which, as I observe, were not made in the pleadings, and were dealt with sufficiently by the Lord Chancellor; but the real question is that which alone seems to have been raised and considered in the courts below, whether the offer for sale in open market, of itself, under the circumstances proved in evidence, amounted to a representation of soundness imposing responsibility on the defendant for the loss which the plaintiff undoubtedly incurred? I assume, for the purpose of the argument, according to the verdict of the jury, that the defendant knew of the diseased condition of the pigs when he sent them to market, although for my own part I am more than doubtful of the correctness of the finding in that respect. But, taking it as proved that the animals were known by the respondent to have disease, I should not be prepared to say, even in the absence of the conditions of sale on which he relies, that the non-disclosure of the fact would, without more, have cast liability for loss upon him. We must deal with the law as we find it, even though we might desire, in cases of bargain and sale, to compel more full and candid statements on peril of grave responsibility; and that law is stated thus by Judge Story in his book on Contracts (at p. 511): "The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact which there is no legal obligation to divulge will not avoid a contract, although it may operate as an injury to the party from whom it is concealed." And again (p. 551): "Although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee, yet, under the general doctrine of *caveat emptor*, he is not ordinarily bound to disclose every defect of which he may be cognisant, although his silence may operate virtually to deceive the vendee." I take it that this is a correct statement, and, if so, as there was not in the present case any legal obligation to divulge the knowledge assumed to belong to the defendant, his simple failure to divulge it did not nullify the contract, and could not be taken, as the appellant insists, either as a representation of the soundness of the animals or as a representation that he did not know them to be unsound. If the vendee bought at his own risk and in reliance on his own inspection, without requiring a warranty, which he might have made the condition of his purchase, and if there was not—and no one says there was—any artifice or disguise on the part of the vendor, for the purpose of concealment, then I should be disposed to hold, if it were necessary to decide upon such a state of facts, that the mere silence, which he was not asked to break, did not impose responsibility. However, the case of the respondent is different and stronger, and we are not required to pronounce such a decision. The argument of the appellant rests upon implication, and inference arising from conduct; and no doubt conduct may amount to representation as clearly as any form of words. But the express declaration made in the conditions of the sale, in my opinion,

forbade the implication and repelled the inference. The purchaser was informed that he would have no warranty, and that he was not to expect compensation for any fault. He was told to inspect for himself and to judge for himself, and warned that he must take the consequences of any error he might commit in making a bad bargain. He had the clearest intimation that the vendor, whatever might be his state of knowledge, expressly refused to give any help to a right decision or make any disclosure of any kind. The legal result is stated very plainly by Lord Ellenborough, in the case of *Baglehole v. Walters* (3 Camp. 154), the authority of which has never, so far as I know, been called in question: "Where an article is sold with all faults I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and apparent. I may be possessed of a horse which I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and, instead of giving a warranty of soundness, to sell him with all faults. Having thus laboriously freed myself from responsibility, am I to be liable if it be afterwards discovered that the horse was unsound?" Now the defendant in this case did precisely what was held by Lord Ellenborough to protect a vendor against liability for all faults, "secret or apparent." And, I repeat, it has not been pretended that he was guilty of any contrivance to conceal or to deceive. The conditions of sale, by declining to compensate, suggested that there existed, or might exist, a state of things which, but for the condition, would entitle to compensation. It at once challenged inspection, and aroused attention to the probable necessity of making it, and so left the purchaser without reason to complain. How is the force of this authority sought to be evaded? Only, so far as I understand the argument, by reliance on the Contagious Diseases (Animals) Act. It is said that this Act, making the exposure in a market of animals affected by contagious disease a criminal offence, warrants purchasers in presuming that persons so exposing them intend to represent them—and represent them, in fact—as free from such disease; and that therefore responsibility attaches as on a warranty created through a representation by conduct. This is very subtle and not very tangible reasoning, and it has failed to satisfy my mind. In the first place, the condition of sale, by its express refusal of warranty or compensation, appears to me to negative the existence of any representation of the kind. It is distinct notice to all the world that there may be faults which the vendor does not care to disclose, for which he will not be accountable. Next the assumption, and the gratuitous assumption, is, that vendors and purchasers generally know not merely of the existence but of the terms of the Act, and of its penal operation, and of its effect in probably deterring the owners of unsound cattle from bringing them to sale. There may have been no such knowledge; and even if it existed, what reason have we for supposing that men will not violate the law, and brave its penalties, taking the risk of discovery and the

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chance of escape? What right or reason has anyone to presume that the dealer, by the fact that he offers to sell, demonstrates, or intends to demonstrate, his compliance with the Act, and consequently affirms the soundness of the animal? In this case, if the finding of the jury was correct, the defendant, knowing that he would be guilty of a breach of the statute subjecting him to punishment, ventured on it notwithstanding, and got off scot free, for his pigs passed the inspector, and were pronounced to be without disease. Many similar transactions may and must take place, for obedience to the law cannot always be expected when evasion of it may be the source of profit; and I find it impossible to hold that the mere appearance of animals in a market can be reasonably presumed to imply their immunity from contagious illness in any case, and certainly not in a case in which the owner negatives any such implication by refusing to warrant, and insisting on an acceptance "with all faults." I cannot see any real relation between the penal statute and the contract we are considering; and I agree with Brett, L.J. that the attempt to connect them is illusory. The Act was passed for the benefit of the general public; it has nothing to do with the bargains of particular persons. Under such circumstances as are now before us the presumption on which the appellant rests his claim to recover the compensation which the conditions of sale forbade him to expect, seems to me to have no foundation in fact or law; and I concur with my noble and learned friend that the appeal should be dismissed with costs.

Lord SELBORNE.—My Lords, I feel compelled to agree in the judgment moved by my noble and learned friend on the woolsack, though I confess I do so with some reluctance. Upon the question of implied representation I have never felt any doubt. Such an implication should never be made without facts to warrant it; and here I find none, except that in sending for sale, though not in selling, these animals, a penal statute was violated. To say that every man is always to be taken to represent in his dealings with other men that he is not to his knowledge violating any statute is a refinement which, except for the purpose of producing some particular consequence, would not, I think, appear reasonable to any man. The argument which for some time most weighed with me was, that for a man to sell to another, without disclosing the fact, an article which he knows to be positively noxious, and the other man does not know to be so, even though he expressly negatives warranty, and says that the purchaser must take his bargain with all faults, is an actionable wrong. I confess I should not be sorry if the law were so; but I know of no authority for the proposition that such is the law, even with respect to the particular case of infectious disease in animals sold. The very nature of the condition that the buyer is to take the animals with all faults implies that they may be diseased, without any distinction between infectious and non-infectious disease, and I cannot think that the legislation which has recently taken place in the public interest against particular acts tending to propagate such disease can make that an actionable wrong as between the parties to a private contract, which would not be so without it.

Judgment appealed from affirmed and appeal dismissed with costs.

Solicitors for the appellant, *Abbott, Jenkins, and Abbott*, for *Lucas*, Newbury.

Solicitors for the respondent, *Richards, Walker, and Maude*, for *Cave*, Newbury.

Supreme Court of Judicature.

COURT OF APPEAL

SITTINGS AT WESTMINSTER.

Nov. 30 and 31, and Dec. 2, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

COVERDALE v. CHARLTON. (a)

Local board—Streets—Vesting—Grazing of roads in board's district—Public Health Act 1875 (38 & 39 Vict. c. 55) s. 149.

The effect of the word "vest" in sect. 149 of the Public Health Act 1875 is to give to an urban authority, with respect to the streets mentioned in the section, the property in so much of the soil and surface as is necessary for all the purposes applicable to a street.

An urban authority, in 1876, let to plaintiff the grazing of a highway and of a private road within their district. Plaintiff accordingly turned in his cattle, and defendant, having subsequently pastured his cattle on the highway and private road, plaintiff claimed damages against him for trespass.

Held (affirming the decision of the Q.B. Division, Cockburn, C.J. and Mellor, J.), (1) That sect. 149 gave the urban authority sufficient property in the highway to enable them to let the grazing, and therefore that plaintiff could maintain his action. (2) That the urban authority, having no power to let the grazing of the private road, plaintiff had not sufficient possession to enable him to maintain his action in respect of that road.

THESE were cross appeals from a judgment of the Q.B. Division, on a special case.

The following are the facts, so far as they are material for the purposes of this report, set out in the special case:—

In the year 1766 an Act was passed for dividing, inclosing, and draining certain lands, grounds, and common pastures in the parish of Cottingham, in the East Riding of the county of York.

The commissioners appointed by or under the said Act made their award on the 24th Aug. 1771, and thereby set out and appointed certain public and private roads within the said parish (including Endyke and Cold Harbour-lanes hereinafter mentioned). Endyke-lane was set out by the said award as a private road in the following terms:

We do order, direct, determine, and award that there shall at all times for ever hereafter be a private way or road, as and where the same is staked, ditched, or bounded out, of the breadth of thirty feet, for the use of the said proprietors whose allotments adjoin upon the same, their tenants, lessees, heirs, and assigns, their servants, horses, cattle, carts, and carriages only, leading from the turnpike road of the town of Kingston-upon-Hull and Beverley westward into and over the south side of lands in the said New Ings herein severally awarded the said Francis Riley and Samuel Knipe to and for them awarded the said Francis Whiting, &c.

(a) Reported by W. AFFLETON, Esq., Barrister-at-Law.

Since the year 1818 Endyke-lane had been a public road, and as such it has since that date been repaired by the parish. Cold Harbour-lane, which in the said award was described as the North Carr-road, was set out thereby as a private road in the following terms :

And we do order, direct, determine, and award that there shall at all times for ever hereafter be a private way or road, as and where the same is now staked, ditched, or bounded out, of the breadth of forty feet, for the use of the several owners of lands and grounds in Cottingham aforesaid, their tenants, lessees, heirs, and assigns, and their servants, horses, carts, and carriages only, and to be called the North Carr-road, leading to and from the said Dunswell-road eastward into and over lands in the said Inn-common and North Carr, to and from the turnpike road leading from the said town of Kingston-upon-Hull to Beverley aforesaid.

Cold Harbour-lane has continued since the date of the said award, and still is, a private road.

Cottingham, whether strictly the area of a parish or a township, is and always has been for the purpose of maintaining its highways a distinct and separate area, which is commonly and in this case hereinafter called the parish of Cottingham.

On the 19th April 1876 the local board entered into an agreement in writing with the plaintiff, under which the local board agree to let to the plaintiff the right of herbage or pasturage for cattle, except sheep, in and about the sides of the roads hereinafter mentioned, from the day of the date of the said agreement, until the 23rd Nov. then next at the rent of 8*l.* 10*s.* Such roads were described as follows in the schedule to the said agreement: "From Gibson's to Railway Gate, north Moor-lane, 5*l.*; Cold Harbour and Middle Dykey to railway gates, 2*l.* 5*s.*; Little North Carr-lane, and Endyke-lane, 1*l.* 5*s.*"

The day after the execution of the said agreement the plaintiff commenced depasturing the herbage with his cattle in the roads that had been assigned to him under the said agreement, and thenceforth until the commencement of this action he regularly continued to do so.

On the 25th April 1876 three horses and eight head of other cattle, belonging to the defendant, were turned into Endyke-lane aforesaid, under the care of the defendant's servant, and grazed there upon the sides of the said road, and on the following day horses and other cattle of the defendant, to about the same number, were turned into Cold Harbour-lane aforesaid, under the care of the same servant, and grazed there upon the sides of the said roads.

The defendant knew that the said alleged right of the herbage in and about the sides of the said roads had been let by the said local board to the plaintiff, but refused to remove his cattle or to discontinue turning them out to graze upon the sides of the said roads.

No actual obstruction of the plaintiff's cattle was caused on either day on which the alleged trespasses took place by the acts referred to in the seventeenth paragraph.

It has been agreed between the plaintiff and defendant that, if the judgment of the court be for the plaintiff, the amount of the damage is to be 1*s.*

The question for the opinion of the court is whether the plaintiff is entitled to recover.

Costs of the trial to abide the event of the action.

The Q.B. Division gave judgment for the plaintiff as to the highway, Endyke-lane; for the defendant as to the private road, Cold Harbour-lane.

Each party appealed from this judgment.

The case in the court below is reported, and the special case fully set out, *ante*, p. 323; and 38 L. T. Rep. N. S. 687.

By sect. 3 of the Public Health Act 1875 :

"Street" includes any highway (not being a turnpike-road) and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not.

Sect. 144 :

Every urban authority shall within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are or may be inconsistent with the provisions of this Act; every urban authority shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which by the Highway Act 1835, or any Act amending the same, are vested in and given to the inhabitants in vestry assembled of any parish within their district.

All ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor to the urban authority, or by or to such other person as they may appoint.

The 149th section is as follows :

All streets being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority. The urban authority shall from time to time cause all such streets to be levelled, paved, metalled, flagged, channelled, altered, and repaired as occasion may require; they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers.

Any person who, without the consent of the urban authority, wilfully displaces or takes up, or who injures the pavement, stones, materials, fences, or posts of, or the trees in, any such street shall be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding five shillings for every square foot of pavement, stones, or other materials so displaced, taken up, or injured; he shall also be liable in the case of any injury to trees to pay to the local authority such amount of compensation as the court may award.

Cave, Q.C. and *Cyril Dodd* for the defendant.—Endyke-lane is a "street" within sect. 149 of the Public Health Act 1875, and vests in the board. The question is, what is the meaning of the expression "vest in?" It cannot be that the section vests the freehold in the soil and surface in the board so as to give them the cellars below the street. This construction is far too large. It is merely meant to give to the board the same right over the streets as existed for the benefit of the public before the Public Health Acts were passed; that is to say, they may deal with the streets, by lowering or altering them or otherwise, without making compensation to the owners of the soil. "Vest" may mean give the right of passage over, and, if so, the difficulty of assigning a meaning to it different from "be under the control of" is got over. It was never intended that the local board should have such a right of property in the street as would enable them to make a profit. The soil in the highway formed part of the common land awarded by the Inclosure Commissioners. The

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property in it therefore remains in the lord of the manor :

Beckett v. Corporation of Leeds, 26 L. T. Rep. N. S. 375; L. Rep. 7 Ch. 421; see also
St. Mary, Newington, v. Jacobs, 26 L. T. Rep. N. S. 800; L. Rep. 7 Q.B. 47;
Lade v. Shepherd, 2 Str. 1004; and
Marquis of Salisbury v. Great Northern Railway Company, 5 C.B. N.S. 174; 28 L. J. 40, C.P.

The surface may be vested in the board so as to make them liable for negligence if they do not repair it (*White v. Hindley Local Board*, 32 L. T. Rep. N. S. 46; L. Rep. 10 Q.B. 219; 44 L. J. 114, Q.B.); but it does not follow that the board acquires any beneficial interest in the soil. The plaintiff cannot maintain this action. He has no better right than the board had, and they had none to let the grass in Endyke-lane.

Wills, Q.C. and Wilberforce for plaintiff.—Under sect. 149 a street becomes vested in the urban authority so as to give them full powers of dealing with the soil, and enabling them to keep the roadway in good condition. "Vest" implies that the property in the soil passes to the board. It must mean something more than the words "be under the control of," which are also contained in the section. In *White v. The Hindley Local Board (sup.)* the point was not taken that the *locus in quo* became vested in the board under the Public Health Acts, so as to give the board a different character with respect to it than as surveyor of highways. The board have clearly a proprietary right in the trees under sect. 149. See also

Taylor v. The Corporation of Wigan, 35 L. T. Rep. N. S. 696; L. Rep. 4 Ch. Div. 396; 46 L. J. 105, Ch.

By sect. 27 of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), the Legislature have thought it necessary to limit the extent to which the soil of streets shall vest by providing that minerals are not to vest in the sanitary authority. As to the private road, Cold Harbour-lane, it is admitted that the board had no power to let the pasturage. But the plaintiff had sufficient possession of the grass to enable him to maintain his action. He had sufficient *de facto* possession by his cattle. Very slight possession is enough as against a mere wrong-doer. In Co. Litt. 4 b, Lord Coke says, "If a man hath 20 acres of land, and by deed granteth to another and his heirs *vesturam terræ*, and maketh livery of seisin . . . the land itself shall not pass, because he hath a particular right in the land; for thereby he shall not have the houses, timber trees, mines, and other real things, parcels of the inheritance, but he shall have the vesture of the land—that is, the corn, grass, under-wood, swepage, and the like, and he shall have an action of trespass *quare clausum fregit*. The same law if a man grant *herbagium terræ*." See also

Earl of Rutland v. Earl of Shrewsbury, 2 Brownl., judgment of court at p. 240;
Bristow v. Cormican, L. Rep. 3 App. Cas. at p. 667;
Catteris v. Cowper, 4 Taunt. 547;
Heath v. Milward, 2 Bing. N.C. 98.

Oave, Q.C. in reply.—As to Cold Harbour-lane, the plaintiff has had no actual or constructive possession. He has never had an actual exclusive possession, because the public have had a right of passing over all the *locus in quo*. The plaintiff is therefore a mere trespasser :

Jones v. Chapman, 2 Ex. 821;
Smith v. Lloyd, 9 Ex. 562.

As to Endyke-lane, the judgment of Willes, J., in *Hinde v. Charlton* (15 L. T. Rep. N. S. 472; L. Rep. 2 C. P. 104; 36 L. J. 79, C. P.) shows that a section like this must be construed with reference to the whole object of the statute, and that "vest" need not necessarily pass the freehold. It is also a clear authority that where a body is intrusted with public duties, such expression as "vest" must be construed so as to give them no more property in the things passed than is necessary for the performance of their duties. He also referred to

Brumfit v. Roberts, 22 L. T. Rep. N. S. 301; L. Rep. 5 C. P. 224; 39 L. J. 95, C. P.;
Parsons v. St. Matthew, Bethnal Green, 17 L. T. Rep. N. S. 211; L. Rep. 2 C. P. 66; 37 L. J. 62, C. P.;
Gibson v. The Mayor of Preston, 22 L. T. Rep. N. S. 293; L. Rep. 5 Q.B. 218; 39 L. J. 131, Q.B.

BRAMWELL, L.J.—I am of opinion that this judgment should be affirmed. With all respect to the framers of these Acts, I find it very difficult to put a meaning on the word "vest" in sect. 149. I have great misgivings as to what is the true meaning, but my inclination would be to attach to "vest" the meaning put upon it by Willes, J. in *Hinde v. Charlton (ubi sup.)*, and to hold that a street, under sect. 149, vests in the local board, without their having any property in the soil or surface. The word "vest" may have two meanings; it may mean that the property in the street, *usque ad cælum et usque ad medium filum*, passes to the board. I cannot think this is the true meaning of the word as used in sect. 144. It is impossible to suppose that, by using the word "vest," it is intended to give the local board an absolute right to the surface, with all above and all below it. It would be an outrageous and needless thing to do so. Mr. Wills's argument was, that the general object and intent of the provisions of this Act were to be looked to, and, if pressed by particular words, the effect of which is to cause loss to individuals, you must suppose that the Legislature, in view of the importance of effecting the general objects of the Act, contemplated that that loss might be sustained. You must not be deterred from construing the Act beneficially for the public by considering the possible loss to individuals. That is a very forcible argument; but, looking steadily to the objects in view here, I could not make up my mind to say that the meaning of "vest" is to grant the freehold of the land to the local board with all the consequences that follow a grant of the freehold, and consequently the rights in the soil *usque ad medium filum*. I do not think the Act of last session (41 & 42 Vict. c. 77) bears upon the matter. All that the Legislature mean by sect. 27 was to declare that, whatever might be the proper construction of sects. 68 and 149 of the Act of 1875, they should not be construed as applying to mines and minerals. The monstrous inconvenience and injustice of holding that the word "vest" has the effect of passing the absolute freehold prevent me from putting that construction upon it—a construction, too, which I think a needless one. Then, what is the meaning of "vest?" I do not know that it is a term of art as applied here. It must have a statutory meaning. There is no expression in the Act such as "transferred" or "conveyed;" but it says the street shall "vest." I should like to hold that that means "shall vest *quâ* street," and that no right of soil

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vests; but I am afraid that is not a sensible construction. I do not see that it would add anything to the words "and shall be under the control," &c. I think by the word "vest" it is meant that the surface, and the street itself, so far as it is used as streets are used, shall vest in the board. The Act says that all streets vest, the pavements, stones, and other materials vest, and "all buildings, implements, and materials provided for the purposes thereof." Then it goes on to say in what manner the urban authority are to deal with the streets, and the soil and fences of them, and provides that any person who, without the consent of the urban authority, wilfully displaces or takes up or injures the pavement, stones, &c., "or the trees in any such street," shall be liable to a penalty not exceeding 5*l.*, and "he shall also be liable, in the case of any injury to trees, to pay to the local authority such amount of compensation as the court shall award." Now, what is the meaning of that? Does it mean that, if an oak was standing in a street at the time when that street became under the control of the local board, they would become entitled to that tree? If it does mean that, it goes a long way to show that the local board have the property in the street they now claim. If it does not apply to trees already in existence, but only to the ones the board themselves may plant, even then it goes to show that they must have some property in the soil, or in the produce of it, of the street. I cannot help thinking that sect. 57 of the Act is adverse to the opposite contention, because there it is evidently contemplated that when the local authority had not the control of a street, it was necessary to give them special power to break open the street in order to lay down pipes, &c., showing by implication that in the case of streets which are highways repairable by the inhabitants at large, they needed no such special power. It seems to show that the surface of such a street as I have last referred to vests in the local board for the purpose of doing that which is necessary for it as a street, and also for doing such things as are necessary and usually done underneath a street. I am much fortified in this view by the strong expression of opinion of Willes, J. in *Hinde v. Charlton* (*sup.*). I think, therefore, the local board had a right to the herbage which was let to the plaintiff, and that the defendant, having incautiously taken part of it, is liable. As to the other part of the claim, I concur in the judgment of the court below that the plaintiff is unable to make out his case. It was attempted to be made out that he had a *de facto* possession as to the private road; but it is difficult to see how there could be any *de facto* possession unless the parts used were so actually in possession that the right claimed by the plaintiff would be an interference with the actual enjoyment of the lane that was going on. If there was an inclosed field, and a man turned his cattle into it and locked the gate, he might well claim a *de facto* possession of the field; but if he turned them on to an open common, to my mind, no *de facto* possession could be set up. In the present case I think there could be no *de facto* possession of anything beyond the spots on which his flock were actually grazing. It is said that by discontinuance of possession the lord of the manor has lost his title, and consequently possession was in the first occupant of the lane; that the actual occupants for the time being

were the board of health, and that they having licensed the plaintiff he was in by right. The answer is, that no jury ought to hold, under the circumstances, that there had been such a discontinuance of possession by the person in whom the true title to the soil was, as to entitle the first occupant to claim it. I think, therefore, on that ground also the plaintiff's claim ought to be disallowed, and the judgment of the court below should be affirmed.

BRETT, L.J.—The plaintiff's action is not necessarily one of trespass; it is one in which he states certain facts, and seeks for a remedy. There was a dispute between the plaintiff and the defendant, and the plaintiff says that he is entitled to a remedy in respect of acts done by the defendant in two separate lanes. But the plaintiff, although he is not bound to say, "I claim against you as a trespasser," yet does in argument really state that he would be entitled to maintain an action of trespass with regard to both lanes. He says so with regard to the first lane, because he says the property in the soil was in the local board, and they let the land to him. As to the second, he says that he had possession of that lane, and that the defendant was a wrongdoer. The questions which arise in the case are: (1) Had the plaintiff a right to the herbage of the first lane? (2) Was he in possession of the second lane, so that he could maintain his action against the defendant, who was a mere wrongdoer? As to the first lane, the plaintiff's right depends entirely upon the right of the local board, and upon whether they had a right to make any arrangement with him as to the grass. It does not depend upon the nature of the right, whether a necessary or some other right. Now whether the board could or could not give him the right he claims, depends entirely upon sect. 149 of the Act of 1875. It is admitted that as to the first lane it is a "street" within the meaning of that section; therefore the question comes to be, what right does sect. 149 give to the local board in a street as defined by that section? That must depend upon the words of the section. Now it is a rule of construction that you must, if you can, give a meaning to every part of the section you are construing. You must give all the words their ordinary legal signification, unless there is something in the context to vary that signification. The words here are, "all streets shall vest in;" but inasmuch as the words follow, "and be under the control of," you must give a meaning to the words "vest in" different to the words "under the control of." The ordinary legal signification of "vest in" is to give the property in. It is argued that sect. 57 of the Act of 1875 shows that "vest" means the same thing as "be under the control of," and that where the local board had not the control of streets it was necessary to give them special power to break up the surface for the purpose of laying pipes. If that contention be true, it is in effect to strike out the word "vest" from sect. 149 altogether. It is attempted to give a meaning to the words "vest in" by saying that they are words of mere inference, and may be treated as surplusage; but it would be entirely contrary to the rule of construction I have mentioned to say that. Therefore I think that sect. 57 has no effect whatever, and we are left then to the construction of sect. 149 standing alone. In my opinion, a meaning cannot be given to the words "vest in"

in addition to that given to the words "shall be under the control of," except by construing "vest in" as passing the property in. Then it is said you give more than it can possibly be supposed the Legislature intended to give to local authorities; that is to say, that construction would give them the cellars under the streets and the mines under the land. But it seems to me that, after "vest" has been decided to give the property in, the real question is, in what does it give the property? That depends upon the words describing the subject-matter to which the section refers. Here the subject-matter is a "street," not land. The case of *Hinde v. Charlton* (*sup.*), with regard to the pew, is a good guide on this point. There the gift of the pew was held not to vest the property in the land on which it was. You must look not only to the words which vest, but to those describing the property given. Here it seems to me "vest" means "vest" the property in a street, so far as it is used as a street. It does not include the houses on each side. It must mean that which consists of the roadway, and the footpath on each side—that part between the houses which is used as the roadway of the street; that is to say, the whole of the surface between the houses. But it is then said, that would not give enough, because it would leave you with respect to matters which must be dealt with in a street without the power of dealing with them. But taking the word "street," as used in an Act of Parliament like this, it means, I think, the depth below the surface, but not the whole depth. It means the whole surface, and so much in depth as may not unfairly be used for the purposes of the local board with respect to the street. That would, therefore, enable them to lay down sewers, gas pipes, and water pipes to such a depth as in a street is used for the purpose of laying them down. It would, therefore, not enable them to go down to the depth of mines, as a street is never used for such a purpose. Neither would it enable them to deal with the houses on each side. "Vest," therefore, in my opinion, gives the local authority the property in the street—the surface and such a depth as may be fairly used for the purposes of the street, and for these purposes the absolute property is given. I agree with Mr. Wills's argument that the Legislature has so far taken away the rights of the adjacent owners, and given them to the local board. They have the ordinary rights of property with respect to what is given to them. If that is so, they were entitled, by reason of the right which they had, to give some right to the plaintiff here. They assumed by agreement to let to him the right of herbage and pasturage. It is not necessary, as to the first lane, to say that they gave him possession of it; but he had a right under his agreement to feed his cattle on that lane, and on that right the defendant has encroached. I am therefore of opinion that the plaintiff is entitled, as to that lane, to bring the action he has now brought. As to the private lane it is admitted that the local board has no right at all. The plaintiff says he had possession, and the defendant was a wrongdoer; but we must inquire what sort of possession the plaintiff was using. The only actual *de facto* possession he had was that his cattle were feeding there. He admittedly had no other possession than by the mouths of his cattle. It might be different if the

local board had assumed to let him the lane as the owners, although they had no right to do it, and if he attempted to set up a right by agreement to the exclusive possession of it; but, notwithstanding their agreement with him, they still meant the public to pass over it and tread down the grass. All they intended to give him was this: they took a sum of money for allowing his cattle to feed upon the lane. That agreement is no more than for a power of agistering which they could have granted if they had been the owners. I do not think there was any agreement under which it could be said that the plaintiff had any possession of the land either by himself or by his cattle, and therefore I do think that he had not any possession at all, and cannot maintain his action. In my opinion the judgment of the Queen's Bench Division was right, and must be affirmed.

COTTON, L.J.—I am of opinion that both appeals fail. As to the first lane, it is admitted to be a street within sect. 149 of the Public Health Act 1875, and the question is whether or not the local board had any right to the grass; that is to say, any property in the surface of the street. It was said for the defendant that, where public bodies, like local boards, are given by statute a public duty to fulfil, you must construe such words as "vest" not according to their natural meaning, which would have the effect of passing the entire property in the soil and surface, but you must construe them to give so much only as is necessary for the fulfilment of the duty. *Hinde v. Charlton* (*sup.*) and the judgment of Willes, J. were relied on to show this. In my mind that judgment does not support the defendant's contention. In construing every Act of Parliament you have to look at the particular words used, and, except so far as it may supply a principle of construction, I do not think *Hinde v. Charlton* applies to the present case. The question there was as to what right to a pew the claimant obtained under an Act which provided that the pews in a church should be "vested in" the purchaser, and the court held that the freehold of the pew did not vest, but only the right to use it during divine service. But they only decided what was the true construction of the word "vest" in the particular Act. Willes, J., in his judgment, says that there are a "whole series of authorities in which language large enough to convey a right to land, to canal and railway companies, and to trustees for the benefit of the public who require only the control of it, has been held to be satisfied without giving an interest in the soil and freehold to the grantees, but by giving a control only to the extent necessary for exercising the functions which it was intended to assist them in the discharge of." He then proceeds to refer to *Stracey v. Nelson* (12 M. & W. 535) as one of the strongest of those authorities; but when that case is looked at it does not bear out the general proposition which Willes, J. lays down. To my mind it does not assist us in construing this Act, because the learned judges who decided it do not affect to construe the word "vest," but only say that it applied to a particular kind of property mentioned in the Act. That case, therefore, lays down no such rule of construction as the defendant contends for. There is the further remark, that in *Hinde v. Charlton* Willes, J. had not to meet the same

difficulty we have here, because here the Act says not only that the street shall "vest in," but also be "under the control" of the urban authority. It is a true principle of construction that when separate and distinct words are used in an Act, you cannot construe one part of a section or sentence so as to render the other part inoperative. Now, had the word "vest" any admitted meaning before this Act was passed? In an Act which is *pari materia*—the Lands Clauses Consolidation Act 1845—you find in sect. 81 that conveyances "shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking." And again in sect. 100 there is a similar proviso. Then in the Trustee Act 1850 (13 & 14 Vict. c. 60), enabling the Court of Chancery to make orders for the transfer of property to new trustees, sect. 3 provides that the Lord Chancellor may make an order that lands belonging to lunatics be "vested in" certain persons. Another class of Act is the Bankruptcy Act 1869 (32 & 33 Vict. c. 31), s. 17, where it is enacted that upon the appointment of a trustee the property of the bankrupt shall "vest in" such trustee. There is therefore an established sort of statutory meaning attached to the word "vest." Looking at the Act in question in this case, we find in sect. 12 that all property, real or personal, belonging to the council of a borough at the passing of the Act "shall continue vested, or vest in, such council," &c. Then it is remarkable that sect. 13 contains almost the same words as regards sewers as sect. 149 does with respect to streets. It says that sewers "shall be vested in and be under the control of" the local board. It is impossible, I think, that the Legislature used words in sect. 13 in a different meaning to the same words in sect. 12. In my opinion the meaning is, that whatever vests in the board must become the property of the board. The board therefore must have some property in the surface and soil of the street, and, agreeing generally as I do with Brett, L.J., I think that the street did vest in the board, and some property in the soil and surface of it became vested in them for the purposes of a street. In regard to Cold Harbour-lane, it is admitted that the local board had no property in the soil; but it is said that the plaintiff had such possession as enabled him to maintain his action of trespass against the defendant under the old procedure, and therefore that he can maintain it now. Now, what did he do with respect to Cold Harbour-lane? He maintained that he had asserted his right under a lease from the board, which was in the nature of a grant to him of *herbageum terre*; that he had taken possession of one part of the lane, and by what he had done had taken possession of the whole. That argument seems to depend upon a fallacious perception of what Lord Coke really said. He referred to a case where there was a grant of an absolute and exclusive right for all purposes of whatever was previously on the land, and then Lord Coke says the grantee shall have an action *quare clausum fregit* against a trespasser. But here the case is entirely different. The public have a perfect right of walking over the grass, and the plaintiff could not complain of an encroachment. What he had got was merely this—only a very limited right of his cattle eating certain parts of the grass. It was a mere enjoyment, subject to the rights of the public. This was distinctly

not a possession of the soil so as to entitle him to maintain his action, and he cannot rely upon any right independent of mere enjoyment, and therefore, in my opinion, cannot maintain his action against the defendant for injury to the grass.

Judgment affirmed.

Solicitor for plaintiff, *H. Stirke*, for *J. Seymour Moss*, Hull.

Solicitor for defendant, *J. L. Morris*, for *Spurr and Son*, Hull.

Thursday, Nov. 14, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

HUNT v. THE WIMBLEDON LOCAL BOARD. (a)

Local board—Contracts—Public Health Act 1848 (11 & 12 Vict. c. 63), s. 85, and 1875 (38 & 39 Vict. c. 55), s. 174.

Defendants, an urban authority, through their surveyor, verbally ordered plans for offices from plaintiff, an architect. Plaintiff made the plans, which were at first approved by defendants, but afterwards abandoned as involving too much expense. New offices were necessary for defendants, and the plaintiff's plans were necessary for the offices for which he had designed them, and the plans were worth 94l.

Sect. 174 of the Public Health Act 1875 enacts that "every contract made by an urban authority, whereof the value or amount exceeds 50l. shall be in writing, and sealed with the common seal of such authority."

Held (affirming the decision of Lindley, J.), that plaintiff was not entitled to recover for his work and labour in making the plans, as, even if plaintiff had executed the consideration on his part, sect. 174 was not directory merely, but obligatory, so as to render all contracts exceeding in value 50l. unenforceable, unless the requirements of the section were complied with.

APPEAL from a decision of Lindley, J., on further consideration, after a trial with a jury at Westminster, on March 13 and 14, 1878.

The action was brought by the plaintiff, an architect, to recover for work and labour done in preparing plans and drawings for the erection of offices for the defendants, the Wimbledon Local Board, in accordance with instructions given to the plaintiff by the defendants' surveyor acting under their authority. The plans, having been made by the plaintiff, were submitted to the defendants, and approved by them, and advertisements for tenders for carrying out the building of offices according to the plans were published, but the amount of the tenders being too high none were accepted. Ultimately offices upon an extensive scale were built from plans made by another architect.

The jury found that the board authorised their surveyor to employ the plaintiff to prepare the plans, and ratified his act in procuring them; that new offices were necessary for the board; that the plaintiff's plans were necessary for the erection of the offices for which they were designed, and they assessed the plaintiff's damages at 94l.

Lindley, J., on April 6, gave judgment for defendants. The plaintiff appealed. The case in

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

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the court below is fully reported *ante*, p. 349; and 39 L. T. Rep. N. S. 35.

The Act in force when the plans were ordered was the Public Health Act 1848. Before they were finished the Public Health Act 1875, repealing the Act of 1848, came into force. The 85th section, however, of the Act of 1848 was substantially re-enacted by sects. 173, 174 of the Act of 1875, except that 50*l.* was substituted for 10*l.* as the limit within which the contracts of urban authorities need not be under seal.

By sect. 173 of the Public Health Act 1875,

Any local authority may enter into any contract necessary for carrying this Act into execution.

Sect. 174:

With respect to contracts made by an urban authority under this Act, the following regulations shall be observed:

(1.) Every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing, and sealed with the common seal of such authority.

(2.) Every such contract shall specify the work, materials, matters or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed.

(3.) Before contracting for the execution of any works under the provisions of the Act, an urban authority shall obtain from their surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner, as of the annual expense of repairing the same; also a report as to the most advantageous mode of constructing, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years, or otherwise.

(4.) Before any contract of the value or amount of 100*l.* or upwards is entered into by an urban authority, ten days' public notice at the least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same; and such authority shall require and take sufficient security for the due performance of the same.

(5.) Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the parties thereto, shall be binding on the authority by whom the same is executed, and their successors and all other parties thereto, and their executors, administrators, successors, and assigns, to all intents and purposes.

By sect. 197,

Every urban authority shall from time to time provide and maintain such offices as may be necessary for transacting their business, or that of their officers and servants under this Act.

The arguments sufficiently appear in the judgment (*post*).

Marriott, Q.C. and *W. Paterson* for defendants.

Patchett, Q.C. and *E. Clarke* for plaintiff.

The following cases were cited:

Nowell v. Mayor of Worcester, 9 Ex. 457; 23 L. J. 139, Ex.;

Frend v. Dennett, 4 C. B. N. S. 576; 27 L. J. 314, C. P.; s. c. in Equity, 5 L. T. Rep. N. S. 73;

Nicholson v. Bradfield Union, L. Rep. 1 Q. B. 620; 35 L. J. 176, Q. B.;

Clarke v. Cuckfield Union, 21 L. J. 349, Q. B.;

Haigh v. North Brierley Union, E. B. & E. 873; 28 L. J. 62, Q. B.;

Ungley v. Ungley, 37 L. T. Rep. N. S. 52; L. Rep. 5 Ch. Div. 887; 46 L. J. 854, Ch.

Wilson v. West Hartlepool Railway Company, 2 De J. & S. 475.

BRAMWELL, L.J.—I am of opinion that Mr. Justice Lindley was right in his decision, and that this judgment should be affirmed. First, I think

that sect. 173 of the Act of 1875 is applicable to this case, and is not limited, as Mr. Patchett contended, to the cases particularly enumerated in the previous part of the Act. I see no reason for limiting the section, which is general in its terms and plain. In the next place, I think that section 174 is not directory, but obligatory. It is not prohibitory merely, so that the making of a contract otherwise is an offence, but mandatory that the contract shall be made in that particular way. It is an injunction relating to the conduct of both parties in making the contract. I do not mean to say that it makes any partial act on the part of the contractors necessary, but the evidence of their obligation upon contracts above 50*l.* must be in writing, sealed with the seal of the corporation. Before the statute the common law said that the contracts of corporations must be under seal, with an exception as to small contracts necessary for the daily carrying out of the work. The section is important in this view, that under the common law rule it might be difficult to fix the limit, say 5*l.*, 10*l.* or 20*l.*, at which the contract ceased to be a small one within the rule. The Legislature, therefore, has now fixed the sum at 50*l.* It is clear to me that this contract was purely executory (having regard to the order given for the plans), and that no action could be brought upon it, unless the requirements of the statute were complied with. It is said, on the other hand, that it was an executed contract of which the corporation have received the benefit. I will deal with that presently. First, the equitable doctrine of part performance of contracts relating to land was relied upon. I think that doctrine is not applicable to the present case. I believe the doctrine to be that which is mentioned by the Master of the Rolls in his judgment in *Ungley v. Ungley* (*sup.*). He says: "The law is well established, that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract. The reason is, that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the court to admit evidence of the terms of the contract in order that justice may be done between the parties." Now, I think the reason of that rule is inapplicable to a case like the present. I venture to say that, if the fusion of law and equity had not taken place, a court of equity would not apply the doctrine to a case like this. It is then said that at common law the plaintiff is entitled to recover because the defendants have had the benefit of the contract. That doctrine possibly exists to some extent—I am not sure to what extent. I am not sure it would be found to exist at all if the sum in dispute was a very large one; but the doctrine is said to be, that where a man enters into a contract, not under seal, with a corporation, of which they have got the benefit, he is entitled to recover. It is said to be limited to cases where the benefit has been entirely in hand, and where the work performed has been so necessary, under the circumstances, that the corporation would not have done its duty if the order had not been given. That doctrine does not apply here, for two reasons. The defendants have not had the benefit of the work in that sense. There is no doubt the order for the plans was given, and, so far as the work went, ratified and acted

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upon, by the defendants; but there the thing stopped. If the tenders had been accepted there would have been a further benefit from the plans to the corporation, they would have derived a benefit from them in respect of having the buildings erected according to them; but that is different from the case cited where they had the coals and burned them. Here they tried to apply the plans to the purpose for which they were ordered, but found they were unable to do so. There is also the further distinction that here the plans were not necessary things, as in the cases of the things ordered in *Clarke v. The Cuckfield Union (sup.)* and *Nicholson v. The Bradfield Union (sup.)*, where it was the duty of the corporation to give orders for them. The corporation in this case could have done without the plans; they could have waited and gone on without new offices. In *Clarke v. The Cuckfield Union (sup.)*, Wightman, J.'s judgment is a very long one, and shows that he entertained very great doubt; but after all in that case the bill only came to 14l. 16s., and it may be doubted whether the contract did not come within the common law rule as to small contracts. The next case was *Nicholson v. The Bradfield Union* (L. Rep. 1 Q. B. 620; 35 L. J. 176, Q. B.), and there the amount was only 26l., and I am not sure that even there the same rule did not apply. That was the case in which coals were ordered and used. Blackburn, J., in his judgment, assumes there was an obligation on the part of the corporation, and he follows the case of *Clarke v. The Cuckfield Union (sup.)*, which he says is not distinguishable. Then he adds, "We are aware that many high authorities have questioned the soundness of that decision, and, as pointed out in the judgment of that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that as far as it extends to such a case as the present, at least the case was rightly decided. There may be cases in which the circumstances may be different from those in *Clarke v. The Cuckfield Union (sup.)* and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer—those we leave to be decided when they arise; but so far as those prior decisions are inconsistent with *Clarke v. The Cuckfield Union*, we prefer to follow the authority of *Clarke v. The Cuckfield Union*, which we think is founded on justice and convenience." One word as to the accountant's case (*Haigh v. The Brierly Union, sup.*): It seems to me that Erle, J. does not put the matter upon the mere ground that the work was actually done; he seems to consider that the retainer to do it would have been an engagement binding upon the corporation. Blackburn, J., in *Nicholson v. The Bradfield Union*, said that "justice and convenience" required that the defendants should be ordered to pay where the contract is executed; but it is by no means clear that he would have said so in a case like the present. It is by no means clear to my mind that people who ought to know the requirements of the law, and that they are dealing with a body exercising authority only on behalf of the ratepayers, should not take the consequences of dispensing with what is required by a provision for the protection of the ratepayers. In the present case, if there had been a little more solemnity in making the contract, the plaintiff's attention might have been called more

particularly to the kind of plans required, and he might have prepared less expensive plans, such as the board could use. In my opinion the importance of preserving the general principle has been too much lost sight of in construing statutes such as the one in question and the Statute of Frauds. The latter Act has been frittered away and made unintelligible from a desire to do justice in particular cases.

BRETT, L.J.—I am of opinion that, even if sect. 174 had not been passed, the plaintiff could not have recovered, on the ground that the defendants are a corporation, and that the contract was not made under seal. I take the rule of the common law to be this—that where the defendants are a corporation, and the contract sued upon is not under seal, the defendants are not liable. This case comes within that general rule, and is not within any recognised exception; nor is it within the exception of the doctrine of equitable part performance, applied by the Court of Chancery to the Statute of Frauds. That doctrine is equally applicable, whether the defendants be a corporation or an individual; it seems to me founded upon the view that the Statute of Frauds only deals with the matter of evidence, and not with the validity of the contract. The Statute of Frauds applies where the contract is a good one, only it says that no evidence shall be given of the contract in certain events. The Court of Chancery have held that under certain circumstances they will allow a contract to be put in evidence, although the terms of the statute have not been complied with; but that doctrine does not apply where by a rule of law the contract is not binding at all. That, in my opinion, is the case here. I also think this case is not within the common law exception suggested. There is, I think, by authority, a recognised common law exception in such cases; where the contract is made by the corporation and not under seal, yet, if it be in the nature of a daily small transaction which must of necessity take place, and with regard to which it would be obviously impossible or inconvenient that it should be under seal, then the courts of common law have declared that the general rule shall not prevail. I think the making of these plans was not part of the daily business of the corporation, nor a necessary part of their business, nor a small contract, and was therefore in no respect within the exception. Another exception is suggested. It is said that a rule of law exists that where orders are given by a corporation, and the person to whom they are given accepts and fulfils them to the best of his ability, and the corporation, or the persons on whose behalf they are acting, accept and enjoy the full benefit, the corporation is liable although the contract is not under seal. I doubt very much whether there is any such exception or rule known to the courts of equity or common law. I doubt whether any such rule has ever been recognised by any authority in a court of justice. But it is unnecessary to consider that matter, because I think that, taking this order to have been given on behalf of persons who may be called *cestuis que trust*, this case does not come within the rule, if it exists at all. This is not like the case of a company where the directors may give the order, and those on whose behalf it has been given may accept or reject the contract, and they do accept it. If that was the case here

the doctrine contended for might apply. But here it is only the corporation acting for the inhabitants of a borough—those inhabitants cannot have power either to accept or reject the engagements which their board enter into. They are not like the shareholders of a railway company. If a contract is made it is without their option, for they have no option. To such a corporation the doctrine is not applicable at all. If it was applicable I think the corporation did not take the whole benefit of the work done by the plaintiff. That work was the making of plans ordered by the corporation; he makes the plans, and he has then done all the work which upon the contract (I will assume) he was bound to do; but the only real benefit to the corporation is that the offices should be built according to the plans. Here the board accepted the work, and used the plans in the sense that they gave them out in order to receive tenders upon them; but that is not a beneficial user by the board. Although, therefore, they accepted and partially used the plans, in my opinion, they obtained no real benefit from the contract. The result is that, even if the doctrine exists, and although the board were to be benefited by the contract, they have not actually received any benefit from it. I am therefore strongly of opinion that, even without the statute, the plaintiff could not have recovered, because this contract is within the general rule, and not within any recognised common law exception to that rule. I further think the statute is conclusive upon the subject, and I think so upon the view suggested by Mr. Marriott. The statute is both directory and mandatory; it really comes to this, that when the Act was passed the Legislature knew of the inconvenience arising from requiring that small contracts necessary for the daily carrying on of the corporation work should be under seal. They meant to get rid of the question with respect to these small contracts, and to say that all contracts which the board are properly authorised to make, if under 50*l.*, shall be brought within the exception; if above, shall in all cases be within the general rule. As to the accountant's case, it is not necessary to say whether it comes within the law applicable to the present case. But I think Crompton, J. assented to the judgment upon the assumption that the contract of the accountant was to perform work from day to day. The contract might have been fulfilled in one way or the other. It might therefore be considered a daily employment to a small amount, and Crompton, J. thought it came within the recognised exception. He did not state any new principle, but only brought the facts of that case within an existing rule of law. I agree that this appeal should be dismissed.

COTTON, L.J.—I also am of opinion that the judgment of Lindley, J. was right. A common law rule exists that corporations are not bound by contracts entered into by them, unless made under their seal. There are exceptions suggested to this rule. For instance, contracts made in the course of carrying on the ordinary daily business of the corporation, and involving small sums, need not be under seal. That exception cannot apply to this case. But is there an exception also showing that a corporation is liable where goods having been supplied, or work done under a contract not under seal,

the corporation have had the entire benefit? Now I doubt whether a corporation like this can be held liable upon any such grounds, because the corporate body was not the persons who got the benefit of the contract, but the ratepayers for whom the corporation were trustees. The corporation as such cannot derive any benefit from their contracts. If the corporation could be bound, in my opinion there has not been such a beneficial user of the plans as to bring the case within the assumed exception to the statute. No doubt there was a certain user of the plans, but not a beneficial one. The matter went no further than using the plans for the purpose of obtaining tenders for the contemplated buildings. They were therefore not used for the more important purpose of erecting the offices. It is argued that such a contract is not within sect. 174 of the statute, because that section only applies to contracts made for the purposes of the Act, and the building of offices is not one of those purposes; but I think that sect. 197, which says that the local board shall provide and maintain such offices as may be necessary for transacting their business, disposes of that objection. If the board provide any offices at all, it must be for the purpose of carrying the Act into execution. I think it is plain, therefore, that this is such a contract as is within the purview of sect. 173. As to sub-sect. 1 of sect. 174, that, in my opinion, must be considered as mandatory, that is to say, as preventing any contract under the Act being entered into except under the seal of the corporation. The Act provides in a particular way for the making of small contracts; its meaning is to say, "as to all contracts exceeding 50*l.* you shall not bind the rates except you enter into a contract under seal." As to the equity doctrine of part performance, which has been relied on, the cases of *Ungley v. Ungley (sup.)* and *Wilson v. The West Hartlepool Railway Company (sup.)* have been principally referred to. In former days the Court of Chancery would not have entertained a suit by the plaintiff to enforce a contract like the present. *Ungley v. Ungley (sup.)* was simply a case of part performance taking the case out of the Statute of Frauds. It was a contract relating to a house, entered into by a father at his daughter's marriage, and if the Statute of Frauds applied no action could be enforced, because there was no agreement in writing; but possession having been given, the Court of Equity said that the part performance of the contract enabled parol evidence of the contract to be given, acting upon the principle that where there exists a valid binding and enforceable contract, but the Statute of Frauds says that no action shall be brought upon it unless it is evidenced in a particular way, then, if the Court of Chancery finds an overt act by the party against whom the contract is sought to be enforced, such as possession, which is referable to the contract, parol evidence is allowed to ascertain what the original terms of the contract really are. This is the class of cases in which contracts are enforced in equity. Notwithstanding the Statute of Frauds, the equity is not administered on the ground of fraud, as is shown by the fact that in a suit for the specific performance of an agreement for the sale of land, payment of the price of the land is not such a part performance of the agreement as will take the case out of the statute. Then there is the case of *Wilson v. The West*

Hartlepool Railway Company (sup.). The judgment of Turner, L.J. was referred to, in which Knight Bruce, L.J. did not concur. I wish to speak with the greatest respect of the opinion of Turner, L.J., and I should have great hesitation in giving judgment against his opinion if he really decided on the point; but really, to a great extent, he was dealing with a difficulty under the Statute of Fraud, and dealing with a corporation governed by the Companies Clauses Act 1845, and to a very great extent his observations apply to the case of private individuals who had a contract for the sale of his land, but not a contract in writing. He deals with a corporation in the same way. They were a railway governed by the provisions of the Companies Clauses Act 1845, and that Act says that contracts which, if made by individuals, must be in writing, will bind the company if signed by two directors. The Act does not say that contracts shall be, but that they may be made in this way, and Turner, L.J. is applying the doctrine of part performance to cases where they have not been so made. There are other parts of his judgment which are not applicable to the case of a private individual, but there he refers to another class of action entertained by the Court of Chancery, independently of contract, namely, where the court says that if any individual having a title to land allows another person who believes that his own title is a good one, to enter into possession of and expend money upon the land, and "stands by" without interfering, a court of equity will not afterwards allow him to assert his title to the injury of him whom he has allowed so to enter into possession. This equity has no application to the present case.

Judgment affirmed.

Solicitor for plaintiff, W. T. Foster.

Solicitor for defendants, W. H. Whitfield.

Nov. 19, 21, 22, and Dec. 10, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

THE ECCLESIASTICAL COMMISSIONERS OF ENGLAND
v. ROWE. (a)

Limitation of actions—Ecclesiastical Commissioners—Corporations sole—Statute of Limitations (3 & 4 Will. 4, c. 27), ss. 2, 29—3 & 4 Vict. c. 113, ss. 50, 57.

Sect. 50 of 3 & 4 Vict. c. 113 enacts, that all the estate and interest of the holder of a deanery in any lands, &c., shall be vested absolutely in the Ecclesiastical Commissioners for England for the purposes of the Act; and sect. 57 provides that they shall, for the purpose of obtaining possession of lands, &c., vested in them have all rights, powers, and remedies, which belonged to the holder of the deanery.

Held, that, with respect to lands vested in the commissioners under sect. 50, their right of entry or action for recovery was barred under sect. 2 of the 3 & 4 Will. 4, c. 27, after twenty years had elapsed without their having taken possession, and that they were not entitled to enter or recover within sixty years, as the holder of the deanery might have done under sect. 29.

APPEAL from a decision of Mellor, J., on further consideration, giving judgment for the plaintiffs in an action for the recovery of land.

The facts of the case and the arguments are fully set out in the judgment of the Court of Appeal (*post*).

McIntyre, Q.C. and *C. Higgins* appeared for the plaintiffs.

Herschell, Q.C. and *Morgan Lloyd, Q.C.* for defendant.

Our adv. vult.

Dec. 10.—COTTON, L.J. delivered the following judgment of the court:—This was an appeal of the defendant from a judgment of Mellor, J., in favour of the plaintiffs after trial without a jury. The action was brought to recover two closes of land called 137 and 137A, which at the time when the action was brought were in the possession of the defendant. After the action was brought the defendant admitted the title of the plaintiffs to the parcel of land No. 137, but defended the action so far as it sought to recover 137A. In the year 1808 an Act was passed authorising the inclosure of certain common lands in the parish of St. Asaph. In the year 1827 the commissioner (acting in the execution of this Act) made his award whereby the parcel of land in question was awarded as follows: "To the personal representatives of Robert Morris, late of St. Asaph, aforesaid, innkeeper, deceased, assigned and allotted in right of the lease of the George and Dragon and other premises in St. Asaph, under the said Dean of St. Asaph." Though the award was not completed until 1827, it appears that the allotment was made in 1816. The George and Dragon, in respect of which the allotment was made, was the property of the Dean of St. Asaph, and until the year 1820 was held under a lease granted by the then Dean of St. Asaph to two persons named Lloyd, as trustees for the next of kin of Robert Morris. This lease was in the year 1820 sold to Hugh Jones, who in 1820 obtained on the surrender of the old lease a new lease. There were several leases of the George and Dragon made after 1820, but none of them included the allotment now in question. By 3 & 4 Vict. c. 113, the estates of all deans passed to the Ecclesiastical Commissioners, but under the 75th section of the Act this was to be subject to the right of every dean then living to the estates of his deanery during his life; and it appears from the statement of claim, that the Dean of St. Asaph, living at the time when the last-mentioned Act passed, died in April 1854, and that thereupon the plaintiffs became entitled in possession to the estates of the deanery. It is admitted that the freehold and reversion of the George and Dragon formed part of the estates of the deanery, and the plaintiffs in the year 1850 purchased the then subsisting lease of that inn, and acquired possession thereof. But they never obtained possession of the allotment now in question, and this action was not commenced until the year 1877. Two questions were raised on the part of the appellant, the defendant in this action: first, that the plaintiffs had not shown that the Dean of St. Asaph ever had any title to the allotment in question; and secondly, that if this was decided in the plaintiffs' favour, the Statute of Limitations was a bar to this action. Mellor, J. found as a fact, that the defendant had been in possession adverse to the title of the plaintiffs for twenty years, but not for sixty years; that is, the right of the plaintiffs to

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.
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bring this action accrued more than twenty years, but not sixty years, before the issuing of the writ, and he decided the question of title and the question raised under the Statute of Limitations in favour of the plaintiffs. The question whether the Dean of St. Asaph ever had any title to this allotment is not free from difficulty. Neither the private Act, which has been already mentioned, nor the general Act in force when the award was made (41 Geo. 3, c. 109), contains any express enactment as to the title of a reversioner to an allotment made to his tenant in respect of his lease. We have not been furnished with a copy of the award, and there is no evidence as to the circumstances under which the allotments mentioned in the award were made to the dean, and, as we are of opinion that the Statute of Limitations affords a good defence to the action, even assuming that under the award the reversion of the allotment made in respect of the Gorge and Dragon vested in the dean, we think it better not to give any opinion on this question. As regards the defence of the Statute of Limitation, the plaintiffs contend that Pears, from whom the defendant bought in 1863, had been in possession of the allotment in question as tenant of the dean. If this point was raised at the trial, Mellor, J. found as a fact against the plaintiffs, and we are of opinion that there is no ground for disturbing his finding, if any, on this point, and further, that the evidence shows that the plaintiffs' contention in this respect is not well founded. In our opinion the allotment referred to in the deed relied on by them is that described in the statement of claim as 187, in respect of which no question now arises. But then it is urged on behalf of the plaintiffs that the Dean of St. Asaph would, under sect. 29 of the 3 & 4 Will. 4, c. 27 (a), have been able to

(a) By 3 & 4 Will. 4, c. 27, s. 1, the word "person" shall extend to a body politic, corporate, or collegiate.

Sect. 2. After the 1st day of December 1833 no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

Sect. 29. It shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual eleemosynary corporation sole, to make any entry or distress, or bring such action or suit to recover any land or rent, within such period as herein-after is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall have first accrued; that is to say, the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said 31st day of December 1833 no such entry, distress, action, or suit, shall be made or brought at any time beyond the determination of such period.

The 3 & 4 Will. 4 is now partly repealed by the Real

bring his action within sixty years from the time when his right to do so first accrued, and that the effect of 3 & 4 Vict. c. 113, s. 57, was to give the plaintiffs the same time to bring their action. Mellor, J. found, and it is conceded by the defendant correctly, that the defendant had not been in possession for sixty years, and he decided as matter of law that under these circumstances the plaintiffs' action was not barred by the statute. We are unable to agree with this decision. The plaintiffs are within the 2nd section of 3 & 4 Will. 4, c. 27, unless they show any statutory enactment which exempts them from the statutory bar of twenty years. The plaintiffs contend that the combined effect of the 57th section of 3 & 4 Vict. c. 113, and of sect. 29 of the Act of Will. 4, gives them such exemption. It is urged that sect. 29 of the Act of Will. 4 gives deans and other corporations sole mentioned in it such a privilege in the nature of a right or power, as by sect. 57 of the Act of 3 & 4 Vict. vests in the Ecclesiastical Commissioners. But this, in our opinion, cannot be maintained. The 29th section, it is true, begins with the words, "Provided always it shall be lawful," words which, if taken without reference to the rest of the statute in which they occur, look as if they conferred a right or power on the corporations therein mentioned. But the statute is not one which confers any right or power. On the contrary, it restricts the rights, powers, and remedies which, independently of its provisions, owners of property would possess, by prescribing a limited time within which they must enforce the rights and pursue the remedies which they, independently of the Act, possess. Although the 29th section seems to be enabling, yet, in truth, this and the 2nd section are statutory enactments, that deans and other ecclesiastical corporations sole shall not bring any action to recover land except within the period mentioned in sect. 29, and that all other persons shall not do so except within twenty years from the time when

Property Limitation Act 1874 (37 & 38 Vict. c. 57), which takes effect from and after Jan. 1, 1879.

By 6 & 7 Will. 4, c. 77, s. 1, the Ecclesiastical Commissioners of England were constituted a body corporate with power to sue and be sued, and to hold lands, &c.

By 3 & 4 Vict. c. 113, s. 50: Subject to the provisions herein contained, all the estate and interest which the holder of any deanery or canonry not suspended by or under the provisions of this Act, and his successors, have and would have in any lands, tithes, and other hereditaments or endowments whatsoever annexed or belonging, or usually held or enjoyed with such deanery or canonry (except any right of patronage), or whereof the rents and profits have been usually taken and enjoyed by the holder of such deanery or canonry, as such holder, separately and in addition to his share of the corporate revenues of such chapter, shall, without any conveyance or assurance in the law other than the provisions of this Act, accrue to and be vested absolutely in the Ecclesiastical Commissioners for England, for the purposes of this Act.

By sect. 57: The Ecclesiastical Commissioners for England shall, for the purpose of enforcing payment of all profits and emoluments to be paid to them, and of obtaining possession of all lands, tithes, or other hereditaments vested in or accruing to them as aforesaid, and of recovering the rents and profits thereof, have and enjoy all rights, powers, and remedies, at law and in equity, which belonged or belong, or would belong or have belonged, to the holder of the deanery, canonry, prebend, dignity, or office, or the rector of the rectory in respect of which such profits and emoluments, lands, tithes, and other hereditaments and endowments respectively are by or under the provisions of this Act to be paid or accrued to and be vested in the said commissioners.

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the right first accrued. It was much pressed upon us that the consequence of holding that the Ecclesiastical Commissioners are within sect. 2 of the 3 & 4 Will. 4, c. 27, would be that at the time of the passing of 3 & 4 Vict. c. 113, the Ecclesiastical Commissioners might have no power to recover property belonging to the deanery, for which the then dean would have forty years to sue, and that it could not have been intended that the Ecclesiastical Commissioners should thus lose property which the dean could have recovered. It is probable that the attention of Parliament was never directed to this point, and that there was no intention either way. But the supposed inconvenience is much lessened by the fact that, during the life of a dean living at the time when the Act of 3 & 4 Vict. c. 113 was passed, the dean and not the Ecclesiastical Commissioners would be entitled to bring an action to recover property of the deanery, and during this period the Ecclesiastical Commissioners could make inquiries as to the property of the deanery, and might arrange with the dean to recover any property in those cases where, though an action by them would be statute barred, the dean could still bring an action. In our opinion the decision on this point in favour of the plaintiffs would lead to this result, that the Ecclesiastical Commissioners could always bring an action to recover land vested in them under 3 & 4 Vict. c. 113, s. 50, even that of which they had at one time had possession, at any time within sixty years from the time when the right to do so first accrued, and that they would not be barred from bringing an action to recover land acquired by them under the last-mentioned Act till the lapse of the period mentioned in sect. 29 of the Act of 3 & 4 Will. 4, c. 27, while they would be barred by the lapse of twenty years from bringing an action to recover other estates derived from persons not mentioned in sect. 29. These are inconveniences at least as startling as that suggested by the plaintiffs as the result of a decision that twenty years is a bar. But the question is not one of convenience or inconvenience. It is whether there is sufficient to prevent an action by the Ecclesiastical Commissioners being barred by the limitation contained in sect. 2 of the Act. We are of opinion that there is not, and that an action brought by them is barred not by the period given by sect. 29, but by that enacted in sect. 2.

Judgment reversed.

Solicitors for the plaintiffs, *Jennings, White, and Buckstone.*

Solicitors for the defendants, *Field, Ruscoe, and Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, Feb. 4, 1879.

(Before HALL, V.C.)

CHAMPNEY v. DAVY. (a)

Charity—Will—Mortmain—43 Geo. 3, c. 108—Pur and impure personality—Construction—Invalid gift—Particular residue—General residue.

A testatrix bequeathed certain personal estate to her

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

*mother for life, and, after her death, as to 2000*l.*, part thereof, to the vicar of M., to be applied by him "in or about restoring, altering, enlarging and improving the church, parsonage house, and school." The residue thereof (the "particular residue") she bequeathed upon trusts in the will mentioned. All the residue of her personal estate (the "general residue") she bequeathed to her mother.*

*Held, that, as to the church, parsonage house, and school the legacy was good, to the extent ascertained by inquiry to be required in restoring, altering, enlarging, and improving such of them as were already in mortmain; but bad as to the rest: that to the extent of 500*l.* for the purposes mentioned in 43 Geo. 3, c. 108, the legacy might and was to be taken out of impure personality; and the rest out of the pure personality to the extent lawful under the Mortmain Acts.*

Held also, that the abatement of the charity legacy went into the particular, and not into the general residue. The construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift.

HANNAH ELIZABETH WEST made her will, dated the 13th Feb. 1872, whereby, among other things, she gave and bequeathed out of her personal estate, to the vicar for the time being of the parish of Muston, near Filby, in the county of York, the legacy or sum of 100*l.*, to be by him applied in such manner for the benefit of the Sunday-school attached to the church there as he in his absolute discretion should think proper. And she directed that the said legacy, with others, should be paid within six months of her decease.

She also gave and bequeathed to her trustees all her money, securities for money, moneys secured on mortgages, railway stocks and shares, moneys to be produced from the sale of any property at Scarborough or Peterborough to which she was entitled, all moneys to which she was or might be entitled under the will of her late grandfather, Thomas Phillips, and also all her moneys invested upon any securities in any way or manner howsoever, upon trusts for conversion and investment, and for payment of debts, legacies, and legacy duties, and to stand possessed of the residue (which is hereinafter referred to as "the particular residue") upon trust to pay the income to her mother, Hannah West, for life, and after her mother's death upon trust as to 2000*l.*, part thereof, to pay the same to the vicar for the time being of Muston aforesaid, to be by him applied and disposed of in such manner as he in his absolute discretion should think proper, in or about restoring, altering, enlarging, and improving the church, parsonage house, and school attached thereto, whose receipt for the said sum of 2000*l.* should be a sufficient discharge to her executors. And as to the residue thereof, upon the trusts declared of certain real estate thereafter devised. And the testatrix bequeathed to her mother all the rest, residue, and remainder of her personal estate and effects, which are hereinafter referred to as "the general residue."

Questions arose as to whether any part of the legacies of 2000*l.* and 100*l.* respectively failed, and whether any part of the legacy of 2000*l.* was payable out of the impure personal estate of the

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testatrix, under the provisions of 43 Geo. 3, c. 108. That Act provides :

That all and every person and persons having in his or their own right any estate or interest in possession, reversion, or contingency of or in any lands or tenements, or of any property of or in any goods or chattels, shall have full power, licence, and authority in his and their will and pleasure, by deed enrolled in such manner and within such time as is directed in England by the statute made in the twenty-seventh year of the reign of King Henry VIII., and in Ireland by the statute made in the tenth year of the reign of King Charles I. for enrolment of bargains and sales, or by his, her, or their last will or testament, being duly executed three calendar months at least before the death of such grantor or testator, including the days of the execution and death, to give and grant to and vest in any person or persons, or body politic or corporate, and their heirs and successors respectively, all such his, her, or their estate, interest, or property in such lands or tenements not exceeding five acres, or goods and chattels, or any part or parts thereof, not exceeding in value 500*l.* for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the said United Church are or shall be used or observed, or any mansion house for the residence of any minister of the said United Church officiating or to officiate in any such church or chapel, or of any outbuildings, offices, churchyard, or glebe for the same respectively, and to or for those purposes applied according to the will of the said benefactor in and by such deed enrolled, or by such will or testament executed as aforesaid expressed, the consent and approbation of the ordinary being first obtained, and in default of such direction, limitation, or appointment, in such manner as shall be directed and appointed by the patron and ordinary, with the consent and approbation of the parson, vicar, or other incumbent.

Sect. 2 provides :

That no more than one such gift or devise shall be made by any one person, and that if any such gift or devise as aforesaid shall happen to exceed five acres in lands or tenements, or the value of 500*l.* in goods and chattels, any such gift or devise shall be good and valid to the extent aforesaid ; and it shall be lawful for the Lord Chancellor for the time being, on petition, to make order for reducing every such gift or devise to and within the said limits, and for allotting such specific five acres, and if occasion should require such specific goods and chattels as in his judgment shall be most convenient, and to make such further order touching the premises as to him shall appear just and reasonable.

Hastings, Q.C. and *Nalder*, for the plaintiffs, stated the facts.

Robinson, Q.C. and *Sutton*, for the vicar of Manton.—We rely upon *Sinnett v. Herbert* (26 L. T. Rep. N. S. 7 ; L. Rep. 7 Ch. 232), which decides that where pure and impure personalty is given to trustees to erect or endow a church, they are entitled, under 43 Geo. 3, c. 108, to 500*l.* out of the impure personalty, in addition to the whole of the pure personalty.

Pearson, Q.C. and *Speed* for certain legatees, defendants.—According to *Hoare v. Osborne* (14 L. T. Rep. N. S. 9 ; L. Rep. 1 Eq. 585) it would be impossible to ascertain what proportion of the gift was to be assigned to the illegal and what to the legal object. See also

Wrigley's Trusts, 15 L. T. Rep. N. S. 499.

There is nothing in 43 Geo. 3, c. 108, which enables you to bring money into mortmain for restoring and enlarging. *Pruitt v. Harvey* (25 L. T. Rep. N. S. 209 ; L. Rep. 12 Eq. 544), before Wickens, V.C., decided that a charitable gift for building must refer to an existing site, or expressly exclude the application of the money in the purchase of land. Moreover, that was not the case of the application of impure but of pure personalty ; and the gift was held void except to the extent of

500*l.*, under 43 Geo. 3, c. 108. There are two grounds on which this gift might be impugned : either as a gift of pure personalty to bring land into mortmain, or as a gift of impure personalty. To be good you must have the possibility of bringing land into mortmain absolutely excluded. This gift would be void as to the pure personalty. But it is a gift of pure and impure personalty—there is no alternative ; therefore it is bad in its totality. See

Walmough's Trusts, 22 L. T. Rep. N. S. 88 ; L. Rep. 8 Eq. 272 ;

Incorporated Church Building Society v. Coles, 1 K. & J. 145 ; 5 De G. M. & G. 324.

Sinnett v. Herbert (*ubi sup.*) was a gift of general residue and not a particular legacy. If one object is void the whole gift fails.

Dickinson, Q.C. and *Joyce*, for the representative of Hannah West, in the same interest, referred to the 2nd section of the Act. *Sinnett v. Herbert* has no application. There is no lawful purpose except what was made lawful by 43 Geo. 3, c. 108 ; and the different purposes are here coupled so inseparably that all must be considered bad.

Robinson, Q.C. in reply.—Schools are within the Act of 43 Eliz. The legacy is good if the land is already in mortmain. See

Theobald on Wills, p. 196.

HALL, V.C.—The questions which have been discussed on the present occasion with reference to the validity of this disposition of 2000*l.* are now to be disposed of by me. The first thing I shall deal with will be the distinction between the pure and impure personal estate with reference to this disposition. As regards the pure personal estate there is no possible objection to the disposition of that so far as there is pure personal estate to answer the gift ; except in so far as that pure personal estate has been directed, if at all, to be laid out for a purpose which is prohibited by the Statute of Mortmain. As to that, the only possible objection I can see to this disposition is, that the fund is to be applied "in or about restoring, altering, enlarging, and improving the church, parsonage house and school attached thereto." The only possible objection which seems to me to arise as to that is, that it may be the parsonage house and school are not in mortmain ; in which case, it would be practically giving money to be applied in or towards acquiring or purchasing a school not already in mortmain. As to those two, the parsonage house and school, therefore, if it be desired, I must have an inquiry to ascertain what the position of them is as regards their being in mortmain already. Subject to that, it seems to me to be plain that the disposition is perfectly good. [*Dickinson, Q.C.*—There must be a short affidavit by somebody stating either one way or the other.] I should think there is no doubt about the parsonage house, and very probably not much as to the other. [*Pearson, Q.C.*—I happen to have some little knowledge of the locality. I believe the parsonage house, is in mortmain, and that the school lands belong to C. Strickland.] To that extent the gift would be bad. I am now dealing with the pure personal estate ; and I say, to that extent (and it is an observation which applies both to pure and impure personal estate), that I do not consider that, with reference to there being three subject-matters upon which the money

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might be laid out, there is any real difficulty arising as to that. No doubt there is an observation, which is to be found in *Sinnott v. Herbert* (*ubi sup.*), by Lord Chancellor Hatherley, and there are observations in other authorities of the same kind, that where there are several objects of the charity, one of which is illegal, the whole must fail, there being no distinction taken as to the amount to be devoted to each. But I do not take that to be law in a case where you can ascertain how much ought to go to each. In fact it was in *Hoare v. Osborne* (*ubi sup.*), and also, as I recollect, in a subsequent case which was before the same learned judge, that Kindersley, V.C., only because he considered that it could not be ascertained from the nature of the subject-matter what property ought to be set apart for each, decided that he would adopt, not the rule of invalidity, but the rule of there being a number of objects, saying so much for one and so much for the other. The same question was under the consideration of Wood, V.C. in the case of *Attorney-General v. Fisk*, which is in the 4th vol. of Equity Cases, p. 521. There was a gift of 1000*l.* Consols to the rector and churchwardens of a parish and their successors upon trust to apply such of the dividends thereof as should from time to time be necessary or required in keeping in repair her family grave, and to pay and divide the residue of the said dividends, at Christmas every year for ever, amongst the aged poor of the parish. It was held, that though the amount of the gift for the repair of the grave was not specified, the court could, if necessary, have estimated the amount "necessary and required" for the purpose, and so have prevented the gift of the residue from being void for uncertainty. Then he observed upon the case which has always been considered as a case looking the other way of *Chapman v. Brown* (6 Ves. 404), and he came to that conclusion. Therefore, as regards the school, you must ascertain how much of the gift, whatever the reduced amount may be, was required to be laid out upon each of the three several objects specified; and the gift, therefore, will prevail to the extent to which it may be ascertained that the money will be required; and it will fail as to the rest. Now then, as to the sum so far as it is to come out of the impure personal estate: it appears that, as regards the coming out of impure personal estate, having regard to the statute, and taking into consideration the second section to which my attention has been called, I must give effect to the gift to the extent to which the law will allow it to take effect out of the impure personal estate. In other words, that it is a valid gift to the extent of 500*l.* after taking the pure personal estate as far as it will go, it being of course clear that the whole amount of 2000*l.* will not be exceeded by taking the whole of the pure personal estate. I assume that, of course, you will take the pure personal estate as far as it will go. I do not know what the amount is.

The question remained to be discussed whether to the extent of the abatement the legacies went into the first or into the ultimate residue.

Pearson, Q.C. and *Speed* for persons entitled to the particular residue.—There is no intention in any event to benefit the residuary legatee. In *Carter v. Taggart* (16 Sim. 423), where a gift, directed to be deducted from a particular residue, failed on ac-

count of the death of the legatee, went to the particular, and not to the general residue. The same rule is applied in *De Trafford v. Tempest* (21 Beav. 564). In *Harries' Trusts* (Johnson, 199), Wood, V.C. thus expresses the principle: "If you find in the will a plain indication of an intention to appoint the whole, that may remain strictly in the shape of residue, as residue is appointed by this will, or to appoint the entire fund charged only with the sums specified in the preceding appointments; then the residuary clause will be read as an appointment, not of the mere balance of the fund, after the sums previously appointed have been deducted from it, but of the entire fund subject to the appointments previously made." The whole question is, what is the first residue? It includes everything payable out of these particular funds:

Theobald on Wills, pp. 93, 94.

Dickinson, Q.C., and *Joyce* for the representative of Hannah West, entitled to the ultimate residue.—The particular residuary legatee of this specific fund, has no claim to anything but what is expressly given her. See

Re Jeaffreson's Trusts, L. Rep. 2 Eq. 278.

The clear distinction is whether the gift, which partly fails, is in the form of a charge or the gift of an aliquot part. Here there is a gift to trustees of a variety of subjects, and a clear residue to be ascertained. It is only in the former case that a particular residue can be benefited by the failure of previous gifts. This case comes within *Eusum v. Appleford* (5 My. & Cr. 56), in which a testator bequeathing a sum to a daughter for life, and then as she should by will appoint, directed that on failure of appointment the fund should go into his general residue. The daughter appointed part of the fund by an appointment which failed, and the residue to other persons. What was ineffectually appointed went into the father's and not the daughter's residue. See also

Oke v. Heath, 1 Ves. sen. 135 (referred to in *Harries' Trusts*, *ubi sup.*);

Bernard v. Minshull, Johnson, 276.

HALL, V.C.—In *Falkner v. Butler* (Amb. 514), under a limited power of appointment, the donee appointed a sum to persons not objects of the power, and this sum was held to pass under the appointment of residue; i.e., it fell into that residue. So in *Wollaston v. King* (8 Eq. 165) it was held there being an invalid appointment of part of a trust fund, that fund passed under an appointment, "subject to the appointment thereinbefore contained of all the trust moneys subject to the trusts of the settlement." In *Carter v. Taggart* (16 Sim. 423), the testatrix exercising a power over a specified sum, gave part of it to a person who died before her, and gave all the rest and residue of the sum, after deducting the legacies above mentioned. The part which lapsed was held to fall into the residue. This decision, I think, turned upon the particular will indicating an intention, particularly by a life estate being given in part with a direction that that part should fall into the residue, that all should pass to the appointee of the residue, subject only to the charge. In *De Trafford v. Tempest* (21 Beav. 564) a lapsed gift of particular furniture was held to fall into a gift of furniture not thereinbefore otherwise disposed of, and not to pass under a general residuary gift. This is a case of two residues. In *Eusum v. Appleford*

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(*vide sup.*), which was a case of an appointment under a power, Lord Cottenham considered that the fund was a definite one, and that the last disposition, though of "residue," was in substance to be read as if the whole amount of such residue had been inserted in the disposition. In *Re Harries' Trusts* (Johns. 199), Wood, V.C. held upon the whole instrument that a lapsed share of a definite sum passed under an appointment of residue of the said moneys after certain specified sums. He considered *Carter v. Taggart* and *Falkner v. Butler* to apply rather than *Easum v. Appleford*. In *Re Jeaffreson's Trusts* (L. Rep. 2 Eq. 276), which was the execution of a power the donee appointed 100*l.*, part of the fund, to a person not an object of the power, and appointed the balance of the fund, after payment of certain other sums well appointed, which balance he described as 260*l.*, and, after payment of the debts (which was an invalid direction), and should any surplus remain, she gave it to an object of the power. Here there were two invalid gifts. The latter was held to fall into the ultimate surplus; the former was held to pass as unapplied. That decision as regards the 100*l.* followed *Easum v. Appleford*, the 100*l.* not becoming part of and passing with the balance, because that was defined as 260*l.* That case, therefore, is not an authority in favour of the general residuary legatee in the present case, viz., the testatrix's mother; and, construing the whole will and having regard to the authorities, I hold that the particular residuary legatees are entitled to so much of the 2000*l.* legacy as is not well disposed of. I do not think there is a sound distinction between cases of lapsed and cases of invalid disposition, whether the disposition be under a power of appointment, special or general, or in exercise of ownership; nor do I think that the construction of a particular residuary gift is affected by the presence or absence of a general residuary gift.

Solicitors: Collyer - Bristow, Withers, and Russell; E. W. and W. B. James; J. and F. Needham; R. Smith and Wilmer, for Ford and Warren, Leeds.

QUEEN'S BENCH DIVISION.

Feb. 27, 28, and March 8, 1879.

(Before COCKBURN, C.J., FIELD and MANISTY, JJ.)

REG. v. BISHOP OF OXFORD. (a)

Mandamus—Ecclesiastical offence—Duty of bishop—"It shall be lawful"—Grounds for refusal—3 & 4 Vict. c. 86, s. 3.

A parishioner made a charge under sect. 3 of the Church Discipline Act 1840, to the bishop of his diocese, that the rector of his parish had offended against the laws ecclesiastical. The bishop declined to issue a commission for the purpose of making inquiry as to the grounds of such charge, for the expressed reasons that the repeated failures in legal proceedings of this kind had tended to cover those concerned in them with ridicule, and to bring the Church into contempt; that the rector was of advanced age, and was held in respect and love; and that the charge was made in opposition to the wish of the majority of the parishioners.

Held, upon a rule for a mandamus, that the reasons alleged by the bishop did not justify him in de-

clining to exercise his office at the instance of a parishioner under this section; and that the court, in the exercise of its discretion, would compel him to proceed.

THIS was a rule nisi for a *mandamus* directing the Bishop of Oxford to issue a commission for the purpose of making inquiry as to the grounds of a charge, made by the applicant, Frederick G. Julius, a parishioner of Clewer, in the county of Berks, of certain offences under the ecclesiastical law, against the Rev. T. T. Carter, the rector of the said parish of Clewer.

On the 11th July 1878 the applicant made a complaint by letter to the bishop of certain alleged illegal practices by the rector at the celebration of the Holy Communion. The bishop acknowledged the receipt of this letter, and promised consideration thereof, on the following day; and on the 9th Aug. the applicant's solicitors wrote to the bishop asking the result of his consideration.

On the 10th Aug. the bishop wrote to the applicant's solicitors as follows:

In reply to your letter, I can only say that I have not yet been able to satisfy myself as to the best way of dealing with the complaint to which it refers. The repeated occurrence of failures during the last few years in the conduct of legal proceedings of this kind has had a tendency to cover all persons concerned in them with ridicule, and to bring on the Church itself some contempt, which I would not willingly increase. In this case I have further to consider that the complaint is made in opposition to the strongly-expressed wish of the great majority of the parishioners, and that the person complained of is a clergyman in advanced years generally respected, and even beloved, by those who know him. I mention these circumstances not as affording any answer to your complaint, but as reasons which impose upon me the duty of taking unusual care in deciding on the course which I ought to adopt.

On the 23rd Oct., in answer to a further application from the solicitors, the bishop again wrote:

My former letter will have explained to you in general the considerations which impose the duty of extreme caution upon me in the nature of complaint professionally intrusted to you. Further, I am led to believe that proceedings will be taken as to the late judgment of the Court of Queen's Bench which may affect the exercise of the jurisdiction of the Court of Arches and of the Judicial Committee of the Privy Council in some important respects. While these are pending, I am unwilling to add to the large amount of costly and abortive litigation from which the Church has already suffered so much discredit.

On the 12th Nov. the solicitors wrote to the bishop:

We are instructed to ask your Lordship for a definite reply to our client's application to your Lordship either to issue a commission for the purpose of making inquiry into the grounds of the charges set out in the application or to send the case by letter of request to the Court of Appeal of the province, to be there heard and determined in accordance with the provisions of the Act.

To this, on the 14th Nov., the bishop replied as follows:

In reply to your note I can only refer you to my former letter. As no change has occurred in the state of things in view of which that letter was written, I have nothing to add to it. I am not aware that there was any obscurity in the language.

On the 22nd Jan. 1879 this rule nisi for a *mandamus* was granted on the application of A. J. Stephens, Q.C. for the applicant.

Feb. 27 and 28.—The Bishop of Oxford in person showed cause against the rule.

Charles, Q.C. and Phillimore also showed cause on behalf of the Rector of Clewer.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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A. J. Stephens, Q.C. and Jeune supported the rule.

The arguments and the authorities discussed sufficiently appear in the judgment of the court.

Cur. adv. vult.

March 8.—COCKBURN, C.J. delivered the judgment of himself, Field and Manisty, JJ.—This was an application for a writ of *mandamus* to the Lord Bishop of Oxford, directing him to issue a commission under 3 & 4 Vict. c. 86, to inquire into the matter of a complaint of Frederick G. Julius, Doctor of Medicine, a parishioner of the parish of Clewer, in the county of Berks, and a member of the Church of England, against the Rev. Thomas Thelluson Carter, rector of the said parish, for offences against the laws ecclesiastical in respect of unauthorised deviations from the ritual of the Church in the Communion Service and the use of unauthorised vestments. The complaint was in due form, and it must be taken that the instances of alleged departure from the established ritual set forth in the complaint were according to the law as it had been laid down in the decisions of the Judicial Committee of the Privy Council offences against the ecclesiastical law, and therefore within the statute. The bishop has declined, however, to issue the commission as required, assigning as a reason, not that the matters complained of were not offences against the ecclesiastical law, or were of too unsubstantial and trivial a character to call for inquiry, but resting his refusal on the ground that the repeated failures which had occurred during the last few years in legal proceedings of this kind had had a tendency to cover those concerned in them with ridicule and to bring the Church itself into contempt, as well as on the advanced age of the incumbent, the respect and love in which he was held, and the fact that the complaint was made in opposition to the expressed wish of the great majority of the parishioners. The writ of *mandamus* being applied for under these circumstances, these three questions present themselves: 1. Assuming the Church Discipline Act (3 & 4 Vict. c. 86), the statute upon which this application is founded, to be still in force in such a case, is it obligatory on the bishop, as a matter of statutory duty, to issue a commission as prayed for, with the alternative of sending the cause to the Court of Arches in the first instance; or is it in his discretion to refuse to institute any further proceeding? 2. Is the Act in question still in force, or has it been superseded by the Public Worship Regulation Act of 1874? 3. If the Church Discipline Act is still in force and applicable to the present case, and the exercise of the power conferred by the statute is obligatory on the bishop, is the present case one in which this court should exercise the discretion which it possesses in the matter of *mandamus* and refuse the writ? With a view to these questions, it becomes necessary, in the first place, carefully to consider the Church Discipline Act under which this application is made, not only with reference to the 3rd section, on which the application is immediately founded, but also with reference to the general scope and purpose of the statute. The 3 & 4 Vict. c. 86, superseding the former modes and proceedings against clerks in orders, in sect. 3, enacts that "in every case of any clerk in holy orders of the United Church of England and Ireland who may be charged with any offence

against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be the vicar general or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report." The commissioners so appointed are to examine witnesses on oath for the purpose of "ascertaining whether there be sufficient *prima facie* ground for instituting further proceeding. If the commissioners report that there is sufficient *prima facie* ground for further proceeding, and if the bishop or the party complaining shall thereupon think fit to proceed against the party accused, articles are to be drawn up, which, with the depositions, are to be filed in the registry of the diocese. The bishop is then to cite the party accused to appear to make answer to the articles. If he appears and admits the truth of the articles, the bishop or his commissary specially appointed for the purpose is to pronounce sentence according to ecclesiastical law. If the party fails to appear, or appearing, makes any other answer than an unqualified admission of the truth of the articles, the bishop is to proceed to hear the cause with the assistance of three assessors specially qualified by the Act; and, having heard the cause, is to determine the same and pronounce sentence thereupon according to the ecclesiastical law. There is, however, a special provision that before issuing the commission, or after the report of the commissioners, provided it be before the filing of the articles, "it shall be lawful for the bishop, if he shall think fit," to send the case by letters of request to the Court of Appeal of the province, there to be heard and determined. Such being the method of proceeding provided by this statute, the first question which presents itself is whether the enactment in the 3rd section, which says that on a complaint against a clerk in orders of an offence against the ecclesiastical law, it shall be lawful for the bishop to issue a commission of inquiry, simply confers a power to be exercised at discretion, or imposes a duty which requires the exercise of the power in the circumstances contemplated by the statute. It is said that the question is settled by authority, there having been a decision of this court to the effect that the Act simply confers a power to be exercised at discretion, in the case of *Reg. v. The Bishop of Chichester* (2 E. & E. 209). But when that case comes to be looked at it appears extremely doubtful whether such was the ground of the decision of the majority of the court. The argument on the rule having been heard before Lord Campbell, and Justices Wightman, Erle, and Hill, before judgment was delivered, Lord Campbell had become Lord Chancellor, and Mr. Justice Erle had become Chief Justice of the Common Pleas; for which reason the only judgments delivered were those of Wightman and Hill, JJ., who, while they concurred in discharging the rule for a *mandamus*, proceeded on different grounds, Wightman, J. no doubt expressly holding that the bishop had a discretionary authority which could not be controlled by *mandamus*, while Hill, J. declining to act on this

view, concurred in discharging the rule solely on the ground that the applicant not being a parishioner, and therefore not interested in the performance of the service in the church in question, the case was not one in which the court, having a discretionary authority in the matter of *mandamus*, ought to issue the writ. It is true that Wightman, J. at the close of his judgment adds that Lord Campbell and Lord Chief Justice Erle concurred in thinking that the rule should be discharged; but he does not say on which of the two grounds they so concurred, which makes it, to say the least, extremely doubtful whether it was in concurrence with his own view; for there being a difference of opinion between himself and Hill, J., had his own view been borne out by the opinion of the other two judges, or either of them, it may reasonably be inferred that he would have said so. It also appears from the statement of Dr. Stephens, derived from his own recollection of what occurred in the case of *Shepherd v. Bennett*, before the Judicial Committee of the Privy Council, and which is fully borne out by the shorthand notes, that in the latter case Sir William Erle disclaimed having acted on the ground taken by Wightman, J. To which we may add that we have been recently informed by Sir William Erle that he did not authorise Wightman, J. to say more on his behalf than that he concurred in discharging the rule for a *mandamus*. It is true that in the *Newport Bridge case* (2 E. & E. 377), which occurred in the same year, Crompton, J. expresses his concurrence in the view taken in the previous case by Wightman, J.; but it is to be observed that Crompton, J. had not been a party to the judgment in that case, or to the discussion which had been held upon it. The same question came again before this court, in the case of Mr. Bennett, on an application for a *mandamus* to the Bishop of London, a report of which case have been published, and from which it no doubt appears that a strong intimation was thrown out, in the course of the argument, as well as in giving judgment, by Lush J., of concurrence in the view of Wightman, J., in the *Bishop of Chichester's case*, founded mainly, however, on what we cannot but believe to have been a mistake—viz., that Lord Campbell and Erle, L.C.J. had concurred in discharging the rule in that case on the ground taken by Wightman, J. It became, however, unnecessary to decide as to the construction of the statute in Mr. Bennett's case; and Lush, J. and the other judges expressly disclaim all intention of doing so; inasmuch as, there being already a proceeding pending against Mr. Bennett, under a commission issued by the bishop in respect of similar doctrines contained in a former publication, the court, in the exercise of its discretion, refused to grant the *mandamus* as unnecessary and uncalled for. In this state of uncertainty we feel ourselves at liberty to form our own judgment as to the construction to be put on the enactment in question; the more so as, for reasons which will be explained further on, the ground on which the opinion of Wightman, J. was founded appears to us open to serious question. The question turns on the true sense of the term, "it shall be lawful" (as used in the 3rd section of the Church Discipline Act)—a term frequently used in statutory language, perhaps, owing to its ambiguity, too

frequently, as it is one which admits of no less than three different meanings, in all of which it occurs in this very statute: (1) It may be used to confer a right or privilege, to be exercised for the benefit of others or not, at the option of the party to whom it is given; (2), it may be used to confer a power or authority, to be exercised for the benefit of himself at the discretion of the party on whom it is conferred; or (3), while it confers a power or authority, it may, at the same time, impose the duty of exercising the power or authority so conferred. Besides which the general sense of these words is sometimes restricted by some qualifying expression, such as "if he shall think fit," "if it shall appear to him right," or the like, which plainly indicate that the exercise of the power is to be subject to the discretion of him who is authorised to exercise it. In the absence of any such qualifying expression, the meaning of the words must be sought in the context of the particular enactment, or of the other sections of the statute, or by reference to its general purpose, and the alteration in the existing law which it was intended to effect, as also in certain canons of construction applicable to this and similar expressions in statutes of a particular class. In the statute before us the term "it shall be lawful" occurs, and that more than once, in the several meanings in which it can thus be used. It is used to confer a right or privilege, to be exercised at the option of the party, in the 4th section, which provides that "it shall be lawful for the party accused, or his agent, to attend the proceedings of the commission, and to examine any of the witnesses;" and again, in the 15th section, which provides that "it shall be lawful for any party who shall think himself aggrieved by a judgment pronounced by the bishop, or in the Court of Appeal of the province, to appeal from such judgment." It is used in the sense of conferring a discretionary power or authority in the 6th section of the Act, where it is said that where proceedings have been commenced under the Act "it shall be lawful" for the bishop, the written consent of the clerk accused and of the party complaining having been first obtained, to pronounce sentence without further proceedings. Three instances occur in which the words are used as imposing a duty. Thus, when in sect. 4 it is said that "it shall be lawful for the commissioners to examine on oath or solemn affirmation, and that such oath or affirmation shall be administered by them to all witnesses who may be tendered to them, either in support of the charge or by the party accused, as well as to all witnesses whom they may deem it necessary to summon, for the purpose of fully prosecuting the inquiry," there can be no doubt that the duty of so examining the witnesses is thereby imposed; and the same observation applies to the use of the same words in sect. 17, which has reference to the evidence of witnesses and documents in every stage of the inquiry. Equally clear is it that when by sect. 9 it is provided that, when the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, "it shall be lawful for the bishop, by writing under his hand, to require the party to appear, by himself or his agent, to make answer to the articles," a judicial duty is cast upon the bishop which he has no alternative but to discharge. Three instances occur in which the effect of these words is restricted by qualifying expressions. Thus sect. 13

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provides that "if it shall appear to the bishop that great scandal is likely to arise from the party accused continuing to perform the services of the church, or that his ministration will be useless while the charge is pending, it shall be lawful for the bishop to inhibit the clerk from performing any service till the sentence shall have been given." It is obvious that the exercise of the power here given must depend on the view taken by the bishop. So when, in sect. 13, where it is provided that "it shall be lawful" for the bishop, "if he shall think fit" at any time before articles are filed, instead of hearing and deciding the cause under sect. 2, "to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of that court," it is obvious that this is a discretionary power. These instances show that the framers of this Act were sensible of the necessity, where the authority conferred was intended to be discretionary, of appending words of limitation to the phrase in question. Of this a still more striking instance is to be found in the very section which we are called upon to construe, which, after providing that "it shall be lawful for the bishop to issue a commission on the application of any party complaining," proceeds to add, "or, if he shall think fit, of his own mere motion." Here the words "if he shall think fit" would appear to be have been introduced for the purpose of preventing the preceding words, "it shall be lawful," from precluding the exercise of the discretionary power which in the alternative it was intended to confer on the bishop. We now proceed to consider the rules of construction to be applied in determining the sense in which the words "it shall be lawful," in the 3rd section of the Church Discipline Act, are to be taken. In doing this we start with a settled canon of construction, that in statutes of a certain class, of which the statute under consideration is one, these words have acquired a settled meaning, unless controlled by the context of the particular enactment, or by the sense in which they are used in other parts of the statute, or, on the purview of the statute, by what is its apparent purpose; in determining which, the prior state of the law, and the end which the statute was intended to effect, may no doubt have to be considered. Whether or not these words are to be considered as simply conferring a discretionary power, or as imposing the duty of exercising the power conferred, when its exercise is called for, must depend in the first place on the subject-matter of the statutory enactment. In the ordinary run of statutes these words import, generally speaking, a faculty or power, to be exercised at the option or discretion of those on whom it is conferred; and such, it seems, is to be taken to be their *primâ facie* meaning where the subject-matter will admit of it, or where the exercise of the power may depend on contingencies on which a judgment has first to be formed. Thus, in the case *Re Newport Bridge* (2 E. & E. 377), which was an application for a *mandamus* under 43 Geo. 3, c. 59, s. 2, which, with reference to county bridges, enacted that where any such bridge was narrow and inconvenient, it should be lawful for the justices of quarter sessions to order the same to be widened and improved, Crompton, J., after saying that "the meaning to be attributed to the

phrase 'it shall be lawful' in a statute must depend on the subject-matter in every instance," goes on to say: "*Primâ facie* those words import a discretion, and they must be construed as discretionary unless there be anything in the subject-matter to which they are applied, or in any other part of the statute, to show that they are meant to be imperative." "In the present statute," he says, "not only does it not appear that the Act was intended to be compulsory upon the justices, but it appears from the subject-matter that it was intended to be left to their discretion. It seems to me that the Legislature must have so intended when I consider the nature of the court which has to decide whether the act shall be done, and the many questions of expense and expediency which may arise before the act can be prudently determined on." Hill, J. dwells more fully on the circumstances to be thus taken into consideration. Blackburn, J. says: "The words 'shall and may be lawful' are to be taken in their primary sense as permissive, and not compulsory, unless there be anything in the subject-matter of the enactment requiring that they shall receive a different construction. For a time I thought that the present enactment did require that the imperative construction should prevail, and that the object of the Legislature was that upon the one fact appearing that the bridge was narrow and inconvenient, it should be widened as a matter of course. I now, however, agree in what has fallen from my brother Hill—that the justices have other matters, such as he has pointed out, to take into consideration, besides the narrowness of the bridge, before they decide whether or not to order it to be widened. That being the case, it is quite clear that the Legislature must have intended to leave them the discretion which the language of the statute *primâ facie* imports." In statutes, however, of the class to which the Church Discipline Act belongs a different rule has prevailed for a very great length of time. So long ago as the year 1693 it was decided in the case of *Rex v. Burlow* (2 Salkeld 609), that when a statute authorises the doing of a thing for the sake of justice or the public good, the word "may" means shall; and that rule has been acted upon to the present time. In Bacon's Abridgment tit. "Statute, i.," the rule is so laid down, as also in Dwaris on Statutes, p. 264. Speaking of facultative words, it is there stated that where a statute directs the doing of a thing "for the sake of justice" or "for the public benefit," the word "may" shall be construed as "shall" or "must," and, of course, the same rule will apply to the words "it shall be lawful." Such a construction was put on these words by the Court of Common Pleas in the case of *McDougall v. Paterson* (11 C. B. 755), in which it was held that the word "may" in the County Courts Extension Act (13 & 14 Vict. c. 61) which provides that in certain cases the court, or a judge at chambers, may by rule or order direct that the plaintiff shall recover his costs, is not used to give a discretion but to confer a power, and that the exercise of such power depends not upon the discretion of a court or judge, but upon the proof of a particular case out of which such power arises. In that case Jervis, L.C.J. says: "When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority

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when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application." "For these reasons," continues the Chief Justice, "we are of opinion that the word 'may' is not used to give a discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises." A similar construction was put on the words "it shall be lawful" in the case of *Morisse v. The Royal British Bank* (1 C. B. N. S. 67), in which it was held that these words, in the 13th section of 7 & 8 Vict. c. 113, the Joint Stock Bank Act, were compulsory, and left no discretion to the court or judge. The case of *Orake v. Powell* (2 E. & B. 210) is to the same effect. But it is unnecessary to multiply cases in support of this position. "It has been so often decided," says Coleridge, J., in the case of *R. v. The Tithe Commissioners* (14 Q. B. 459, 474), "as to have become an axiom, that in public statutes words only directory, permissive, or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." It may, however, be satisfactory to observe that the same sense has been ascribed to these words in the courts of the United States. In the case of *The Supervisors v. United States* (4 Wallace's Reports, p. 446), Swayne, J., in delivering the judgment of the Superior Court, after referring to the English and American cases, says as follows: "The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the Act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is, in fact, precatory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless." Now, the statute we are considering unites both the properties which have been referred to. It has reference to the administration of justice in the matter of ecclesiastical offences; and, as it relates to the maintenance of the doctrines and ritual of the established religion, for upholding the uniformity of which so many Acts of Parliament have been passed, it cannot be held to be other than matter of national interest and concern. Moreover, it is the undoubted right of every inhabitant of every parish in the kingdom, desirous of frequenting the parish church, to have the services of the church performed according to the ritual of the Church, as established by law, without having his religious sense shocked and outraged by the introduction of innovations not sanctioned by law or usage, and which may appear to him to be inconsistent with the simplicity of the Protestant worship, and to pertain to a religion which he believes to be erroneous, and the ritual of which is not that of the Church of England. It cannot admit of doubt that a statute, by means of which a right so important to the general sense of mankind was alone to be capable of being enforced and upheld—since it abolished the previous jurisdiction of the ecclesiastical courts in the matters of clerks in

orders—is one of general interest and concern, in the construction of which the rule referred to would be applicable. This being so, we have next to see whether we find anything in the language or purpose of the statute which shows that the words were intended to have a less authoritative meaning. So far from this being the case, as regards the language of the 3rd section, we find, as has already been pointed out, that between that part of it which relates to the power of the bishop to issue a commission on a complaint addressed to him, and which enacts that it shall be lawful for him so to do, and that part which enables him to do so of his own mere motion, independently of any complaint, the words "if he shall think fit" are interposed. It is here obvious that if the words "it shall be lawful" had been intended to confer a discretionary power, as these words would, in the absence of the words "if he shall think fit," have governed and controlled the whole sentence, the latter words would have been wholly superfluous. They can only have been introduced, therefore, for the purpose of qualifying the previous expression. Taken as a whole, it therefore seems to us from the collocation of the words that the passage affords the key to its own interpretation, and indicates the sense in which the words in question are to be taken. It was suggested on the part of the bishop that the words "if he shall think fit" in section 3 should be rejected as superfluous. To this we answer that in so doing we should violate a settled canon of construction—namely, that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant (*Bac. Abr.*; tit. "Statute" I. sub-sec. 2). But this is not all. The words are significant, as indicating the sense in which the words "it shall be lawful" in the preceding part of the section had been used by the framers of the Act. They would in any point of view have been idle, if not introduced to qualify the effect of the words, "it shall be lawful," as imposing a duty. Wightman, J., it is true, in *Reg. v. The Bishop of Chichester*, arrived at the opposite conclusion, derived from the enactments of the section in question. His opinion was founded on the ground that the power to issue a commission in the 3rd section applied equally to a case of scandal or evil report of having offended against the ecclesiastical law as to one of an offence charged to have been actually committed; and he argues, *ab inconvenienti*, that it cannot have been the intention of the Legislature to put it in the power of a prosecutor to call upon a bishop to issue a commission, and so initiate proceedings on what may turn out to be unfounded rumours; the more so as, according to the learned judge, as the law before stood, "the office of the judge could only have been promoted in the case of some direct and positive charge of an offence against the laws ecclesiastical, and no proceeding upon the ground of scandal or evil report of having offended against these laws would have been admissible." But, in the latter assumption the learned judge is, we cannot but think, in error. Public report or scandal was a ground of accusation in the ecclesiastical procedure, not only in the proceedings by inquisition, when the proceeding was taken by a bishop or an archbishop, *ex officio mero*. Here the articles, Oughton tells us ("*Ordo Judic.*" tit. 141, sect. 1), were to contain "Tam

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causas conventionis (i.e., in *jus vocationis*) quam *famam publicam*." Again, he says (Ib. n.f. 22), "*Et si reus non tenetur respondere positioni criminosa, tenetur tamen respondere positioni contenti famam publicam criminis articulati*. Igitur in his articulis *famam publica* objecti criminis est *alleganda et obijcienda*." Nay, so material was public scandal or evil report deemed to be as founding a charge against a party, that the judge was bound to summon and examine the fellow-parishioners of the accused as to its existence. "*Si reus negaverit criminem objectum et famam*," says Oughton ("Ordo Judic." tit. 145, sect. 1), "*tunc, si crimen objectum fuerit notorium et publicum, ac de eodem publica vex et fama, iudex producere et examinare curabit parochianos rei, vel alios quosunque, ad famam probandam, eosque ad perhibendum testimonium, si rogati recusaverint per censuras ecclesiasticas compellere*." Even though the proof of the alleged offence failed, if the evil report was established the accused might be sentenced to clear himself by purgation—that is, by producing a certain number of *compurgatores*, who were to swear they believed the report to be unfounded. "*Si fama confessata vel probata fuerit*," says Oughton (tit. 144, sect. 7), "*iudex potest purgationem indicere*." If the accused failed in his purgation, he might be enjoined to do public penance (Ib. 147, sect. 2). The same thing occurred on presentments by churchwardens (see tit. 152) termed by the civilians *Denunciatio*. Here again, as appears from Conset, Oughton, and the 115th canon, public scandal and report became part of the inquiry, it being, according to the old law, part of the duty of the churchwardens to present those against whom, whether ministers or parishioners, such scandal or report prevailed. Nor was this confined to the proceedings by inquisition or by presentment. On an accusation by a party promoting the office of the judge, the articles in like manner alleged the *publica fama* of the imputed offence; and here again it is laid down (Oughton, tit. 149, sects. 7 & 8), "*Si actor probaverit famam publicam, vel præsumptiones vehementes, ob quas purgatio parti reæ indicta fuerit, vel indicii possit et debuisset, quamvis non probaverit crimen objectum, tamen obtinebit sententiam purgationem esse indicendam, et reus est in expensis illius litis condemnandus*. Nam reus, negando famam, causavit actorem litigare, et expensas facere circa probationem ejusdem." It thus appears that public scandal or report did play an important part in penal suits in the ecclesiastical courts, and was of itself sufficient to place the party against whom it was brought forward under the necessity of clearing himself by oath; and it is, we think, going too far to say that if a strong case of public scandal had been brought before the judge as the ground for allowing the office of the judge to be promoted, the application would have been refused. We think it not unlikely that the intention being, as we shall presently more fully show, to leave the substantive law as it stood, changing only the method of proceeding, these words were introduced as applicable to the cases in which public report might have formed matter of judicial inquiry. At all events, we think the argument afforded by the fact that in the passage in question the words "if he shall think fit," give, as seems to us, the key to the words "it shall be lawful" in the earlier branch of the sentence, the

inference arising from the collocation of the words is far stronger than any which can be drawn from the supposed intention of the Legislature, which, after all, can only be matter of surmise. The language of the section, though it might have been more explicit, is, we think, too clear to warrant us in speculating on the legislative intention. It is, moreover, obvious that if it had been the intention of the Legislature that the issuing of a commission should be at the discretion of the bishop, nothing would have been easier than to say so, as has been done in the Public Worship Act. By placing the words "if he think fit" in an earlier part of the sentence, immediately after the words "it shall be lawful," all ambiguity would have been removed. We proceed to consider the purpose of the statute as a whole. On the purview of it, especially when looked at by the light of the report of the Ecclesiastical Courts Commissioners, which preceded it, and of the preamble, which is confined to the recital that "the manner of proceeding in causes for the correction of clerks required amendment," it appears plain that it has reference, not to the substantive law, but simply to the procedure applicable to a suit against a clerk in orders for an ecclesiastical offence. It leaves the law as to what shall constitute an offence under that law as it stood before. It nowhere professes to abridge or interfere with any existing right of instituting proceedings against a clerk in orders for an ecclesiastical offence. It is the method of proceeding alone with which the statute deals. Thus, by the effect of the 23rd section, it takes from the bishop the power of instituting proceedings by way of inquisition, as was held in the *Dean of York's case* (2 Q. B. 1), and make it necessary for the bishop, if he desires to prosecute *ex mero officio*, either to issue a commission under sect. 3, if he desires to prosecute the suit in his own court, or to send the cause in the first instance to the metropolitan court by letters of request under sect. 13. And whereas, in a penal suit instituted by a party promoting the office of the judge, leave to promote the office must first have been applied for and obtained in the court of the bishop, and, leave to promote the office of the judge having been obtained, articles would have been at once exhibited and the suit proceeded with—a matter generally involving much expense, and sometimes the vexatious harassment of the defendant—the statute, on an accusation of an ecclesiastical offence being brought forward, requires a complaint to be addressed to the bishop himself, and, except in the case just put, where the bishop thinks proper to exercise the power vested in him by the 13th section, and, dispensing with any preliminary inquiry, sends the cause at once by letters of request to the court of the province, interposes, before the suit can be further prosecuted, a preliminary inquiry as to the facts by means of a commission, on whose report whether a *prima facie* case for further proceedings has been made out it depends whether the suit shall proceed—an institution analogous to the finding of a grand jury on a bill of indictment. In other respects, when the commissioners have reported that there is *prima facie* ground for further proceedings, the jurisdiction of the bishop remains very much as it was before, except that he may have to exercise the functions of a judge himself, instead of the cause being tried before his appointed judge. If the party admits the truth

of the articles, the bishop, or his commissary appointed for the purpose, may at once pronounce sentence. If the facts are denied, the bishop can either try the cause himself, with the assistance of three assessors specially qualified under the Act, and himself determine it, this mode of trial being substituted for the trial in the diocesan court by the bishop's judge; or, the bishop, as he might have done before, on a suit being instituted in his own court, may send the suit by letters of request to the metropolitan court. In all this there is manifestly nothing which affects the right to institute proceedings, though the mode of initiating the suit is changed, and the party desirous of prosecuting a clerk in orders for an ecclesiastical offence, instead of obtaining leave to promote the office of the judge, must now prefer a complaint to the bishop, and, unless the bishop thinks proper to send the case at once to the provincial court, must abide by the report of a commission as to whether the suit shall be proceeded with. But, subject to this, the statute does not profess to deal with the right to prefer a charge against a clerk in orders, if the offence charged amounts to an offence against the ecclesiastical law; and it therefore becomes material to consider how the law stood in respect of the right of instituting proceedings against a clerk in orders prior to the passing of the statute. Two conflicting views have been pressed upon us: the one that though, in order to promote the office of the judge, it was necessary to obtain leave of the court, yet that this was, practically speaking, merely matter of form, and that the leave could be claimed as of right, provided the offence proposed to be prosecuted was one of ecclesiastical cognisance, and the promoter was of ability to pay costs if defeated in the suit. On the other hand, it was contended that to allow the office of the judge to be promoted was not matter of form, but one on which the judgment of the judge had to be exercised; from which it was argued that, in the present statute, it must have been intended to leave a like discretion to the bishop. In support of the first proposition, the old authorities, Conset and Oughton, are cited. Thus, Conset ("Practice," part 7, c. 2) says: "If any hath committed any crime (whereof the Spiritual Courts have cognizance) and is not detected, denounced, or presented for the same, or if the bishop or archdeacon have not proceeded against him by way of inquisition, yet any person (who offers himself ready to pay the party to be convened his charges, if he doth not prove the matters objected) hath interest voluntarily to implore and promote the office of the judge, and may call the delinquent to answer articles, and may administer articles to him when he appears, in the name of the judge, and of his office promoted, and may accuse the delinquent." So Oughton, following Conset, says ("Ordo Judiciorum," tit. 150):—"(1) Siquis crimen, ad fori ecclesiastici cognitionem spectans, commiserit, et de oedem non fuerit detectus, denunciatus, vel preentatus, vel Episcopus, vel Archidiaconus non processerit contra eum per inquisitionem; quælibet tamen persona (si fuerit solvendo expensæ parti convenientes, si objecta non probaverit) habet interesse (quoniam Reipublicæ interest ut delicta puniantur) et Judicis officium implorare, et voluntarie promovere; et delinquentem, ad respondendum articulis, ex officio Judicis promoti, ministratis, in just vocare potest, et parti comparenti articulos (nomine

Judicis, et ex ejus officio promoti) objicere, et ministrare, et delinquentum accusare." That this principle continued to be acted on appears from several dicta of ecclesiastical judges. In *Argar v. Holdsworth* (2 Cases temp. Lee, 515) Sir George Lee says: "A clergyman may be prosecuted by anyone for neglect of his clerical duty." In the case of *Procurator-General v. Stone* (1 "Consist." 424) Sir William Scott says: "This is a prosecution originating in a citation in the name of the Bishop of London, though the bishop might be personally ignorant of the existence of such suit. It is the constant style of the court; and it is not in the power of the bishop by any intervention on his part to refuse the process of the court to any one desirous to avail himself of it in a proper manner." In *Turner v. Meyers* (1 "Consist." 414) the same learned judge had said: "The criminal suit is open to every one; the civil suit to any one showing an interest." These dicta were, however, only incidentally made, and were not necessary to the decision of the cases in which they were pronounced. What was said by Sir John Nicholl in *Carr v. Marsh* (2 Phill. R. 198, 204) is more directly to the point. The suit being *in personam*, in which the office of the judge was promoted, against a clergyman, for officiating in a chapel licensed by the bishop, but without the consent of the incumbent of the parish, it was urged that, the defendant having acted with the sanction and approbation of the bishop, the promoter ought not to be allowed to promote the office of the judge in the bishop's own court. Sir John Nicholl, however, says: "It is said that there is a discretion in this case, and that the court should not allow the office of the judge to be promoted in such a cause. But the cause must be tried before we arrive at this conclusion, otherwise we enter on the merits prematurely. Application is always made to the judge before a citation issues in a cause in which the office is promoted; but that is not for the purposes of considering the merits of the case, but from the nature of the suit, whether it be of ecclesiastical cognisance or the fitness of the person to be made responsible for costs to the other party. But dicta of an opposite tendency are brought forward on the other side. Thus, in *Muidman v. Malpas* (1 Consist. 205, 209), Sir William Scott, speaking of a suit in which the office of the judge is promoted, says: "The leave of the court should be first obtained, since it is a part of the ecclesiastical jurisdiction which is not to be exercised without discretion or to be left entirely to the judgment or passions of private persons." In *Lee v. Mathews* (3 Hagg. Eccl. R. 169), which was a case of brawling in a vestry, Sir John Nicholl certainly uses language which tends to show that it is in the discretion of the judge in certain cases to allow his office to be promoted or not as he may think right. "This being," he says, "a case of office, the whole transaction should have been fairly and candidly stated at once in order that the judge might have an opportunity of considering whether both parties being involved in *pari delicto* he ought to allow his office to be promoted." "Had all the facts appeared in the articles," he continues, "I doubt whether, considering that the promoter is not a disinterested officer of the parish proceeding in his official capacity, *non publicam vindictam*, but a private individual proceeding for an offence com-

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mitted against himself, I should have allowed the case to have gone on." It is, however, here to be observed that this by no means shows that if the suit had been promoted by a proper party and *in publicam vindictam* the office of the judge could have been properly withheld. The language of the same learned judge in *Carr v. Marsh* would lead us to think that under such circumstances the permission to promote the office of the judge would have been granted as of course. In *Sherwood v. Ray* (1 Moore P. C. 353), in a civil suit instituted by a father to annul the marriage of his daughter as incestuous, and which came before the Judicial Committee on appeal, the objection having been urged that the father had no civil interest to enable him to maintain the suit, Parke, B. in delivering the judgment of the court, of which Sir J. Nicholl had been a member, as a ground for holding that the possibility of having to support the offspring, if legitimate, under 43 Eliz. c. 2, was a sufficient interest to entitle him to sue, observes that "this may be the only form in which any individual can question the marriage as matter of right." "For," says the learned judge, "to promote the office of judge in a criminal suit requires the authority and consent of the court; and though this is obtained without difficulty in ordinary practice, it cannot be demanded *ex debito iustitie*." But it is here to be observed that this was not the point to be determined in the cause, nor had it been adverted to in the argument, but appears to have been resorted to by the court as a technical, certainly not being a substantial, ground for holding that the very remote possibility of having to maintain the issue, if legitimate, furnished a sufficient interest to sue to annul the marriage. Though, technically speaking, it might be true that the office of the judge could not be claimed as of right *ex debito iustitie*, no one can doubt that it would have been allowed as of course to a father seeking to set aside the incestuous marriage of his daughter. Moreover, one is at a loss to see how the absence of a right to sue criminally could be any reason for holding that the party had a civil interest entitling him to sue. Lastly, in *Elphinstone v. Purchas* (L. Rep. 3 P. C. 245, 254), also a case before the Judicial Committee, it is said by Sir Robert Phillimore, in delivering the judgment of the court: "It was decided by their Lordships in the case of *Sherwood v. Ray*, which was one of great importance, and very carefully considered by the eminent judges who sat upon it among whom was Sir John Nicholl—perfectly acquainted with the practice of the Ecclesiastical Courts—that the promotion of the office of the judge, though generally permitted as a matter of course, cannot be demanded *ex debito iustitie*." There is here, we cannot help thinking, some mistake. As has been observed, the point was not decided in *Sherwood v. Ray*, it was only thrown in by way of argument; but the language of Sir Robert Phillimore shows that he—himself an eminent authority—and the other members of the Judicial Committee who sat in *Elphinstone v. Purchas*, took the same view of the question as had been incidentally expressed in the former case. Looking to these authorities, it appears to us that neither of the conflicting propositions thus put forward is tenable to the full extent to which it has been urged. The result of the authorities as to the former law appears clearly to

be that although, as may be gathered from *Maidman v. Malpas* and other cases, it was necessary for a party desirous of proceeding in a penal suit in an Ecclesiastical Court to obtain leave to promote the office of the judge, yet if the charge involved an offence against the ecclesiastical law, and there was no reason for doubting the *bona fides* of the complaint, and the complainant was a proper person to institute the suit, and of ability to pay costs if he failed in it, the leave was never withheld, but, on the contrary, was always granted as a matter of course—we had almost said of right—without any precognition of the case as to its intrinsic merits, or reference to the position of the accuser, whether parishioner or otherwise, beyond his fitness to carry on the suit. Theoretically it may be correct to say that leave to promote the office of the judge could not be claimed *ex debito iustitie*, and that if it had been refused the party would have been without redress—at all events, so far as the remedy by *mandamus* was concerned. But it is, nevertheless, plain that to refuse it, except in very special cases, would have been a denial of justice, to which we may presume that no ecclesiastical judge would have been a party. This being so, we do not feel warranted in assuming, in the absence of positive enactment, that, in transferring the jurisdiction of the Ecclesiastical Court to the bishop, the Legislature can have intended to place a party desirous of prosecuting a clerical offence in a less advantageous position than he would have been in before the statute. We find nothing in the provisions of the statute which has or, so far as appears, can have been intended to have the effect of taking away the right of instituting a suit against a clerk in orders where it existed previously, all that the statute does being to alter the mode of proceeding. Instead of obtaining leave to promote the office of the judge from the bishop's court, the prosecutor must now apply directly to the bishop, who, under the terms of the 3rd section, would have to see, as the judge had before, that the complaint involved an offence of ecclesiastical cognisance, it being to such only that the enactment applies. But with this limitation we see nothing that alters or affects the right of a party desirous to prosecute, or which debars him from calling upon the bishop, thus substituted for the judge, to set the law in motion by either issuing a commission under the 3rd section or at once sending the complainant to the court of the province under the 13th section. It is difficult to suppose that if the intention of the Legislature had been so to modify the right of a party desirous to prosecute as to make it contingent on the will of the bishop, it would not have said so in clear and unambiguous terms. Of course nothing would have been easier than to do this. The transposition of the words "if he shall think fit" in the 3rd section so as to make them govern the whole instead of prefixing them to the action of the bishop *ex proprio motu*, would obviously have had that effect, whereas their present collocation leads strongly to the opposite conclusion. But we are invited to follow the history and origin of this legislation in order the better to apprehend the meaning and intention of the enactment in question. It is true that the Ecclesiastical Courts Commissioners, in their report of 1832, having pointed out the evil of the great delays and expenses attendant on the pro-

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section of penal suits in the Ecclesiastical Courts, and which had been strikingly exemplified in certain recent suits which had caused considerable scandal, recommended that the proceedings in the prosecution of offences against clerks in orders should be transferred to the bishop. But they further proposed as part of their scheme, as a protection against vexatious suits, that there should be a preliminary inquiry on oath before the bishop, with a view to his allowing or disallowing the suit to proceed, with, in case of his disallowing it, an appeal to the archbishop. The first part of this recommendation was adopted, but not the remainder. It was not till some years afterwards that—in 1840—the Government carried through Parliament the Church Discipline Act, in which, for the preliminary hearing before the bishop recommended by the commissioners, was substituted, the commission to be appointed under sect. 3, by whose report the bishop, except where he chose at once to institute proceedings by letters of request, was to be guided as to allowing the suit to proceed. We see nothing in the circumstances under which this statute was passed to lead us to think that it was intended to do more than to afford the accused clerk the protection of the preliminary inquiry by the commission. For the discretion proposed by the report of the Ecclesiastical Commissioners—to be given to the bishop to be exercised, it must be remembered, after inquiry on oath—was substituted the inquiry by the commission, upon whose decision the further prosecution of the suit was to depend. It is also, perhaps, not altogether beside the question to observe that the suits to which the commissioners were referring were for the most part suits against clergymen for immorality. The movement in the Church with respect to doctrine and ritual of a Roman Catholic tendency had not then as yet arisen, and it may well be doubted whether, if that movement could have been foreseen, the Legislature would have placed any additional restraint on the right of parishioners to bring innovations of such a nature to the test of legal decision. Far, therefore, from affording any proof of the intention of the Legislature to give an absolute and unfettered discretion to the bishop, the prior state of the law and the origin of the statute have rather a contrary tendency. But, instead of speculating on the legislative intention by reference to extraneous circumstances, we think it safer to found our view on the internal evidence afforded by the statute itself. Now, finding nothing in the enactments or language of the 3rd section or other parts of the Church Discipline Act which should have the effect of controlling or qualifying the words "it shall be lawful," but, on the contrary, finding the language of the section pointing, as it seems to us, the other way, we can see no ground which would justify us in giving to those words any other than the meaning which the established canon of construction had ascribed to them. With this rule before us, we do not deem ourselves called upon to enter into the subject of the inconveniences on which the Lord Bishop dwelt in his argument as likely to result from withholding from a bishop the free exercise of his discretion. These considerations, if well founded, might be well worthy the attention of the Legislature, but they cannot prevail against the Act as it stands. Moreover, it might be thought that any such inconveniences would be outweighed by the object to which so much legis-

lation has been directed—namely, the maintenance of uniformity of doctrine and ritual in the Church. It should be observed that this construction of the statute will not take from the bishop the discretion which the judge previously exercised of judging whether the facts complained of constitute an ecclesiastical offence or not. For, as we have said, it is only to complaints of such offences that the Act relates; and the constitution of the commission, one member of which must be the bishop's officer, and the rest are to be of his own selection, will insure a careful consideration of the case, and protect clergymen against frivolous and vexatious charges. When it is said on the part of the bishop that if he is not invested with the discretionary power for which he contends he must issue a commission in every case in which it is applied for, no matter how frivolous or vexatious the proceeding may be, the answer is that no such consequence will follow; for if the application be of the character alluded to, this court, in the exercise of its discretion, would refuse to issue a *mandamus*. And that this court has the right to exercise such discretion cannot be doubted. (See *Rees v. The Bishop of Chester*, 1, T. R. Rep. 396-408, and *Reg. v. The Bishop of Winchester*, 2 E. & E. 209-223). On the whole, therefore, the only conclusion at which we can arrive is that a duty is here cast upon the bishop, where complaint is made of that which constitutes in a clerk in orders an offence against the ecclesiastical law, of issuing a commission, unless he thinks proper—and herein he undoubtedly has a discretion—to send the case at once by letters of request to the provincial court. The view we take of the enactment in question is confirmed by the opinion of the late Dr. Lushington, we need not say a great authority in all matters of ecclesiastical law. His opinion on this point appears from a report of a case of *Ditcher v. Denison*, a proceeding against the Dean of Taunton, in which Dr. Lushington acted as assessor to the Archbishop of Canterbury, and which was cited by Dr. Stephens on an application to this court for a *mandamus* to the Bishop of London in the case of Mr. Bennett. Referring to the 3rd section of the Act, Dr. Lushington there says: "It is perfectly clear that if a bishop under this statute thinks fit, he has a discretion which he is entitled to exercise whether he will himself of his own mere motion direct proceedings to be commenced. It is not so with reference to an application made to the bishop, and for various reasons. If it were so, the ancient law of the Church would have been subverted by this statute, which there was no intention to do." Having cited the judgments of Lord Stowell and Sir John Nicholl with respect to the former state of the law, Dr. Lushington proceeds: "What would be the consequence, if the archbishop or bishop had a purely discretionary power to order the commencement of the proceedings according to his own judgment, or, I might also say, according to his fancy? Why, in every bishopric within a province or within the whole kingdom of England, it would rest entirely in the power of a single bishop either to permit a prosecution against any ecclesiastic for any alleged unsound doctrine or immoral conduct, or, according to his own mere opinion, he might prevent any discussion taking place and any charge, however serious, from being considered. The consequences of which would be that the uniformity

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which now happily prevails among the clergy of this country would be destroyed or subverted." In this view we entirely concur, and it is materially confirmed by the fact that the uniformity on which Dr. Lushington congratulated his hearers has unhappily ceased to exist. If the construction contended for by the bishop should prevail, looking at the wide differences of opinion prevailing among the clergy in reference to rites and ceremonies, it might well be that in a short time uniformity in the realm might disappear, and diocesan uniformity take its place, which again would be liable to vary with each succeeding ordinary. Whereas, if the law is to be enforced, any doubtful or disputed question of doctrine or ritual may be brought to the test of legal decision, if necessary by the appellate tribunal in the last resort. This being, in our opinion, the construction to be put on the Act of 1840, the question already adverted to presents itself, whether this statute has not been virtually abrogated by the Act of 1874, commonly called the Public Worship Regulation Act, the two statutes being *in pari materia*, and apparently inconsistent with one another. That the two statutes are *in pari materia* as regards offences relating to ritual is clear. Both were passed for the purpose of establishing a new method of proceeding in the trial of offences committed by clergymen in substitution for the previously existing procedure; the only difference in this respect being that, while the earlier Act refers to "any offence against the laws ecclesiastical" committed by any clerk in holy orders, the later statute enumerates the particular offences to which it is applicable—viz., "firstly, where any alteration in, or addition to, the fabrics, ornaments, or furniture of a church without lawful authority, or any desecration forbidden by law, has been introduced into it; secondly, where the incumbent has within the preceding twelve months used or permitted to be used in a church or burial-ground any unlawful ornament of the minister of the church, or neglected to use any prescribed ornament or vesture; or, thirdly, where the incumbent has failed to observe, or to cause to be observed, the directions contained in the Book of Common Prayer relating to the performance, in such church or burial-ground, of the services, rites, and ceremonies." It is, therefore, plain that, so far as relates to offences committed in the observance of the established ritual, both statutes apply to the offences which form the subject-matter of the complaint in the present instance. If the enactments of the two statutes are inconsistent, the rule would apply that where two statutes are *in pari materia*, and their enactments cannot stand together, the later statute shall prevail, as being the later exponent of the legislative will. Now when we turn to the later statute we find an entirely new and different system and scheme of proceeding. Though the charge is still to be addressed to the bishop in the form of a representation, it can no longer, unless when it is preferred by the archdeacon or a churchwarden, be made by a single individual, whether a parishioner or not, but requires the concurrence of three parishioners, or, in case of cathedral or collegiate churches, of three inhabitants of the diocese. The commission of inquiry, which was at once the creation and the

distinctive feature of the Act of 1840, is entirely superseded, while an absolute discretion is given to the bishop, who is required to further the suit in the manner prescribed by the Act, "unless he shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation;" in which case he is to state in writing the reasons for his opinion, which statement is to be deposited in the registry of the diocese, apparently without any ulterior consequences, thus making the bishop the sole judge and arbiter whether the suit shall proceed, not merely with reference to the nature of the offence charged, or the facts on which the charge may be founded, but enabling him to take into account collateral circumstances, in themselves affording no answer to the accusation, or satisfaction to the parishioners complaining that the public worship is conducted otherwise than according to the ritual of the Church as by law established. It seems at first sight difficult to conceive, in the face of so entire a change in the system of proceeding, that the Legislature can have intended that the two statutes should stand together and the two modes of proceeding remain equally open to parties desirous of prosecuting such a suit, or that while three parishioners are needed under the later Act to set the bishop in motion, who then has an arbitrary discretion to determine whether the suit shall proceed or not, under the earlier Act it shall still remain open to a single individual, whether parishioner or not, to compel the bishop, however unwilling, to put the statutory process in motion. We should therefore have been disposed to hold, with reference to the rule just referred to, that the earlier statute was virtually repealed, and, consequently, that it was not open to the complainant to insist on its application in the present instance. But we are met by the positive enactment contained in the 5th section of the later statute, "that nothing in this Act contained, except as herein expressly provided, shall be construed to affect or repeal any jurisdiction which may now be in force for the due administration of ecclesiastical law." Now, not only was the jurisdiction given by the Church Discipline Act in force when the Public Worship Act passed, but, with the exception of the appellate jurisdiction of the Judicial Committee of the Privy Council in ecclesiastical suits, to which this saving provision can scarcely have been intended to apply, it was the only jurisdiction in penal matters then in force. And the 18th section of the later statute is conclusive, for it expressly provides that where sentence has been pronounced against an incumbent for an offence under the Act of 3 & 4 Vict. c. 86, he shall not be proceeded against under this Act, and where any judgment has been so pronounced under this Act, he shall not be liable to be proceeded against under the former statute, thereby conclusively indicating that an offence within the Public Worship Act may still be proceeded against under the earlier statute. This apparently conflicting legislation may, however, be reconciled. The purpose and effect of it appears to be this: The proceeding by commission and the cumbrous procedure by articles in a formal suit being deemed too dilatory in cases of flagrant ritualistic excesses, a more expeditious mode of proceeding and a simpler procedure were made available, subject, however, to more rigorous conditions. If the more expeditious process of the

Public Worship Act, in which preliminary inquiry is dispensed with, is invoked, the strictor conditions of the Act as to the number of the complainants and their subjection to the absolute discretion of the Bishop must be complied with. But it still remains open to a party who is willing to adopt the more elaborate process to claim under the former Act the remedy which it affords. All that remains to be considered is whether, the writ of *mandamus* being a discretionary writ, we should, in the exercise of the discretion which we are undoubtedly at liberty to exercise, decline to issue the writ in this instance. We cannot but be sensible of the apparent incongruity which is involved in the interference of a temporal court between a bishop and one of his clergy, in a matter of ecclesiastical discipline. But it must be remembered that there is a third element in the case which must not be lost sight of. In these questions of doctrine or ritual the laity are interested, and deeply interested, as well as the clergy. As an institution endowed and maintained by the State, the Church exists for the benefit of the laity. It is the right of the latter, being members of the Church, to take part, under the ministrations of the clergy, in the public worship, as well as to have the benefit of the various rites and services of the Church, according to the ritual of the Church as by law ascertained and established. One of their most sacred and valued rights is infringed when they are driven to abandon their churches by the introduction of a ritual which is not that of the Church, and which appears to them to be an advance towards a religion which is not that of the Reformation. It is unnecessary to express any opinion as to the decision which was come to in this respect by this court in the case of *Reg. v. Bishop of Chichester*, further than that, as it must be taken to be clear that prior to the passing of the Church Discipline Act a stranger would have had no difficulty in obtaining permission to promote the office of the judge in such a suit, as one of the public, in a matter of so much concern to the community as the maintenance of the public worship of the Church as by law established, if the case of a stranger applying for a *mandamus* should again occur, we might think it necessary to reconsider the matter before we should be prepared to follow the precedent set in that case. But in this case we have no such difficulty as there presented itself. We have here a parishioner, who, as such, has an undoubted right to have the services of the Church performed in the church of the parish to which he belongs, according to the law of the Church as established by the rubric, the canons, and the Acts of Uniformity, complaining that by reason of unlawful practices introduced into the Communion service, his religious sense is so offended that he cannot conscientiously take part in the administration of the Sacrament and demanding inquiry. There cannot be a doubt that a person so circumstanced would, prior to the Church Discipline Act, have been admitted to prosecute as of right, or that his application to promote the office of the judge, the *bona fides* and substantial character of his complaint not being open to doubt, would have been granted as matter of course. We are of opinion that under such circumstances we have no alternative but to grant the writ. It would be a very different thing if the bishop had declined to grant a commission

on the ground that the complaint was frivolous and vexatious, or that it had been prompted by sinister or unworthy motives. Under such circumstances we should have felt ourselves justified in refusing the writ; but nothing of the kind exists here. It is admitted that there has been such a substantial departure by the incumbent from the established ritual as amounts to an offence against the ecclesiastical law. It is not denied that the practices complained of were such as might give offence to the religious conscience of a member of the Established Church, and deter him from partaking in the service of the Communion when thus administered. The refusal of the commission by the bishop was founded, not on the nature of the complaint, or the claim of the applicant to redress, but on collateral and extraneous circumstances which do not alter or affect the offence, but are founded on considerations of expediency, or such as have reference to the person of the party against whom the application is made. Now, not only do we think that, on the construction of the statute, the bishop had no discretion in this matter, but we are further of opinion that the purpose of this legislation being to maintain uniformity of doctrine and ritual, and it being the right of the parishioners to have the services of the church performed according to the law of the Church, even if the bishop had discretionary authority in such a case, he ought, having here a judicial, or, at all events, a *quasi-judicial* duty to discharge, to have used it to allow an inquiry to take place. We do not think, therefore, that we should be justified as matter of discretion in withholding the writ. But it was suggested that the Public Worship Act having made the concurrence of three parishioners necessary to found a complaint to the bishop, we ought not, in the exercise of our discretion, to give effect by *mandamus* to the complaint of one. But the obvious answer is that if the Legislature had intended that any change in this respect should be made in the Church Discipline Act, which it advisedly keeps alive, it could have introduced such a provision in the later Act. If it was incumbent on the bishop to entertain the complaint on the application of a single parishioner—and we think he had no discretion in the matter—it cannot be open to us as a matter of discretion to withhold the redress which the applicant seeks at our hands. The rule for a *mandamus* to the bishop to issue a commission, or send the case at once to the Court of Arches by letters of request, must therefore be made absolute.

Judgment for applicant.

Solicitors for applicant, *Moore and Curry*.

Solicitors for Mr. Carter, *Brooks, Tunner, and Jenkins*.

COMMON PLEAS DIVISION.

Nov. 19 and 20, 1878.

(Before Lord COLERIDGE, C.J., GROVE and LINDLEY, JJ.)

LEONARD v. ALLOWAYS. (a)

APPEAL FROM REVISING BARRISTER.

Parliament—County vote—Late notice of claim—Power of overseers to waive irregularity—6 Vict. c. 18, ss. 4, 5, 37, 40.

By 6 Vict. c. 18, s. 4, every person claiming to vote

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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shall on or before the 20th July give notice of claim to the overseers. By sect. 5, "the overseers shall, on or before the last day of July in every year, make out a list of all persons who, before the 20th day of July then next preceding, shall have claimed as aforesaid." A claim was delivered to the overseers on the 25th July; the overseers inserted the name of the person claiming in a list of voters which they published on the 29th of the same month.

Held, that the overseers had power to waive the irregularity, and that the list prepared by them was conclusive as to the claim having been duly made.

Davies v. Hopkins (3 C. B. N. S. 376; 30 L. T. 152) followed.

APPEAL from the decision of the revising barrister for the county of Gloucester.

At the revision of the list of voters for the parish of Stapleton, the appellant objected to the name of the respondent being inserted in the list.

The following facts were established by the evidence: That the claim of the respondent to be inserted in the said list of voters for the parish of Stapleton was not delivered or sent to the overseers of the said parish until after the 20th July last, but was delivered to the said overseers on the 25th July last. That the said overseers published the said claim on the 29th July last. That the respondent attended at the said court and duly proved his qualification.

Ten other persons delivered claims to be inserted in the said list under similar circumstances, and such claims were published by the said overseers on the said 29th July, and they also attended at the said court and duly proved their qualifications.

The revising barrister decided that the names of the respondent and of the said ten other persons should be inserted in the said list.

If the court should be of opinion that the decision was wrong, the register of voters for the western division of the county of Gloucester is to be amended by erasing therefrom the names of the respondent and of the said ten other persons.

C. Bowen for the appellant.—By 6 Vict. c. 18, sect. 4, every person desiring to make a claim to vote "shall, on or before the said 20th of July, deliver or send to the said overseers a notice signed by him of his claim, according to the form of notice," &c. And by sect. 5, "the overseers of the poor of every parish and township respectively shall on or before the last day of July in every year make out, according to the form numbered (3) in the said schedule (A.), an alphabetical list of all persons who on or before the 20th of July then next preceding shall have claimed as aforesaid, and in every such list," &c. By sect. 40, "where the name of any person inserted in any list of voters shall have been objected to by the overseers, or by any other persons, and such other person," &c., the "revising barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list, and in case the same," &c. [Lord COLERIDGE, C.J.—*Davies v. Hopkins* (3 C. B. N. S. 376; 30 L. T. Rep. 152) in principle governs this case.] It is submitted that that case was wrongly decided.

Anstie, for the respondent, was not called upon.

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Lord COLERIDGE, C.J.—I am of opinion that the judgment of the revising barrister was right, and should be affirmed. What may be the power of the court to reverse its own decision I decline to say, because the decision on which I base my judgment is, in my opinion, a right decision. In the present case the objection raised against the claimant is that he did not claim within the day specified in the sects. 4 and 5, and the counsel for the appellant has argued that the claimant must be one who makes a claim within the provisions of the Act, for that if the claimant does not follow the provisions of the Act, he is not a claimant within the meaning of the Act, and consequently has no right to be on the list. No doubt, on the words of sect. 5 there is plenty of ground on which to found such an argument, and, if that section stood alone, there would be considerable force in the argument; but there are other sections, especially sects. 37 and 40, which throw light on that section by showing, first, what the revising barrister has to do when the claimant is not on the list and is objected to; and, secondly, what he has to do when the claimant is on the list and is objected to. Sect. 37 deals with the case of a claimant who is omitted from the list. There the revising barrister is ordered to call on the claimant to show that he is *rectus in curia*, and that before he is entitled to be placed on the list he has fulfilled all the conditions of the various Acts of Parliament; the revising barrister has, in the words of the section, to see "that such person gave due notice of such his claim to the said overseers," words which are omitted in sect. 40. But when we come to look at sect. 40 and see what is ordered to be done when persons are on the list and are objected to, then all that we find the revising barrister is entitled to require is proof that the claimant was entitled on the 31st July then next preceding in respect of his qualification described in such list to have his name inserted in the list. Changing the collocation of the words, that is the sense of the section. This appears to me to be a strong argument to show that the duty of making the claim and the power of the overseers are correlative, and that the overseers are only concerned with the directions of sect. 5. Such being my opinion with regard to these sections, I find that in *Davies v. Hopkins* (*ubi sup.*), a case in which all these sections were before the court, the same conclusions were come to, and I have therefore merely to say that I think *Davies v. Hopkins* was perfectly well decided, and, on the authority of that case and the construction there placed on the Act, I am of opinion that the decision of the revising barrister was right, and should be affirmed.

GROVE, J.—I am also of opinion that the judgment of the revising barrister must be affirmed, and I base my judgment on *Davies v. Hopkins* (*ubi sup.*). That case is admitted to be identical in principle with the present. I was struck with the argument of the appellant's counsel founded on sect. 5 of the Act; and I am not prepared to say that I should have decided against his contention without hearing counsel on the other side if it were not for the decision in *Davies v. Hopkins*. The strength of the argument is lessened by sects. 37 and 40, which seem to point to the 31st of July as the date to which the revising barrister has to look when considering the qualification of the claimant, and on which the public are in-

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formed of the names of the persons on the list and the claimants. But the argument has not satisfied me, on any view of these sections, that *Davies v. Hopkins* (*ubi sup.*) was wrongly decided, and I gather from *Hadfield's* case (L. Rep. 8 C. P. 306), that we must be satisfied the previous decision was clearly and manifestly wrong before we reverse it. I am of opinion, therefore, that the decision of the revising barrister was right.

LINDLEY, J.—I am of the same opinion. The claim ought to have been sent in before the 20th July, instead of which it was sent in on the 25th July. This was wrong, and the claimant not having claimed in time had no right to be on the list; so far the case is clear. The question then arises, had the overseers power to receive the claim though not sent in in time? *Davies v. Hopkins* (*ubi sup.*) decides that they had, and on a careful review of the sections of the Act, and especially sect. 37, I agree with the conclusions there arrived at, and I am of opinion that, though the claimant had no right to be on the list, yet that his sending in the claim late was an irregularity which the overseers had power to waive.

Decision affirmed with costs.

Solicitors for the appellant, *Ellis, Munday, and Co.*, agents for *Vizard and Co.*, Dursley.

Solicitors for the respondent, *Jerdein*, agent for *Carter*, Newnham.

Tuesday, Nov. 20, 1878.

(Before Lord COLERIDGE, C.J. and GROVE and LINDLEY, JJ.)

SMITH v. WOOLSTON. (a)

APPEAL FROM REVISING BARRISTER.

Parliament—County vote—Description of qualifying property—Power of amendment—6 & 7 Vict. c. 18, s. 40—28 & 29 Vict. c. 36, s. 6.

A revising barrister has power to amend the description of a voter's qualifying property by striking out such portions of it as he has parted with, and, if what remains is of sufficient qualifying value to confer the franchise, the voter is entitled to remain on the list.

APPEAL from the decision of the revising barrister for the Northern Division of the county of Northampton.

The case stated was as follows:—

At the revision of the list of voters for the parish of Wellingborough, the respondent duly objected to the name of the appellant being retained on the list. The objection was grounded on the third column of the register, and the objection related to the nature of the interest of the appellant in the qualifying property. The name of the appellant was on the list of voters for the parish of Wellingborough.

Christian Name, &c.	Place of Abode.	Nature of Qualification.	Street, &c., where the Property is situate.
Smith, Henry	33, Norfolk-st., Strand, London.	Freehold land.	Plots 166, 167, 168, 169, 170, 171, 172, 173, 174, 176, 177, 178, 179, 175, 475, 476, Victoria Estate.

It was admitted the appellant had parted with

(a) Reported by A. H. BITTLETON, Esq., Barrister-at-Law.

all the plots mentioned as above in the fourth column, except plot 476, and that plot 476, which he retained, was freehold land, and of sufficient qualifying value to confer the franchise. The revising barrister was of opinion that the freehold land mentioned in the third column was not the freehold land now possessed by the appellant, and that he had no power to amend the fourth column, as requested by the appellant, by striking out the plots which he had parted with as aforesaid. The revising barrister, therefore, held that the appellant was not entitled to be retained as stated upon the list of voters, and expunged his name from the list of voters. If such decision was correct, such list as revised was to remain without alteration; if such decision was incorrect, the name of the appellant, with his address and particulars of his qualification, was to be added to the revised list of voters for the parish of Wellingborough, in the northern division of the county of Northampton.

Gibbons for the appellant.—The notice of objection was to the third column, where the nature of the qualification is described as freehold, which is admitted to be correct. But, before the revising barrister, an objection was taken to the fourth column, which was not objected to in the notice, that the appellant had parted with fourteen plots out of the fifteen therein mentioned, although the remaining plot was sufficient to qualify him. The revising barrister was wrong to expunge the name from the list on that ground. He had power to amend the description by striking out the surplus plots:

Bendle v. Watson, L. Rep. 7 C. P. 163; 25 L. T. Rep. N. S. 806;

Registration Act, 6 Vict. c. 18, sect. 40. (a)

[He was stopped by the Court.]

Horace Smith for the respondent.—First, where the objection is to the third column, both it and the fourth column must be looked at to ascertain the voter's right to be on the register (*Hitchins v. Brown*, 2 C. B. 25); and in *Howitt v. Stephens* (5 C. B. N. S. 30, 39; 32 L. T. Rep. 162), which was a case of an objection to the third column. Byles, J. says, "I read the third and

(a) 6 & 7 Vict. c. 18, sect. 40, is, as far as is material, as follows: "That the revising barrister shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, and also the name of every person who shall be proved to him to be dead; and wherever the christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted in any case where the same is by this Act directed to be specified therein, or of any person whose name is included in any such list, or his place of abode, or the nature or description of his qualifications, shall, in the judgment of the revising barrister, be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list. Provided always that, whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same, and where," &c.

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fourth columns together." Second'y, 6 & 7 Vict. c. 18, sect. 4, enacts that the overseers shall every year publish a notice requiring all persons entitled to vote in respect of any property within the parish who shall not be upon the register, and also all who "being upon such register shall not retain the same qualification . . . as described in such register, and who are desirous to have their names inserted in the register about to be made," to give to the overseers notice in writing of their claim. The appellant had parted with the greater portion of his land, and did not "retain the same qualification as described" in the register, and should therefore have made a new claim :

Burton v. Gery, 5 C. B. 7.

[Lord COLERIDGE, C.J.—Had the appellant parted with only one plot, could the amendment not have been made?] No; he ought to make a fresh claim, that attention may be called to the diminution of his property, and, if it be insufficient, objection may be made. Otherwise one whose actual qualification was doubtful might, by causing it to seem sufficient on the register, prevent valid objection being taken. Williams, J., in *Burton v. Gery* (*ubi sup.*), says: "The qualification on the list which has stood the test of public inquiry and investigation having ceased on the voters ceasing to occupy the land, upon principle as well as upon the plain natural meaning of the words of the Act, the new occupation required a new claim."

Lord COLERIDGE, C.J.—In this case I am not quite certain whether the objection which appears on the case as having been taken before the revising barrister was the objection which has been argued before us. The revising barrister says that the objection "was grounded on the third column of the register, and related to the nature of the interest of the said Henry Smith in the qualifying property." But the third column is "freehold land," and the objection to the nature of the interest would seem to have been, therefore, that the land was not freehold, but copyhold, or some estate other than freehold. If so, that objection entirely fails, the barrister himself saying that the nature of the interest is rightly described as freehold. I am strongly of opinion that it is not the duty of a revising barrister, if one objection is pointed out by notice, to allow another objection to be taken before him; because the voter may come prepared to meet the one objection, and then be surprised by another for which he is not prepared. But it appears that the real objection was not to the tenancy, but to the description of the qualification in the fourth column; the description there specifies fifteen plots on the Victoria estate, and in fact fourteen of them had been sold. One remained in the voter's possession, and that one was sufficient to confer the right to vote. The revising barrister was asked to amend the fourth column by striking out the numbers of the plots sold. He considered that he had no power, but, if his decision was wrong, he thinks that the list should be so amended. We are, therefore, to determine whether the revising barrister had power to make the amendment asked for, and I am of opinion that he had. This is not a case where tricks have been played on the register, as Mr. Horace Smith, in his very able argument, suggested might sometimes happen. If there were any reason to suppose that the voter had put a quali-

cation of nine-tenths on the register, when he possessed only one-tenth, and then an objection having been taken, he asked that the correction should be made, and those circumstances were brought to the barrister's notice, I should think it very doubtful whether he ought to exercise the power of amendment. But this case is admitted to be perfectly *bonâ fide*. I think it is difficult to draw a precise line as to the cases in which the power of amendment should be exercised; but I am of opinion that it should have been in this case. When, in the course of the argument, I put the case of one only of these plots having been sold, Mr. Horace Smith, in order to be logical, was forced to say that the revising barrister could equally not have struck out the one. It is, as I have said, extremely difficult to draw the line within which the power of amendment ought to be exercised, but I think that where no fraud exists, and where the person objected to retains property sufficient to entitle him to a vote, that then anything inserted in the fourth column beyond what he actually possesses may be struck out as surplusage. I am of opinion that the amendment asked for was within the power of the revising barrister, and should have been made. This decision must therefore be reversed.

GROVE, J.—I am of the same opinion. The case finds that "the objection was grounded on the third column of the register, and the objection related to the nature of the interest of the appellant in the qualifying property." My attention has just been called to 28 & 29 Vict. c. 36, s. 6, which provides that no notice of objection given under the provisions of the 7th section of 6 & 7 Vict. c. 18, "shall be valid unless the ground or grounds of objection be specifically stated therein; and this provision shall be deemed to be sufficiently satisfied by naming the column or columns of the list on which the objector grounds his objection; provided always, that if the objection be grounded on the third column, then it shall be necessary to state in the notice whether the objection relates to the nature of the voter's interest in the qualifying property, or to the value of the qualifying property, or to both; and each of such last-mentioned grounds of objection shall be deemed a separate ground of objection, as well as any objection grounded on any one of the other columns." There seems, therefore, to have been no valid notice of objection in this case. Then as to whether the case falls within sect. 40 of 6 & 7, Vict. c. 18. In *Bendle v. Watson* (*ubi sup.*), Willes, J. says: "It is impossible to say this is a description of another qualification; it is an insufficient description of the claimant's qualification, not a description of another qualification; it is the old description, which at one time was true. Then, as respects the exception, 'except for more clearly and accurately defining the same,' the same test applies; it would be a true description to a person who had left the street several years back, and a false one to a person who only knew the new state of things. Then, as to the words 'change the description of the qualification,' there, I think, 'qualification' must mean the nature of the qualification—*e. g.*, freehold—while the object of a number is to individualise, and perhaps, in that sense, describe. I think that throughout, the word 'his' governs the meaning, and as the qualification is the same, and the description one which might in one sense be

true, inasmuch as it might indicate the house to some people, and there was no falsification or intention to deceive, the revising barrister ought to have amended." Assuming here that there was no falsification or intention to deceive, and that the qualification remained the same, namely, freehold, the one plot retained by the appellant was sufficient to qualify him. Had the revising barrister power to strike out the plots which were erroneously appended to the description of the appellant's qualification? I think that he had. To put the case suggested by the Lord Chief Justice, suppose the voter had disposed of an insignificant part of his land, could not the barrister have amended? If so, the amount of land disposed of cannot alter his power of amendment, although it might affect the exercise of his discretion.

LINDLEY, J.—I am of the same opinion. The statute 28 & 29 Vict. c. 36, determines the first point. Then there remains the point as to whether power is given to the revising barrister by sect. 40 to make the amendment asked for. Looking at that section, I think that the revising barrister would have no power to make an amendment affecting the identity of the property. Here the claimant described the nature of his qualification rightly, viz., as freehold land; he misdescribed, or rather over-described, the amount of land, but there is no change in its identity. That being so, I think the revising barrister had power to amend, and was not restricted by the words of sect. 40, "that he shall not be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." The mistake amounts, in my judgment, to a mere misdescription. The land is described as Victoria Estate, which in fact it is, and if it has been altered by addition or subtraction, yet the land remains the same, and it appears to me the amendment might in either case be made.

Decision reversed without costs.

Solicitors for the appellant, *Sharman and Jackson*.

Solicitors for the respondent, *Lewis and Indermaur*, agents for *Toller, Kettering*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Dec. 6, 7, and 9, 1878, and March 22, 1879.

(Before JAMES, BAGGALLAY, and THESIGER, L.JJ.)

ATTORNEY-GENERAL v. BIPHOSPHATED GUANO COMPANY (LIMITED). (a)

Highway—Agreement to dedicate to public—No actual dedication—Purchaser for value without notice—Lessee—Evidence of dedication—Highway Act (5 & 6 Will. 4, c. 50).

B., who was in possession of certain land under an agreement for a lease, entered into an agreement with the vestry of the parish in which the land was situate, whereby the vestry consented to a proposed diversion by B. of a public footpath which crossed the land on condition that he should make a certain new roadway and throw

it open to the public. The footpath was diverted (an order authorising its diversion having been obtained from the court of quarter sessions in accordance with the provisions of the Highway Act, 5 & 6 Will. 4, c. 50, but the proposed new roadway was not mentioned to the court) and the new roadway was made.

A lease of the land was subsequently executed to B., the land being described in the lease by the reference to a plan, on which the roadway was marked "private road," and being devised "subject to the existing rights of way" over it. B. assigned the lease to a company, and it afterwards became vested in W., as an assignee for value without notice of the existence of any public right of way over the land, and from him it passed to the defendants, whom the present information and suit sought to restrain from obstructing the new roadway:

Held, that, if there had been an actual dedication of the roadway to the public (which the court held on the evidence there had not been), the public would have been entitled to have kept it open against all persons, whether they took with notice of the existence of the highway or not; that the making of the new road could not, under the provisions of the Highway Act (5 & 6 Will. 4, c. 50), be made a condition of the diversion of the old footpath, and the public could not be parties to the arrangement made between B. and the vestry of the parish, and that, although there was a moral obligation on B. to make and throw open the new roadway to the public, and an animus dedicandi on his part, that could lead to no inference of an actual dedication so as to bind a purchaser for value without notice.

Decision of Fry, J. affirmed on slightly different grounds.

Quære, whether there can be a dedication of a highway to the public by a lessee.

THIS was an appeal from a decision of Fry, J. The hearing in the court below is reported *ante*, p. 342; and in 38 L. T. Rep. N. S. 941, where the facts of the case and the judgment appealed from are sufficiently stated.

Bagshaw, Q.C., North, Q.C., and Speed for the appellant.

Fischer, Q.C., Patchett, Q.C., and Kingdon for the respondent.

The following cases and authorities were cited:

Phillips v. Phillips, 5 L. T. Rep. N. S. 655; 4 De G. F. & J. 208;

Highway Act (5 & 6 Will. 4, c. 50), ss. 84, 85;

Roberts v. Hunt, 15 Q. B. N. S. 17;

Dovaston v. Payne, 2 Sm. Lead. Cas. 6th edit. p. 147;

Reg. v. Wilson, 18 Q. B. N. S. 348;

Wood v. Veal, 5 B. & Ald. 454;

Re v. Barr, 4 Camp. 16;

Dawes v. Hawkins, 4 L. T. Rep. N. S. 288; 8 C. B.

N. S. 848;

Mercer v. Woodgate, 21 L. T. Rep. N. S. 458; L. Rep.

5 Q. B. 26;

Arnold v. Blaker, L. Rep. 6 Q. B. 433;

Arnold v. Holbrook, 28 L. T. Rep. N. S. 23; L. Rep.

8 Q. B. 97.

Cour. adv. vult.

March 22.—THESIGER, L.J. now delivered the following written judgment of the court.—The defendants to this information and bill are the occupiers of certain lands situate in the parish of East Greenwich, under an agreement for a lease made between one Christopher Weguelin and certain

(a) Reported by H. PEAT, Esq., Barrister-at-Law.

persons carrying on business as guano merchants under the firm of Messrs. Mockford and Co., and the benefit of which agreement was in Nov. 1873 transferred by Mockford and Co. to the defendants, the Biphosphate Guano Company. Weguelin himself was entitled to the lands, as assignee from the Agra Bank (Limited) and Wilkinson Dent, of a lease dated the 14th May 1866, by which the trustees of Morden's College let the lands to Theophilus Alexander Blakely for eighty years from the 25th March 1864. That lease was assigned by Blakely to a company called the Blakely Ordnance Company (Limited), and by that company to the Agra Bank and Dent. The object of the information and suit is to restrain the defendants from obstructing a certain road made upon the lands occupied by the defendants, and communicating at one end with the river Thames, and at the other with a public footpath, and which road it is alleged is either a public highway or road which the defendants, by virtue of their privity in estate with Blakely, the original lessee, were bound by agreement to keep open to the public. Upon the hearing before Fry, J., he decided, first, that there had been no dedication of the road to the public; and, secondly, that assuming an agreement such as was alleged between the vestry of Greenwich and Blakely to have been proved, and to be valid, it could not be enforced against the defendants, on the ground that neither the Blakely Ordnance Company nor the Agra Bank and Dent were affected with notice of the agreement, and consequently that Weguelin, even if he himself had notice, took his assignment unfettered by the agreement. Judgment was accordingly given for the defendants. Upon the appeal it has been objected by the appellants that, looking to the pleadings, the fact of notice was not put in issue by the defendants, except as regards Weguelin, and that the learned judge was not justified in deciding the case upon the want of notice to persons prior in title to Weguelin. We are of opinion that the objection is a well-founded one. The defence of a purchase without notice is one which ought to be specifically alleged as well as proved by those who rely upon it. In this case, on the contrary, the defence as alleged in paragraph 37 of the answer is strictly confined to Weguelin's want of notice, and while Weguelin himself made an affidavit in verification of that defence, no attempt was made on the part of the defendants to carry their evidence further. The objection, too, is one of substance, for the absence from the pleadings of any issue as to notice, except as regards Weguelin, would naturally put the informant and plaintiff off their guard, and prevent their offering any evidence beyond that bearing on the question raised by the pleadings. And, indeed, it would appear that the evidence in relation to this point was limited on both sides to the question so raised. But although we think that the particular grounds taken by the learned judge upon this part of the case were not properly open to him, we are of opinion at the same time that his judgment on this branch of the case may be supported upon the ground of want of notice in Weguelin. The way in which it is attempted to affect him with notice is by showing that upon the plan prepared for the sale by auction, and by reference to which he purchased, the road in question appears as terminating at the river Thames at a point marked "Ferry from

Blackwall Stairs," and it is contended that this indicated to all intending purchasers that the road leading to the river was in whole or in part a public one. But the answer to this contention is, first, that no ferry in the legal sense of the term, and no regular ferry in the popular sense of the term, really existed; secondly, the road, a part of which is claimed as public, is marked generally in the plan as a private road, and consequently there is nothing to indicate to the purchaser anything more than that a private road existed, and that persons entitled to use it might be ferried across the river to and from Blackwall. We would add that the lease to Blakely, if inspected by the purchaser, would give still less indication of any public right having been created over the road in question, for upon the plan attached to that lease the very part of the road claimed as public has written upon it the words "private road." Consequently, although the lease was made subject to all rights of way, and a purchaser might be held affected with notice of ways, not shown on the plan, but really existing, he could hardly be said to be affected with notice that a road, which at the date of the lease was a mere paper road, and marked on the plan as private, was, in fact, public. Being of opinion that Mr. Weguelin was a purchaser without notice, it becomes unnecessary to consider whether or no the vestry of Greenwich were compelled to contract, and did in point of fact and law, contract with Captain Blakely for the formation by him of the road in question. But the question remains: was there a dedication of the road to the public; for, if so, the public are entitled to have it kept open against all persons, whether they took with notice of the existence of the highway or not. This question appears to have been almost passed over in the court below, where the agreement was made the foundation of the present appellants' claim, and the subject of the learned judge's decision. In this court it has formed the prominent feature of discussion, and being sufficiently, although not very definitely, raised by the pleadings, must be decided upon. The argument has raised an important point of law with reference to the power of a lessee to dedicate, at least as against himself and his assignees, a highway to the public; but that point can only, as a matter of necessary decision, arise after the court is satisfied that the evidence establishes such a contract on the part of the lessee on the one hand, and the public on the other, as would if the lessee were an owner in fee amount to proof of dedication in fact. We proceed, therefore, to consider the evidence, but before doing so would first call attention to the allegations of the parties in their respective pleadings. In paragraph 11 of the amended information and bill of complaint, the appellant's case is thus alleged: "In pursuance of the said order (the order made by the court of quarter sessions on the 6th April 1865), and in part performance of the said agreement in that behalf, the said Theophilus Alexander Blakely diverted, turned, and stopped up the said public highway or footway in the manner proposed and agreed as aforesaid, and he caused a new footway, not less than five feet in width, to be made as shown on the said plan, in lieu of so much of the said old public highway or footway as was stopped up, turned and diverted as aforesaid; and he erected and

built, or caused to be erected and built upon the said piece or parcel of land so agreed to be demised to him as aforesaid, and over part of the site of the said public footpath, a factory, an engine and boiler house, a smith's shop and office; and in pursuance of his said agreement in that behalf, he caused a new road forty feet in width to be made on and over the said land to the waterside between the places marked with the letters D and E respectively on the said plan, and threw open and dedicated such new road to the public as he had agreed to do, and the said new road was thenceforth, that is to say from the year 1865, used by the parishioners of the said parish of East Greenwich and by the public generally, as a public highway to and from the river Thames without interruption, until it was obstructed and blocked up by the above-named defendants, the Biphosphate Guano Company (Limited)."

That case is met by the defendants in paragraph 19 of the answer, which is as follows: "We cannot say to our knowledge, information, belief, or otherwise, whether the said Theophilus Alexander Blakely did or did not cause a new road, and whether or not forty feet in width, to be made on and over the said land to the waterside, between the places marked with the letters D and E respectively, on the said plan. However, speaking to the best of our knowledge, information, and belief, we deny that, if this was the case, he did so in pursuance of any such agreement as in that behalf alleged in the said information and bill, or that he did in fact throw open or dedicate such new road to the public, as he is alleged to have agreed to do, or that the said alleged new road was thenceforth, that is to say from the year 1865, or from any other time, or in fact has been used by the parishioners of the said parish of East Greenwich, or by the public generally, as a public highway to and from the river Thames without interruption until it was obstructed and blocked up as in the said information and bill in that behalf alleged, for we say that no other road than such private road as herein mentioned has ever existed over the premises, and we insist that, having regard to the limited interest of the said Theophilus Alexander Blakely, he could not, without the consent of both the said trustees of Morden College, and also the Charity Commissioners for England and Wales, dedicate any such road to the public, and in fact he did not make any such dedication. However, we admit that a private road has, as aforesaid, for some time existed from the entrance to the property to the river side, in or nearly in the direction marked in the said plan, but the defendants, the company, insist that they have a right to stop up and put a fence across any such part of the same private road as is north of the ditch mentioned in paragraph 5 of our answer, provided that they do not interfere with the pathway, A D C" (a footway). These being the allegations of the parties, the evidence for the informant and plaintiffs was as follows: In the first place, the proceedings between Captain Blakely and the Vestry of Greenwich in 1864, were proved, and from those proceedings it appears that in the clearest and most unmistakable terms Captain Blakely, as an inducement to the Greenwich vestry to consent to the deviation inland of a public footpath, which ran along or near to the bank of the river Thames, had stated that he proposed and intended, if the old footway were stopped

up and diverted in another line proposed by him, to give and make a new roadway to the waterside forty feet in width between the places marked with the letters D and E respectively on a certain plan referred to, and to throw the same open to the public. The vestry, in equally clear and unmistakable terms, made their assent to the proposed diversion of the old footway subject, amongst other things, to the proposed new roadway being formed and thrown open to the public, with free access to and from the river Thames to the full extent of the said width of forty feet. This fact is undoubtedly a most important starting point for the appellants. It establishes, at the very least, a moral obligation upon Capt. Blakely to make and throw open to the public the road in question, and it indicates in the strongest manner that could well be conceived, the existence on his part at the time of the *animus dedicandi*. It tends, therefore, to strengthen and give point and force to any evidence of use by the public of the road when made. But it must not be pressed too far. The public were not and could not be parties to the bargain. The making of the road, though an inducement to the vestry to consent to the diversion of the footpath, was not and could not, looking to the provisions of the Highway Act (5 & 6 Will. 4, c. 50), be made a condition of such diversion. The arrangement was not even put before the court of quarter sessions, which under the Highway Act had to approve, and did approve, of the diversion solely upon the consideration of the advantages of the substituted footpath, and those advantages the public have attained. The bargain between Capt. Blakely and the vestry may, in short, explain doubtful acts, but it cannot remove the necessity of proof that the road in question has been in fact thrown open to the public and used by them, for without such proof the existence at one time of the *animus dedicandi*, however clearly established, can lead to no inference of a dedication. [His Lordship examined the evidence upon the alleged dedication of the road to the public and the public user of the road, commenting upon its vagueness and insufficiency, and then proceeded:] It seems to us that the result of the evidence fully accounts for the little reliance placed in the court below upon proof of any dedication to the public. We cannot think that, giving the fullest weight to the intention to dedicate evinced in 1864, when the arrangement with the vestry was made, it is reasonable to hold upon such vague and unsubstantial evidence as that adduced on the part of the appellants that such intention was actually carried out. In order to constitute a dedication binding upon the owner of the land, it is not necessary to prove that the parish in which the road alleged to be dedicated is situate has taken to the road so as to be liable to repair it; but, looking to the importance attributed in 1864 to the promised road by the vestry of East Greenwich, an additional argument against any dedication having existed in the present case is to be found in the fact that after 1864 the parish never repaired or interfered in any way with, and as far as is shown by the evidence, never raised in any shape or form the question of the road which their officer now claims for the public. The affidavits of Alfred David Lewis, William Henry Welch, Henry Johnson, Benjamin Wood, and John Wm. Atkins, filed on behalf of the defend-

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ants, explain the character of such user as there has been of any way from the Thames over the defendants' land, and further strengthen the view that neither as regards the certainty of the way used or the persons using it, has there been any such user as is properly required to create a public right of way. Such rights have been held in some cases to have been acquired by user of not many years' continuance, but in those cases the way itself has been clearly defined and the character of the user left no doubt as to the intention to dedicate by the owner of the land over which the way ran, and the assertion of right on the part of the public; but here everything is left vague and uncertain. Time, place, termini, extent of user, persons using, and all matters requiring clear proof, are either scarcely proved at all, or are even proved in a manner unfavourable to the inference of the existence of a public right, and we are of opinion that the appellants have failed to make out any title to relief, and that the appeal should be dismissed with costs.

JAMES, L.J.—The question whether there can be a dedication of a highway to the public by a lessee we have left untouched, to be dealt with when it arises.

Appeal accordingly dismissed with costs.

Solicitor for the appellants, *W. Bristow.*

Solicitor for the respondents, *Mark Shephard.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

March 26, 27, and 28, 1879.

(Before MELLOR and LUSH, JJ.)

HOYLE (app.) v. HITCHMAN (resp.). (a)

Adulteration—Quality—Prejudice of purchaser—Sale to inspector—38 & 39 Vict. c. 63, s. 6.

The offence created by sect. 6 of the Sale of Food and Drugs Act 1875, viz., the sale of an article which is not of the nature, substance, and quality of the article demanded by the purchaser, does not depend upon any pecuniary or personal prejudice to the purchaser, but is committed in the case of a sale to an inspector appointed under sect. 13 to carry out the provisions of the Act, if an ordinary customer would have been prejudiced by such a sale to him.

THIS was a case stated by a metropolitan stipendiary magistrate for the opinion of the court under 21 & 22 Vict. c. 43.

The respondent Hitchman was summoned on the complaint of Hoyle, an inspector, under the Sale of Food Act 1875 (38 & 39 Vict. c. 63), for that he "on the 13th Sept. 1878, within the metropolitan police district, did sell, to the prejudice of the said John Hoyle, a certain article of food—to wit, milk, which was not of the nature, substance, and quality of the article demanded by the said John Hoyle, contrary to the statute 38 & 39 Vict. c. 63."

On the 4th Oct. last the case was heard by Sir James Ingham, the chief magistrate of the police-courts of the metropolis.

The appellant was the inspector of nuisances of the Board of Works for the St. Giles's district, in the county of Middlesex, and was also the inspector

duly appointed under the 13th section of the Sale of Food and Drugs Act 1875. He went on the 13th Sept. last to the respondent's shop and asked for half a pint of milk, and upon being told that the price was 1½d. he paid that sum out of money belonging to the said board, for which he had to account, and took possession of the milk. Directly after the purchase was completed he told the respondent's shopman that he was an inspector of nuisances and an inspector under the Sale of Food and Drugs Act 1875, and that it was his intention to have the milk analysed by the public analyst, whom he named. He then offered to divide the milk into three parts, and did, in fact, so divide it, and sealed up such parts, as required by the Act. One part he delivered to the shopman, and the remaining two parts he took away with him, and delivered one of them to Dr. Redwood, the public analyst, and produced the third part on the hearing of the case. The milk so purchased was found by the public analyst to contain 76 parts milk and 24 parts water, which water had been added to the milk after it came from the cow. On cross-examination by the respondent the appellant stated that he was not prejudiced, and that no injury had been done to him personally.

The respondent submitted that no offence had been established under the 6th section of the Act, as the milk sold was not sold to the prejudice of the purchaser. The magistrate found that the appellant demanded milk; that the article sold was not of the nature, substance, and quality of the article demanded, as it was, in fact, milk and water, and not milk; that the appellant at the time when he purchased the milk had no knowledge as to whether the milk which the respondent sold to him was adulterated or not; that no notice of any kind was given to him that the article sold was milk and water and not milk. Had the purchase in this case been by one of the ordinary customers of the respondent, the offence mentioned in the Act would, in the magistrate's judgment, have been committed. He, however, dismissed the summons, because he thought that, although the appellant did not get the article he paid for, the sale was not, in the circumstances mentioned, a sale to the prejudice of the purchaser within the meaning of the Act, as the milk was purchased by an inspector for the purpose of analysis only.

The question for the opinion of the court was, whether the magistrate was right in point of law in dismissing the summons.

By the sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 3, the mixing of ingredients injurious to health in any article of food with intent to sell the same, and the sale of the same, are made offences.

Sect. 4 deals in the same way with the mixing of ingredients, so as to affect the quality or potency of drugs.

Sect. 5 exempts from conviction under the two previous sections, when absence of knowledge is proved.

By sect. 6:

No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser.

The provisoes do not apply to this case.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at Law.

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By sect. 13:

Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable under the direction, and at the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of this Act, may procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analysed by the analyst of the district or place for which he acts; or if there be no such analyst then acting for such place, to the analyst of another place; and such analyst shall, upon receiving payment as is provided in the last section, with all convenient speed analyse the same and give a certificate to such officer, wherein he shall specify the result of the analysis.

By sect. 14:

The person purchasing any article with the intention of submitting the same to analysis, shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article, his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated, and each part to be marked and sealed, or fastened up in such manner as its nature will permit; and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller, or his agent.

By sect. 17:

If any such officer, inspector, or constable, as above described, shall apply to purchase any article of food or any drug exposed to sale, or on sale by retail on any premises or in any shop or stores, and shall tender the price for the quantity which he shall require for the purpose of analysis, not being more than shall be reasonably requisite; and the person exposing the same for sale shall refuse to sell the same to such officer, inspector, or constable, such person shall be liable to a penalty not exceeding 10*l*.

March 26.—Poland for the appellant.—The question here raised involves the whole object of the statute. If the magistrate's decision is upheld the legislation on this subject must be a dead letter. The words "to the prejudice of the purchaser" were inserted, as clearly appears from the various sections, merely to protect a tradesman who sells an article different in nature, substance, or quality from that demanded, but of equal or greater value, so as not to prejudice the purchaser. [LUSH, J.—Sects. 13, 14, and 17 expressly provide for sales to an inspector. MELLOR, J.—Let us hear what can be said on the other side.]

Morton Smith for the respondent.—This case was stated in deference to a remark ascribed to the Lord Chief Justice during the argument of a case concerning the adulteration of whisky, which, although it appears in some of the daily and weekly papers, is not contained in either of the legal reports of the case (*Sandys v. Small*, L. Rep. 3 Q. B. Div. 449; 39 L. T. Rep. N.S. 118); and the magistrate's decision is supported by the majority of five out of seven judges of the Scotch Court of Justiciary in a case of alleged adulteration of cream (*Davidson v. McLeod*, Cases decided in the Court of Justiciary 1877-8, 4th series, vol. 5, part 22; also reported in the Justice of the Peace of 19th Jan. 1878), in which, although other points are discussed, two at least of the judges based their decisions on the ground of the impossibility of an inspector being prejudiced by such a sale. They were of opinion that the sections relating to sales to inspectors applied only to sales under sects. 3 and 4 of articles injurious to health. [LUSH, J.—It surely cannot be that sect. 17 applies only to sales under those two sections. The words are "to purchase any article of food or any drug exposed to sale."] These words "to the

prejudice of the purchaser" appear here for the first time in the legislation on this subject; and this same Act for the first time compels sales to inspectors; it may be therefore that it was intended to enable an inspector to procure a conviction only for the sale of deleterious compounds. [LUSH, J.—Your contention must extend to the purchase of an article, not injurious to health, by an ordinary customer, for a charitable or any other than a personal purpose.] Possibly: but the words "to the prejudice of the purchaser" do not convey the meaning suggested by the appellant, and some weight should be given to them. [LUSH, J.—Without these words, it might be said it was an offence to sell a superior article to that demanded.] A *bonâ fide* purchaser might be prejudiced even then, if he got an article of a nature he did not want.

March 27.—Poland in reply.—The decision of this court in *Sandys v. Small* does not involve this point, and there is nothing in the judgments relating to it. There is another case of *Sandys v. Markham* (41 J. P. 52) in which an adulteration of mustard was discussed before Mellor and Lush, JJ. The case was remitted to the justices on another point, but the prejudice to the inspector was there assumed. So it was in a case of lard, before Kelly, C.B. and Pollock, B. (*Book v. Hopley*, L. Rep. 3 Ex. Div. 209). The effect of *Davidson v. McLeod* is merely that the tradesman, having sold cream when cream was demanded of him, could not be convicted under this section, because his cream was not the richest kind of cream. The majority of the judges, although they overrule the conviction, were opposed to the contention that an inspector could not be prejudiced under this section. *Cur. adv. vult.*

March 28.—MELLOR, J.—In the special case stated by Sir James Ingham, which has been argued on the last two days, concerning a question as to what is an offence within the 6th section of the Sale of Food and Drugs Act 1875, we are now prepared to deliver our judgment. The question for us is a very narrow one, for it is found expressly in the case that, had the purchaser of the milk therein described been by one of the ordinary customers of the respondent, the offence created by this section would have been committed. The magistrate also finds that the purchaser was duly constituted as the inspector under the 13th section for the purpose of carrying out the provisions of the Act; but he dismissed the summons because he thought that, the milk having been purchased by the inspector for the purpose of analysis only, the respondent did not sell it to the prejudice of the purchaser within the meaning of the section. Therefore, it seems that the only ground on which the magistrate had dismissed the complaint was, that the purchaser was not "prejudiced" by the sale of the milk to him. That gives rise to the question whether the "prejudice" contemplated by the 6th section is a pecuniary prejudice. Such a view of the Act would, in my judgment, absolutely nullify its beneficial effect. For if the meaning of the enactment is that the offence cannot be complete without its being "to the prejudice of the purchaser," it is hardly possible that the offence should be brought home to anyone. And this observation, in my view, goes far to show that this construction cannot be the right one. So far as authority is concerned,

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there is no direct decision in favour of such a view, and indeed, in the English courts, there is hardly any authority upon the point. For, in the first of the two cases in this court referred to, the 'mustard case' (*Sandys v. Markham*), my brother Lush distinctly said that, in his view, if the article were adulterated, it must be presumed that it was "to the prejudice of the purchaser," and I could not have dissented from that opinion or I should not have concurred in sending the case down to be re-stated on the other point. And as to the other case (*Sandys v. Small*), no doubt in the course of the argument the Lord Chief Justice made some such remark, but not by way of a decided dictum, and rather by way of query or suggestion, and the decision went upon the other point, so that there is no authority in the English courts in favour of the view now presented. There is, however, the decision of the Court of Session in Scotland (*Davidson v. McLeod*), and if the judges had concurred in that view we should have been reluctant to give a decision contrary to their judgment. But, out of seven judges, two of them dissented from the decision altogether, and two more appear to have declined to adopt this view, so that the majority of the Court do not appear to have entertained the view now presented to us, and (if I may presume to say so) I am not prepared to hold that their actual decision upon the case before them was erroneous; indeed, the inclination of my mind is to go along with the majority of the Scotch judges in the conclusions they arrived at. But two, at least, even of the majority who concurred in the decision, appear to have dissented from the view that pecuniary prejudice to the purchaser is essential to constitute the offence, and one of them said that such a view would nullify the operation of the Act. Therefore, in this diversity of opinion as to the meaning of the words "to the prejudice of the purchaser," it cannot be said that the weight of judicial authority is against, and I rather think it is in favour of, the view which we have arrived at after the best consideration we can give to the question as to the true construction of the enactment. It is quite general in its terms, and its terms are very large, nor is there anything to limit them—"if any one shall sell, to the prejudice of the purchaser, any article of food not of the nature, substance, or quality of the article demanded by the purchaser." There is nothing to limit the application of the enactment (as some of the Scotch judges seem to have supposed) to articles deleterious in their nature. And in several of the sections (13 to 17) provisions are made for purchases by public officers for the purposes of analysis and prosecution, assuming that if the article is found to be adulterated the offence will have been committed. It would be strange indeed if all these provisions were to be made nugatory by a construction which would, in effect, come to this—that proceedings could only be taken by private individuals. Here the purchase was made by the inspector under those sections; but surely the case must be treated as though the purchase had been by a private individual. Now, in the case of a private individual no one could dispute that in such a case as this the offence would have been completed; and the magistrate has so found in fact. That being so, what difference can it make as to the nature of the offence that the purchase was by an officer on

behalf of the public and furnished with public money for the purpose? If the purchaser asks for a certain article and gets an article which by reason of some admixture of a foreign article is not of the nature or quality of the article he asks for, he is necessarily "prejudiced;" and how can the fact that the purchase is not with his own money at all affect the question of the commission of the offence? The offence intended to be prevented by the Act was the fraudulent sale of articles adulterated by the admixture of foreign substances which would necessarily be to the "prejudice of the purchaser;" and those words were inserted only to require that such an adulteration should be shown to have been made. Taking all these matters into consideration, I cannot bring my mind to the conclusion that in such a case as this the offence is less complete merely because the money with which the purchase was made was not the money of the purchaser, which must be wholly immaterial to the seller, and cannot affect the offence he has committed. I come, therefore, to the conclusion that the magistrate was wrong in dismissing the case on that ground, and therefore, that the case must be remitted to him to be determined on the evidence as to the offence alleged to have been committed.

LUSH, J.—The 6th section of this Act has given rise to a judicial difference, which has materially crippled the effect of this useful law. The magistrate had high authority for his decision in the judgments of the Justiciary Court in Scotland in the case referred to, although the only dictum in the English courts suggested in its favour is that of the Lord Chief Justice, which does not appear in the Reports. What appears in my Lord's judgment in *Sandys v. Small* I entirely concur in. He says: "The provisions of the Act were intended to apply to adulterations of a clandestine character, which operate to the prejudice of the purchaser. The provisions of the 6th section seem to me to apply to cases where a seller professes to sell to the purchaser an article as being of a certain denomination, whereas the article has been altered by an admixture of some other ingredients, and it seems that when the article is so altered, this must be considered to have been done to the prejudice of the purchaser, unless it is duly and sufficiently brought to his knowledge." This does not at all imply that an inspector could not under any circumstances be prejudiced. In *Sandys v. Markham*, I seem to have expressed an opinion that it is a matter of no consequence with what object an article is purchased, and unless we entertained that opinion we should scarcely have sent the case back to the justices. I have carefully studied the Scotch case, and I think myself that the majority of the judges arrived at a correct conclusion, but I must differ from many of the reasons they give. The cream sold in that case was poor, but it was really cream; here milk was demanded, and the article sold was milk and water. This of itself is sufficient reason for our not deciding this case as that was decided. But some of the judges thought that this 6th section could not apply to a purchase by a public officer, and in this I cannot concur. The object of the Act is to prevent adulteration, and for that purpose a machinery is provided for the detection of offences. Sects. 13, 14, and 17 relate to an official buyer, who is to act in the interest of the public; he is to go to tradesmen's shops as a

buyer, and is to take proceedings for an offence. Now, what is the offence for which he is to proceed? Why, the sale of the article to this very man; yet it is said that such a sale is not an offence. To my mind, it is unquestionably clear that the words "to the prejudice of the purchaser" cannot exclude from the operation of the Act a sale to an inspector. It is stated by one of the judges in the Scotch case, that these sections as to a public buyer apply only to sects. 3 and 4; but there are no words so to limit them, and I cannot think it was intended to do so. The words "to the prejudice of the purchaser," or some others like them, were necessary here to protect a seller from committing an offence who gave a purchaser something better than that demanded of him. The offence under the 6th section consists not in selling something different from that which is asked for, but in fraudulently handing over to the buyer something to his prejudice; and it matters not who the buyer is, nor what is his object. This is, in my opinion, the clear effect of the Act, and we must remit the case to the magistrate for his further consideration.

Judgment for appellant.

Solicitor for appellant, *J. Henry Jones.*
Solicitor for respondent, *W. T. Ricketts.*

Monday, March 31, 1879.

(Before COCKBURN, C.J. and MELLOR, J.)

REG. v. VICAR AND CHURCHWARDENS OF
TOTTENHAM. (a)

Vestry meeting—Summoning authority—Hour of meeting—Right of parishioner.

The vicar and churchwardens of a parish declined to enter upon the notice paper of a vestry meeting a notice of motion by a parishioner that future meetings should be held in the evening.

Held, upon a rule for a mandamus to compel them to do so, that the summoning authority had power to fix the time of each vestry meeting; and that there was no duty to allow notice of a motion which could not have any effect.

THIS was a rule nisi obtained at the instance of Mr. Edward Maitland, a resident and ratepayer of the parish of Tottenham, Middlesex, calling upon the Rev. A. Wilson, the vicar of the said parish, and the churchwardens to show cause why a writ of mandamus should not issue, directed to them, commanding them or such of them to whom the same should of right belong to cause notice of the following motion to be inserted in the notice paper of the next vestry meeting of the said parish, that is to say, "To be moved by Mr. Edward Maitland, that the hour for holding the meetings of the vestry of the parish of Tottenham be 7 o'clock in the evening."

It appeared from the affidavit of the applicant that it had been usual to hold the vestry meetings in this parish at seven o'clock in the evening until the 8th Nov. 1877, on which occasion there was a disturbance, and the vicar, who occupied the chair, adjourned the vestry. The adjourned meeting was held on the 22nd Nov., at eleven o'clock in the morning.

In answer to a letter from the applicant, asking to have the vestry meetings held as before at seven in the evening, the vicar wrote on the 28th

Feb. 1878 that he had come practically to the conclusion that morning vestry meetings were much more conducive to order and despatch of business than the latter.

Subsequently, at a meeting of the ratepayers, it was resolved that it was desirable all future vestry meetings should be held at seven o'clock in the evening; and a deputation was appointed to wait upon the vicar and churchwardens.

On the 23rd March 1878 the vicar declined to receive the deputation, on the ground that the speakers at the meeting seemed to have prejudged the question of the proper authority for calling vestries and regulating their proceedings.

A requisition was afterwards made to the churchwardens by the ratepayers to summon a vestry meeting to consider the question, but no notice was taken of it.

On the 20th July 1878 a formal request was made to the vestry clerk by several ratepayers to insert in the notice paper for the next vestry meeting a notice of motion in the words mentioned in the rule; to which the vestry clerk answered that the request had been submitted to the vicar for insertion, and rejected by him.

On the 7th Dec. 1878 the applicant wrote to the two churchwardens asking why this notice of motion was not included in the notice paper for the vestry meeting held on the 26th Sept., or for that to be held on the 12th Dec. In answer to these letters, one of the churchwardens referred the applicant to the vicar; and the other said the vicar claimed the right of framing the notices of vestry, and therefore he (the churchwarden) had no voice in the matter.

After some further correspondence, on the 19th Dec. 1878, the vicar wrote a letter to the applicant's solicitors, in which he said: "I claim as of right to name the day and hour for holding vestries, and determining agenda: Mr. Maitland claims that the right belongs to the parishioners. This is the issue." He also mentioned in this letter that he had received a memorial signed by a very large number of influential parishioners requesting him to accede to the request for evening vestry meetings.

Phillimore, on behalf of the vicar and churchwardens, showed cause.—The 1st section of 58 Geo. 3, c. 69, requires three days' notice on the church door of the place and hour of holding a meeting of the inhabitants in vestry, of or for any parish, and of the special purpose thereof; and the 2nd section recognises the right of the rector or vicar to preside. By 7 Will. 4 & 1 Vict. c. 45, s. 3, "no such notice of holding a vestry shall be affixed to the principal door of such church or chapel, unless the same shall previously have been signed by a churchwarden of the church or chapel, or by the rector, vicar, or perpetual curate of such parish, or by an overseer of the poor of such parish." The case of *Rees v. Archdeacon of Chester* (1 A. & E. 342), is an authority that a chairman of a vestry meeting may appoint a convenient place for taking a poll; and Lord Denman said, at p. 345, "But those who summon a meeting of this kind must necessarily lay down some order for the proceedings." In another case, *Reg. v. D'Oyly* (12 A. & E. 139, 158), Lord Denman said: "Stat. 58 Geo. 3, c. 69, s. 1, requires notice of the vestry to be given, but does not say who is to give it. We are of opinion that the rector is the

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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fit person; he is at the head of the parish for this purpose." These statutes and authorities go far to show that the persons who have a right to summon a vestry meeting must be competent to fix the time for its assembling; and although it may be that a parishioner is entitled to have a notice of motion in the agenda paper, the vicar and churchwardens are competent to disallow notice of any proposed resolution which would, if passed, be of no effect.

Charles, Q.C. and Oumyngame supported the rule.—The question raised by the rule is whether a majority of a vestry meeting may not fix the hour for a future meeting; and this right, if it exists, can only be exercised upon notice of motion. It may be admitted that no single parishioner can claim to fix the time of a vestry meeting, but when assembled, he can introduce a discussion as to future meetings. [COCKBURN, C. J.—Is it not a fallacy, upon which such a contention must be based? A vestry is not in continuous existence, it is summoned by the act of the vicar or churchwardens. How can one vestry determine at what time another vestry shall meet? The stat. 58 Geo. 3, c. 69, s. 1, relates to a "vestry or meeting of the inhabitants in any vestry or for any parish," which seems to assume the continuous existence of the body which is to meet at a vestry. According to *Dawe v. Williams* (2 Add. 130), vestries are to be called by the churchwardens with the consent of the minister; and in *Butt v. Fellowes* (3 Curt. 680) on referring to *Dawe v. Williams*, it was said at p. 696, that it "does not establish that if any other person calls a vestry, it is not a legal meeting." In the argument of *Reg. v. D'Oyly*, at p. 148, it was said that a chairman had no right to order the adjournment against the declared wishes of the meeting itself. "*Stoughton v. Reynolds* (2 Str. 1045) has never been overruled; the best report is in Fortescue (p. 168), and there it is said, 'At the common law anciently, the sheriff could not adjourn the county court; for the suitors, not he, were judges of it, though now the law has put that power in him. But in this case, the law has not placed it in anyone, wherefore we have not the power to take it from those who have it to place it in those who have it not. And even supposing the vicar had a power of presiding, it does not follow that he has the power of adjourning.'" In the same way, the discretion which *prima facie* exists in the vicar and churchwardens as to the time of meeting may be limited by a direction of the inhabitants as to their future meetings.

COCKBURN, C.J.—It seems to me this rule must be discharged. It is necessary that a vestry meeting should be duly summoned; but whether by the incumbent alone or by the churchwardens alone, or by both together, it is not material for us now to consider. I think we ought not to grant a *mandamus* for the purpose asked, because the summoning power must, as it seems to me, include the right to fix the time for meeting. It may well be, when once assembled, that it is within the competence of the vestry to adjourn to any hour fixed by the majority, even in opposition to another hour proposed by the vicar and churchwardens; but we are asked to compel the vicar to give notice of a resolution which would distinctly deprive the summoning authority of the power which they must possess, and would abrogate their legal right.

MELLOR, J.—I am of the same opinion. Mr. Charles admits that a vestry must be summoned every time it assembles; and this must be by the same persons. In my opinion this admission is enough to preclude the applicant from obtaining this rule. We cannot compel notice of a resolution which, if passed, could not be carried out.

Rule discharged.

Solicitors for applicant, *Brookes, Tanner, and Jenkins*.

Solicitors for respondent, *Peckham, Maitland, and Peckham*.

Wednesday, April 2, 1879.

(Before COCKBURN, C.J. and MELLOR, J.)

NEW RIVER COMPANY (apps.) v. ISLINGTON ASSESSMENT COMMITTEE (resps.). (a)

Metropolitan rating—Valuation list—Increased value of hereditaments—Supplemental list—32 & 33 Vict. c. 67, ss. 43-47.

The second Metropolitan quinquennial valuation list under the Valuation (Metropolis) Act 1869, s. 43, came into force in April 1876. During the year following some new houses were built, to which the appellants' mains in existence before the beginning of the year were connected by means of service pipes belonging to the owners of the houses.

Held, upon a case stated, that the increased rents thereby receivable by the appellants constituted an alteration which had taken place in the matters stated in the valuation list within sect. 46, so as to increase the valuation list for the following year.

THE Governor and Company of the New River duly appealed against the Supplemental Valuation List for the parish of St. Mary, Islington, which was made and deposited on the 31st May 1877 under the Valuation of Property (Metropolis) Act 1869 (32 & 33 Vict. c. 67), and the Court of General Assessment Sessions, held at the Guildhall, Westminster, on the 14th Feb. 1878, on the trial of the appeal, ordered the said supplemental list to be altered by reducing the gross value of the company's property in the said parish from 23,250*l.* to 22,612*l.*, and the rateable value from 20,700*l.* to 20,100*l.* subject to the opinion of the High Court of Justice (Queen's Bench Division) on the following case:

1. In 1875, pursuant to the Valuation of Property (Metropolis) Act 1869, the overseers of the parish of St. Mary, Islington, duly made their second quinquennial valuation list in which the land occupied by the water mains, pipes, and reservoirs of the said New River Company in the parish of St. Mary, Islington, were assessed as follows:

Gross value as estimated by overseers, and finally determined by assessment committee	232,500
Rate of deduction per cent.	11½
Rateable value	20,000

2. That list duly came into force on the 6th April 1876, and the company have since paid the rates made in conformity with such list.

3. Between the 6th April 1876 and the 6th April 1877 a certain length of new mains had been laid by the company.

4. Between the 6th April 1876 and the 6th

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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April 1877 a number of new houses had been built, many of which had, in that interval, been connected by means of service pipes with mains in existence prior to the 6th April 1876.

5. The service pipes from the mains to the houses belong to the owners or occupiers of the houses.

6. All houses in the parish of Islington are supplied with water by the New River Company, which is empowered by Act of Parliament to charge the occupiers at the rate of 4l. per cent. upon the annual value of the respective houses.

7. A large number of new houses are built and connected with the mains every year within the said parish.

8. In Feb. 1877 the overseers of the parish made, pursuant to sect. 47 of the said Act of Parliament, a provisional valuation list containing the gross and rateable value of the company's property as increased in value, being 23,250l. gross and 20,700l. rateable.

9. The company in due course objected to such provisional valuation list, but the assessment committee confirmed it.

10. On the 31st May 1877, the supplemental valuation list now in dispute was made and deposited by the overseers pursuant to sect. 46 of the said Act, and in it was embodied the provisional valuation list referred to.

11. The company also duly objected to the supplemental valuation list, which objection was however disallowed, and the list finally approved by the assessment committee.

13. The figures of the supplemental valuation list show an increase of 750l. upon the gross, and of 700l. upon the rateable value.

14. A portion of this increase, viz., 112l. gross, and 100l. rateable value, relates to the rating of the land occupied by the new mains, and is not now in dispute.

15. The remainder represents the increased value of the water mains, pipes, and reservoirs derived from the connection of the mains existing prior to the 6th April 1876 with houses built between the 6th April 1876 and the 6th April 1877.

16. It was arranged between the parties that the General Assessment Sessions should not be asked to settle the amount of the assessment to be entered in the supplemental valuation list, but simply to determine the basis upon which such amount should be calculated, as the parties would have no difficulty after the decision of the question of law in agreeing to the amount thereof.

17. The company contend that they are not liable to have their assessment increased by reason of the increase of their gross receipts in the parish arising from the additional water rentals derived from connections of new houses with mains which were in existence prior to the year which the supplemental list of 1877 was made to cover, and that the mains being in existence before the 6th April 1876, the assessment of the company could not be increased by reason of such mains being made to supply additional houses between the 6th April 1876 and the 6th April 1877.

18. The assessment committee contend that the rateable hereditaments of the company had under the circumstances mentioned increased in value by reason of the mains being connected with the new houses during the year which the supplemental valuation list in dispute was made

to cover, viz.: from the 6th April 1876 to the 6th April 1877; and that a tenant would pay more for the company's property after such connections had been made than before; and, further, that there had been a structural alteration in the property during the said year ending 6th April 1877 by tapping the mains in front of the houses for the purpose of connecting the pipes from the houses with the mains; that there was both an alteration in the company's property and an increase in the value thereof within the meaning of sect. 47, and that the increase of the assessment was not to be limited to the value of the new mains put in the land since the commencement of the year (6th April 1876) which the supplemental list in dispute was made to cover.

The Court of General Assessment Sessions decided in favour of the company, and ordered the supplemental valuation list to be reduced as before-mentioned.

The question for the opinion of this court was whether the increase in the value of the company's property by reason of the increase in the gross receipts derived from the new connections mentioned in paragraph 4 is such an increase as is within the meaning of sections 46 and 47 of the said Act.

If the court shall answer this question in the affirmative, then the order of sessions is to be quashed and the supplemental valuation list to remain as originally approved by the assessment committee or to be altered as agreed between the parties.

If the court shall answer this question in the negative, then the order of sessions is to be confirmed.

By the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), s. 43:

The valuation list as approved by the assessment committee, and if altered on any appeal under this Act to any sessions or a superior court, as is altered, shall come into force at the beginning of the year (commencing on the 6th April) succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as herein-after mentioned.

By sect. 45:

The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned (amongst them, for all rates made in the metropolis on the basis of value) be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted.

By sect. 46:

Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years (the first of such periods beginning with the 6th April 1871) shall be conducted as follows:

1. In each of the first four years of such period, a supplemental list shall, if necessary, be made out, in the same form as the valuation list, and shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations.

4. A supplemental list and a new valuation list shall come into force at the beginning of the year succeeding that in which they are respectively made, in the same manner and subject to the same conditions as the valuation list made in the first year after the passing of this Act.

5. In each of the last four years of such period the

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valuation list which was in force on the day before the commencement of each such year, together with and as altered by the supplemental list, if any, which comes into force at the commencement of such year, shall be the valuation list which is in force during that year.

By sect. 47:

If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:

1. The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee, or of any ratepayer of the union, or of the surveyor of taxes for the district, shall send to the assessment committee a provisional list containing the gross and rateable value, as so increased or reduced, of such hereditament.

8. A provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made, comes into force.

10. A provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly.

A. Wills, Q.C. and Clerk, for the respondents, the Assessment Committee, were stopped by the Court.

Webster, Q.C. and Russell Griffiths, for the appellants, the New River Company.—The valuer at the commencement of each quinquennial period ought to take into consideration the probable increase of value during the period in those hereditaments which continue without alteration. We do not dispute the increase upon the new mains; but the connection of service pipes to the old mains is not "an addition thereto or erection thereon of any building" in the words of sect. 47, which justifies an increase in a provisional or supplemental valuation list. The whole object of a quinquennial valuation list will be lost if every alteration in the value of unaltered hereditaments is to affect the rateable value; and the inconvenience in arriving at the probable rent of the hypothetical tenant must be greatly increased thereby.

COCKBURN, C.J.—We need not trouble Mr. Wills again. Mr. Webster has given us a very ingenious argument, and has pointed out the inconveniences of a plain construction of the statute. We cannot, however, provide for the consequences of the manifest aim of the Legislature, and cannot avoid the effect of the words which have been used. The provision is clear; the supplemental list is to be made to "show all the alterations which have taken place during the preceding twelvemonths in any of the matters stated in the valuation list;" it is, indeed, more intelligible than such provisions always are. It must be intended that injustice should be remedied, if by extraordinary or unlooked-for circumstances any great addition or reduction of value may take place. Not, perhaps, that every minute detail need be considered when the question of retaining or altering the valuation is to be determined; but if there be a substantial change in the value of a hereditament, such as there is found here to be the

case with respect to these mains, then effect must be given to it in the valuation for the remainder of the period. There is but one interpretation for the words of the 46th section; and the 47th merely affords a means by which the 46th is to be carried out.

MELLOR, J.—I am of the same opinion. I can only give the 46th section the interpretation which my Lord applies to it. There is no other possible meaning to the words.

Judgment for respondents.

Solicitors for the appellants, *Thompson and Debenham.*

Solicitor for the respondents, *John Layton.*

March 25, 26, and 29, 1879.

(Before MELLOR and LUSH, JJ.)

MELLOR (app.) v. DENHAM (resp.). (a)

School Board—Bye-laws—Attendance of children employed in factories—7 & 8 Vict. c. 15, s. 31—33 & 34 Vict. c. 75—37 & 38 Vict. c. 44, ss. 6 & 15—39 & 40 Vict. c. 79, ss. 5, 6, 7.

By the Factory Act 1844, s. 31, it is enacted that it shall be lawful to employ any child ten hours in a factory on alternate week days, provided (inter alia) that on the other alternate days, the child shall attend school for five hours a day, except Saturday.

By the Elementary Education Act 1870, s. 74, school boards may make bye-laws provided (inter alia) that no bye-law shall be contrary to anything contained in any Act for regulating the education of children employed in labour.

The respondent was summoned for breach of a bye-law made by a school board requiring all children to attend school twenty-seven hours a week, his child being employed and duly attending school under the Factory Acts.

Held, that the school board was not entitled to enforce their bye-law in respect of children who, although not obeying such bye-law, were fulfilling and observing the conditions of the Factory Acts; and that the justices were right in refusing to convict the respondent.

THIS was a case stated by four of Her Majesty's justices of the peace in and for the borough of Oldham, in the county of Lancaster, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose as hereinafter stated.

(1.) At a petty sessions holden at Oldham aforesaid, in and for the said borough on the 3rd Oct. 1878, an information preferred by James Mellor (hereinafter called the appellant) against Thomas Denham (hereinafter called the respondent) under the bye-laws of the School Board for the district of the borough of Oldham duly made on the 12th March 1877, and confirmed in pursuance of sect. 74 of the Elementary Education Act 1870, charging that "the respondent, being the parent of a child called Joseph Denham, who was in his custody and not less than five nor more than thirteen years of age, did unlawfully neglect and omit to cause the said child to attend school the whole of the ordinary school hours as required by the said bye-laws, he, the said Thomas Denham, not having a reasonable excuse for such non-

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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attendance," was heard and determined by the said justices, who dismissed the said information.

(2.) The appellant being dissatisfied with this determination upon the hearing of the said information, applied in writing for a case setting forth the facts and grounds of such determination for the opinion of this court, and duly entered into a recognisance as required by the said statute in that behalf.

(3.) Therefore the said justices, in compliance with the said application and the provisions of the said statute, stated and signed the following case.

(4.) Upon the hearing of the said information it was proved on the part of and by the appellant, and found as a fact, that the said child did not attend school during the whole of the ordinary school hours, and that the child was ten years and six months old, and the bye-laws of the said school board, of which a copy was attached to this case, were put in evidence and proved.

(5.) It was also proved on the part of the respondent that the child was employed at the cotton factory of Messrs. Radcliffe and Sons in Oldham, and was attending an efficient elementary school regularly pursuant to the Factory Acts 1833 to 1874.

(6.) It was contended on the part of the appellant that, by virtue of the bye-laws of the board made in pursuance of the 74th section of the Elementary Education Act 1870, the board could, if they thought fit, compel children to attend school during the whole of the school hours; and that this applied notwithstanding that such children were working at a factory and attending an efficient elementary school in conformity with the provisions of the Factory Acts 1833 to 1874; and that there was nothing in the said Acts restraining the powers conferred on the board by the Elementary Education Act 1870, that there was nothing in the bye-laws contrary to anything contained in any Act for regulating the education of children employed in labour, and that the Elementary Education Acts 1870 and 1876 controlled the Factory Acts 1833 to 1874.

(7.) The justices, however, being of opinion that, as the child was attending an efficient elementary school pursuant to, and was otherwise fulfilling the conditions and provisions of the Factory Acts 1833 to 1874, the school board could not compel him to attend school during the whole of the school hours under their bye-laws; that the child was within the exemption created by the 5th bye-law; that the language of the Elementary Education Acts 1870 and 1876 keeps in force the provisions of the Factory Acts with respect to the education of children between the ages of ten and thirteen years employed pursuant to those acts; and that the bye-laws with reference to the case before them were *ultra vires*, gave their determination against the appellant in manner before stated.

(8.) During the hearing of the case reference was made to the bye-laws of the Oldham School Board, which were made under the authority of sect. 74 of the Education Act 1870 (33 & 34 Vict. c. 75): bye-law No. 5 was in effect the repetition of the proviso contained in that section: "Provided that no such bye-law shall be contrary to anything contained in any Act for regulating the education of children employed in labour."

The other bye-laws, all of which formed part of the special case, were immaterial to the point dis-

cussed, except bye-law No. 3, which required that the time during which children between the ages of five and thirteen residing in the district were to attend school, should be the whole of the ordinary school hours, being not less than twenty-seven hours a week.

(9.) The questions of law arising on the above statement for the opinion of this court therefore were:

(1) Are the Oldham School Board able to enforce their bye-laws against children between the ages of ten and thirteen years, who although not obeying such bye-laws are attending efficient elementary schools, pursuant to and otherwise fulfilling and observing the conditions of the Factory Acts 1833 to 1874?

(2) Do the Elementary Education Acts 1870 & 1876 control the provisions of the said Factory Acts regulating the education of children employed in pursuance of the last-mentioned Acts?

(10.) And the court was humbly solicited according to the powers vested in the court by the said statute (20 & 21 Vict. c. 43) to remit the case to the said justices with the opinion of the court thereon, or to make such other order as to the court might seem fit.

By the Factory Act 1844 (7 & 8 Vict. c. 15), sect. 30, it is enacted,

That no child shall be employed in any factory more than six hours and thirty minutes in any one day, save as hereinafter excepted, unless the dinner time of the young persons in such factory shall begin at one of the clock, in which case children beginning to work in the morning may work for seven hours in one day; and no child who shall have been employed in a factory before noon of any day shall be employed in the same or any other factory, either for the purpose of recovering lost time or otherwise, after one of the clock in the afternoon of the same day, save in the cases when children may work on alternate days, or in silk factories more than seven hours in any one day, as hereinafter provided.

By sect. 31, after making provision for the employment of a child in a factory on three alternate days of every week, it is enacted (*inter alia*) as follows:

Provided always that the parent or person having direct benefit from the wages of any child so employed, shall cause such child to attend some school for at least five hours between the hours of eight of the clock in the morning and six of the clock in the afternoon of the same day on each week day preceding each day of employment in the factory, unless such preceding day shall be a Saturday, when no school attendance of such child shall be required: Provided also that on Monday in every week after that in which such child began to work in the factory, or any other day appointed for that purpose by the inspector of the district, the occupier of the factory shall obtain a certificate from a schoolmaster according to the form and directions given in the schedule (A) to this Act annexed, that such child has attended school as required by this Act.

Sect. 38:

Save as herein otherwise provided, the parent or person having any direct benefit from the wages of any child employed in a factory shall cause such child to attend some school on the day after the first employment of such child, and thenceforth on each working day of every week during any part of which the said child shall continue in such employment, so that on every such day except in the cases hereinafter provided, such child shall attend school during at least three hours after the hours of eight of the clock in the morning and before the hour of six of the clock in the evening: Provided always that any child attending school after one of the clock in the afternoon, shall not be required to remain in school more than two hours and a half on any one day between the first day of Nov. and the last day of Feb., and no child shall be required to attend school on any Saturday.

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By the Elementary Education Act 1870 (33 & 34 Vict. c. 75), sect. 74,

Every school board may, from time to time, with the approval of the Education Department make bye-laws for all or any of the following purposes:—(1) Requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the bye-laws, to cause such children (unless there is some reasonable excuse) to attend school; (2) Determining the time during which children are so to attend school; provided that no such bye-law shall prevent the withdrawal of any child from any religious observance or instruction in religious subjects, or shall require any child to attend school on any day exclusively set apart for religious observance by the religious body to which his parent belongs, or shall be contrary to anything contained in any Act for regulating the education of children employed in labour; . . . Provided that any bye-law under this section requiring a child between ten and thirteen years of age to attend school shall provide for the total or partial exemption of such child from the obligation to attend school, if one of Her Majesty's inspectors certifies that such child has reached a standard of education specified in such bye-law.

By the Factory Act 1874 (37 & 38 Vict. c. 44), sect. 6, it is enacted that

In a factory to which this Act applies, the children may be employed either in morning and afternoon sets, or for the whole day on alternate days, and the following regulations shall be observed:

(1) When the children are employed in the morning and afternoon sets:

(a) A child who on any day except Saturday is employed before noon, shall not on the same day be employed after one o'clock in the afternoon, or if the hour of dinner be one o'clock, after such hour of dinner; and

(b) A child shall not be employed on Saturday in two successive weeks, nor on Saturday in any week, if on any other day in the same week he has been employed for more than five hours; and

(c) A child employed in the factory shall attend school in manner directed by sect. 38 of the Factory Act 1844; and the provisions of that Act with respect to such attendance, and certificates thereof, shall apply accordingly; and

(2) Where the children are employed on alternate days:

(a) A child may be employed during the same hours, and with the same hours for meals, as young persons and women in a factory; and

(b) A child shall not be employed in any manner on two successive days; and

(c) A child employed in the factory shall attend school in manner directed by sect. 31 of the Factory Act 1844; and the provisions of that Act with respect to such attendance, and certificates shall apply accordingly.

By sect. 15, it is enacted

That after the 1st Jan. 1876, attendance at a school in England, which is not for the time being recognised by the Education Department as giving efficient elementary instruction shall not, in the case of a child employed in a factory to which this Act applies, be deemed to be attendance at a school within the meaning of this Act or the Factory Act 1844.

By the Elementary Education Act 1876 (39 & 40 Vict. c. 79), sect. 5, it is enacted as follows:

A person shall not after the commencement of this Act take into his employment (except as hereinafter in this Act mentioned) any child—

(1) Who is under the age of ten years; or

(2) Who being of the age of ten years or upwards, has not obtained such certificate either of his proficiency in reading, writing, and elementary arithmetic, or of previous due attendance at a certified efficient school as is in this Act in that behalf mentioned, unless such child being of the age of ten years or upwards is employed, and is attending school in accordance with the provisions of the Factory Acts, or of any bye-law of the local authority (hereinafter mentioned) made under sect. 74 of the Elementary Education Act 1870 as amended by the Elementary Education Act 1873 and this Act, and sanctioned by the Education Department.

By sect. 6,

Every person who takes a child into his employment in contravention of this Act shall be liable, on summary conviction, to a penalty not exceeding forty shillings.

By sect. 7,

The provisions of this Act respecting the employment of children shall be enforced: (1) In a school district within the jurisdiction of a school board, by that board; and (2) in every other school district by a committee to be appointed annually by the town council or guardians, such board or committee being referred to in the Act as "the local authority." Provided that it shall be the duty of the inspectors and sub-inspectors acting under the Acts regulating factories, workshops, and mines respectively, and not of the local authority, to enforce the observance by the employers of children in such factories, workshops, and mines of the provisions of this Act respecting the employment of children; but it shall be the duty of the local authority to assist the said inspectors and sub-inspectors in the performance of their duty by information and otherwise.

Hamilton argued for the appellant.—This bye-law, requiring a child to attend school not less than twenty-seven hours a week, is not contrary to the provisions of the Factory Act 1844, that it shall be lawful to employ a child in a factory ten hours on alternate days, provided that the child attends school for five hours on the other alternate week days. The Factory Acts restrict the time for labour, and make even that time conditional upon school attendance. The School Board imposes a further condition of longer school attendance; but the consequent reduction of the hours of labour is not contrary to the Factory Acts. The meaning of these words in sect. 74 of the Elementary Education Act 1870, viz., that no bye-law "shall be contrary to anything contained in any Act for regulating the education of children employed in labour," was considered with regard to the provisions of the Workshop Regulation Act 1867 (30 & 31 Vict. c. 146), in the case of *Bury v. Cherrybohn* (25 L. T. Rep. N. S. 403; L. Rep. 1 Ex. Div. 457). By sect. 14 of that Act every child employed in a workshop was required to attend school for at least ten hours in every week; it was held by Bramwell, B., Mellor and Denman, JJ., that a bye-law requiring a longer attendance than ten hours a week was not contrary to this section. The present case was decided by the justices before the operation of the Factory and Workshop Act 1878 (41 Vict. c. 16); but there is nothing in the words used in sect. 23 concerning the education of children to alter the power of school boards over the school time of children employed under that Act.

Aspland for the respondent.—This case really involves the question whether a school board has the power to prohibit juvenile labour within its district. In the case of *Bury v. Cherrybohn* no one represented the respondent, and the recognition by the Legislature of the educational effect of labour was overlooked in the decision of the court. Throughout all the statutory enactments concerning education there is no provision for altering the school hours of children employed in labour under the Acts on that subject; and at all events in respect of the Factory Acts, the words used in sect. 74 of the Elementary Education Act 1870 cannot be interpreted to abridge the children's hours of labour. *Bury v. Cherrybohn* is no authority in this case; and the Legislature seems to have recognised the difference between the words used in the Factory Act 1844 and the Workshop Regulation Act 1867, and at the same

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time to have expressed its disapproval of the decision in *Bury v. Cherrybohn*, by enacting in the 8th section of the Elementary Education Act 1876, that the words of the former Act are to be substituted in the latter for those upon which that case was decided. It was admitted in the argument of that case that if the Workshop Regulation Act had enabled a parent to employ his child in a workshop, provided that the child attended school for ten hours a week, the bye-law would have been contrary to the provision. Here is a case in which by the Factory Act the respondent is enabled to employ his child in a factory, provided the child attends school for a certain time; the bye-law therefore is contrary to that provision, when it requires a longer time of school attendance.

Cur. adv. vult.

March 29.—LUSH, J. delivered the judgment of MELLOR, and himself in these terms:—We have gone through the various Factory Acts and the Education Acts, and the result is that we entertain no doubt that the decision of the justices, the propriety of which is submitted to us, was substantially correct. The question in this case, which, undoubtedly, is one of great and general importance, arose out of an information laid against the father of a boy between ten and eleven years old for neglecting to cause him to attend school during the whole of the ordinary school hours, as required by the bye-laws of the School Board for the district of the borough of Oldham. The defence set up was that the boy was employed at a cotton factory at Oldham, and was attending an efficient elementary school regularly, pursuant to the Factory Acts; and this the justices found to be the fact. The bye-laws of the school, which were put in evidence at the hearing, contained an express enactment that nothing therein should have any force or effect in so far as it may be contrary to anything contained in any Act for regulating the education of children employed in labour—thus following the words of the proviso in the 74th section of the Elementary Education Act 1870, which prohibits the making of any bye-law which shall be contrary to any such Act. We observe here in passing that the finding of the justices that the bye-laws were *ultra vires* cannot be sustained. They are, in our opinion, strictly within the powers conferred on the board by the 74th section, inasmuch as they contain the enactment above mentioned, together with the other provisions required by that section. The question is as to the meaning of the enactment above quoted and its application to the state of facts proved and found by the justices. The contention on the part of the school board was that the Education Acts overrode and controlled the provisions of the Factory Acts, and that children employed in factories, though receiving the education provided for and required by the Factory Acts, were in the same position as other children not so employed, and were, like them, compellable to attend school during the whole of the school hours. The argument was that the Factory Acts, which commenced at a time when no scheme of general education existed, are merely restrictive; that they do not enact that children shall or may be employed for a given number of hours in the factory, and while so employed shall receive a certain amount of education;

but that all which they enact is that the children shall not be employed for a longer time in the factory, and shall not during such employment receive less than the given amount of education; and, further, that the policy of the Education Act, which passed long afterwards, was to secure to all children, however employed, a much larger amount of education than the Factory Acts provided; and that it cannot be said to be “contrary to” nor inconsistent with the provisions of the Factory Acts for the School Board to require that all children should attend school for a longer period than factory children had been required to attend, although the effect might and would be to put an end to child labour in factories. What the construction might have been if the Education Acts had made no reference to the Factory Acts it is needless to consider. The meaning of the 74th section of the Education Act 1870, already adverted to, does not appear to us to admit of a doubt. That section says that the school board may make bye-laws for the following purposes, among which purposes is “determining the time during which children are to attend school, provided that no such bye-law shall prevent the withdrawal of any child from any religious observance or instruction in religious subjects, or shall require any child to attend school on any day exclusively set apart for religious observance by the religious body to which his parent belongs, or shall be contrary to anything contained in any Act for regulating the education of children employed in labour.” Placed as a limitation of the power of fixing the time of school attendance, the meaning of this part of the proviso obviously is that the board shall not use the power given to them so as to interfere with the arrangements already made by the Factory Acts, which embrace both the time of working and the time of attending school, each being dependent on the other, and neither of which can be interfered with without disturbing the other. That this was the meaning intended is further shown by the later Acts. The Education Act of 1876 recognises the Factory Acts as an existing code for regulating the employment and education of children employed in factories, and the Factory Act of 1874 gives the Education Department the power to recognise or refuse to recognise a school as a proper school for the education of a factory child, and says in terms in another part of the Act that a child employed in a factory shall attend school in manner directed by the Factory Act 1844. We are therefore of opinion that the decision of the justices was right, and we answer the questions submitted to us as follows:—1. The School Board are not entitled to enforce their bye-law against children between the ages of ten and thirteen years, who, although not obeying such bye-laws, are attending efficient elementary schools, pursuant to and otherwise fulfilling and observing the conditions of the Factory Acts. 2. The Elementary Education Acts do not control the provisions of the Factory Acts regulating the education of children employed in accordance with those Acts.

Judgment for the respondent.

Solicitor for appellant, J. Ponsonby, Oldham.
Solicitor for respondent, H. Booth, Oldham.

EX. DIV.]

DEARDS v. GOLDSMITH AND WIFE.

[EX. DIV.]

EXCHEQUER DIVISION.

Tuesday, March 25, 1879.

(Before KELLY, C.B. and HAWKINS, J.)

DEARDS v. GOLDSMITH AND WIFE. (a)

APPEAL FROM INFERIOR COURT.

Turnpike Act, construction of—"Town"—Definition of—Turnpike gate in the town—Exemption of inhabitants of town from toll—Question of fact for the determination of the magistrates—Omission to demand toll for forty years—No right to exemption established thereby.

A Turnpike Act passed in 1815 provided that "no toll should be demanded or taken of or from any of the inhabitants of the town of S. at any toll gate or toll bar to be erected in the said town." In 1838 the turnpike trustees removed a turnpike gate, which since 1815 had stood in the town, to a site without the town, and 1200 yards distant from its old position. At that time and for several years afterwards there was not any house on either side of the road between the old and the new site of the gate; but within the last few years some fifty or sixty detached or semi-detached houses had been built, some on one and some on the other side of the road, between the two sites, but the houses were not contiguous or continuous, there being arable and other fields, and a reservoir, &c., intervening. From 1838 until June 1878 the inhabitants of the town of S. had been in the habit of passing through the gate without paying toll, and on the appellant, an inhabitant of the town, driving through the gate in Aug. 1878, toll was demanded from him by the respondents, the toll collectors, and was paid under protest by the appellant, who subsequently laid a complaint before the magistrates against the respondents for unlawfully demanding and taking toll from him as an inhabitant of the town of S.

The magistrates, after hearing the evidence on both sides and personally inspecting the locus in quo, found, as a fact, that "there was not any collection of houses at the said toll gate, nor a continuous series of houses from the old to the present site of the gate, and that the gate did not, at the time of its erection or of the complaint, stand within the town of S.," and they accordingly dismissed the complaint; and on appeal therefrom it was

Held, by the Exchequer Division (Kelly, C.B. and Hawkins, J.), dismissing the appeal, that the question, whether within a town or not within a town was a question of fact for the determination of the magistrates, and that the magistrates having found that the gate was not within the town, the court were not at liberty to go behind that finding, but must treat it as a question of fact on which the magistrates had jurisdiction to determine, and had determined, for themselves. But the Court also expressed their opinion that, having regard to the facts of the case, the finding of the magistrates was right in point of fact.

Held, also, that the omission of the trustees to demand toll for a period of forty years established no right in the public to exemption, which nothing but an Act of Parliament could create or sanction; nor had the trustees any right or power to exempt any person, or class of persons, from payment of the toll except those expressly exempted by the Act.

(a) Reported by HENRY LEWIS, Esq., Barrister-at-Law.

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Per Hawkins, J.: Had the effect of the building operations been such as to bring the toll gate within the "town," though it was not so in 1838, the appellant, as an inhabitant of the "town," would have been entitled to exemption from toll, on the ground that at the time the exemption was claimed, the gate was within the "town," though it was not at the time of its removal. In my opinion a "town" grows with the buildings, and wherever it can be said that the latter have advanced to such an extent as that that which was formerly without is now within the "town," the exemption will apply to such newly added part of the "town." The definition of a "town," given by Russell Gurney, Q.C., Recorder of London, in *Reg. v. Cottle* (16 Q. B. 412; 20 L. J. 162, M. O.), and by Alderson and Parke, B.B., in *Elliott v. The South Devon Railway Company* (2 Ex. 725; 17 L. J. 262, Ex.) approved and acted upon.

CASE stated by magistrates for the opinion of the court, at the request of the appellant, on an appeal by him from their decision dismissing his complaint against the respondents for having unlawfully demanded and taken toll from him at a certain turnpike gate under the circumstances set forth at length in the case, of which the following is a statement of so much as is material for the purpose of this report.

The appellant was an inhabitant of the town of Sutton, in the county of Surrey, and the respondents were the collectors of the tolls at a turnpike gate in the parish of Sutton, called the Sutton Lane-gate, on the turnpike road leading from Sutton to Reigate. The complaint against the respondents before the magistrates arose under a Turnpike Act (55 Geo. 3, c. xlviii.), "for repairing the road from Sutton, in the county of Surrey, through the borough of Reigate by Sidlow Mill to Povey Cross, and several other roads therein mentioned in the same county," whereby it was enacted in sect. 32 of the same Act, amongst other things, as follows:

Provided also, that no toll shall be demanded or taken by virtue of this Act of or from any of the inhabitants of the town of Sutton at any toll gate or toll bar to be erected in the said town, or for any horses, cattle, or carriages belonging to such inhabitants passing through the same.

The toll gate in question formerly stood close to a tavern, called the Cock Inn, in the High-street of the town of Sutton. But about forty years ago, namely, some time in the year 1838, the trustees of the said turnpike road, under and by virtue of the powers vested in them by the said Act of Parliament, removed the said toll gate from its then position, which was admittedly within the town of Sutton, to its present site, where it has ever since stood and now stands in Sutton-lane within the parish of Sutton, a distance of about 1200 yards, or rather more than five-eighths of a mile in a southwardly direction from the Cock Inn aforesaid.

At the time of such removal there was not any house between the Cock Inn and the present position of the toll gate in Sutton-lane, but since the said removal, and within the last few years, some thirty-seven detached or semi-detached houses have been erected on the west side of the road, but they are not contiguous or continuous, there being a reservoir with a frontage of 92 feet to the said road, and a large arable field intervening in which there are no houses, and which has a

frontage to the turnpike-road of rather more than one-eighth of a mile, and which field is in the market for building purposes; and on the east side of the said road from the said Cook Inn to where the gate now stands in Sutton-lane there are seventeen villas or detached houses, the railway station, and an iron church, but they are not contiguous or continuous, there being on the same side also a field of about six acres, another field of about twenty acres, both having a frontage to the said road, a third field (arable) having a frontage of 107 feet to the said road, and a meadow having a frontage of nearly one-eighth of a mile to the said road, lying between the Cook Inn and the said toll gate.

On the west side of the said road, beyond the said toll gate, there is a row of eleven houses in the parish of Sutton, beyond which the land is all farming land, and on the line of the said road there are new roads being formed on which are already built, or in course of building, nineteen houses in the aggregate. A farmhouse building and premises of a Mr. Burton are near to the said toll gate, on the east side of the said road, but immediately at the rear of and surrounding the said farmhouse and buildings there is nothing but agricultural land, and in fact the said toll gate is surrounded by such land on its north, south, and east sides. The average rental of the houses along the line of the said road from the Cook Inn to the Sutton-lane gate is 70*l.* per annum, and the houses in such line of road are rated at over 3000*l.* Some sixty or seventy years ago the rateable value of Sutton was 5000*l.*, and the population about 800; and while twenty years ago the whole rateable value of Sutton was 8800*l.*, it has now a rateable value of 43,000*l.*, the total rateable value of property on the south side of the Cook Inn alone being upwards of 8650*l.*

In the preamble to the said Act, and in the several sections therein up to and inclusive of sect. 4, the words "Sutton" and "Sutton aforesaid" only are used, without distinguishing the place called "Sutton" from the "town of Sutton;" and in sect. 5 the "town of Sutton" is first mentioned in the words there, "leading from the 12th milestone in the town of Sutton;" and when Sutton is afterwards referred to in the same section it is mentioned as "Sutton aforesaid," and in various other sections, up to sect. 32, the word "Sutton" only is used; and in the before-mentioned proviso in sect. 32 the words "town of Sutton" and "the said town" are again and for the only other times made use of; in all other instances throughout the Act where Sutton is mentioned therein it is referred to as "Sutton" only or "Sutton aforesaid."

Until the month of June 1878 the inhabitants of the said "town of Sutton" had been in the habit of passing and repassing through the said toll gate at Sutton-lane aforesaid without paying toll; and on the appellant driving through the said gate on the occasion in question, the 14th Aug. 1878, toll was demanded from him by the respondent Ann Goldsmith, the wife of the toll collector at the said gate, when the appellant, having first claimed exemption from toll as an inhabitant of the town of Sutton, paid the toll under protest.

On the hearing of the complaint before the justices, it was contended, on the part of the appellant that the "town of Sutton" extended to and beyond the site of the present toll gate in the

town by reason of there being houses on both sides of the road, and on adjacent roads, so situated as to constitute a town, and to be part of the "town of Sutton;" and that the present site of the gate was within the "town of Sutton," within the meaning of the exempting proviso in sect. 32 of the said Act; and that the removal of the said toll gate to its present position by the trustees some forty years ago was subject to the rights, remedies, and restrictions imposed by the said statute, and that the removal of the gate from its former site to its present site did not confer upon the trustees the right to impose a toll on the inhabitants of Sutton.

On the part of the respondents it was contended that the words "town of Sutton" in sect. 32 were words of restrictive limitation, and that by using them in that section the intention was to restrict the exemption to inhabitants of the town on passing through any toll gate to be erected in the said town. That it was a question of fact, to be determined by the justices, whether or not the said toll gate was within the "town of Sutton;" that it was not within the said town, and accordingly that the inhabitants were not, nor were the appellants, exempted from the payment of tolls.

The justices inspected the position of the Sutton-lane toll gate, and, upon such inspection and the evidence, they found as a fact that there was not any collection of houses at the said toll gate, nor a continuous series of houses from the Cook Inn to the said toll gate, and that the said gate did not at the time it was erected, nor at the time of the said complaint, stand within the "town of Sutton," and they also, upon the construction of the statute, and of the decisions in the cases cited by counsel for the complainant and the solicitors for the defendants, came to the same conclusion, that the Sutton-lane toll gate did not stand within the said "town of Sutton;" and they accordingly dismissed the complaint, with costs against the said complainant, the present appellant, and, upon his application, they stated the present case, in which the questions for the opinion of the court were:

1. Whether, under the circumstances, the removal of the toll gate from the town of Sutton to the present site outside the town, but within the parish of Sutton, conferred a right on the trustees of the road to exact a toll from the inhabitants of the town of Sutton?

2. Whether the words "town of Sutton" are to be held to be co-extensive with the word "Sutton," as used in the said Act, or must be limited to the exemption clause of the said Act?

3. Whether by custom or usage the inhabitants of the town of Sutton are entitled to exemption from tolls at the said toll gate?

If the court should be of opinion that these questions should be answered in the negative, then our said determination is to be enforced; and if in the affirmative, our determination is to be reversed and our decision quashed.

Kydd, for the appellant, contended that the decision of the magistrates was erroneous, and should be reversed. Three times only in the Act was the "town" of Sutton mentioned: viz., in the 5th section, where the words, "twelfth milestone in the town of Sutton" were, it is submitted, descriptive only, and not words of limitation; and immediately afterwards, in the same section, the place "Sutton" was mentioned as "Sutton aforesaid;" and in all the subsequent sections of

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the Act, where the place was mentioned or referred to, it was mentioned as "Sutton" only, or "Sutton aforesaid," except in the exempting proviso in sect. 32, on which the question here turned, where the word "town" was again twice used. [HAWKINS, J.—Do you say that the justices as a matter of fact ought to have found that this spot where the gate now stands was town?] The justices have misapprehended the cases cited before them, and the construction of the Act of Parliament, and the proper legal definition of the word "town;" and it is a question for the consideration of the court on the facts as found. The justices, having an anterior or foregone impression in their minds, inspected the *locus in quo*, and under that impression, and not from any *a posteriori* reasoning, said, "This is not a town." They have gone wrong in point of law in attempting to define a town as "a continuous series of houses" merely. There is no such thing as a "continuous series of houses" without qualification contemplated by the cases which were cited before the justices, and on which the latter appear to have based their decision. It is the continuous growth of the town, and the gradual extension and expansion of its limits, that is to be looked at, as in *Reg. v. Cottle* (16 Q. B. 412, 20 L. J. 162, M. C.); where the late Recorder of London, Mr. Russell Gurney, having directed the jury "to consider whether the gate in question in that case was situated within the town of Taunton, and told them that the word 'town' was to be taken in its popular sense of a collection of houses, where people congregate, and that they were to consider whether the spot in question was so surrounded by houses that the inhabitants might fairly be said to dwell together, and that the fact of the houses being separated by gardens would not prevent them from being said to lie together," that direction and definition were approved of by Lord Campbell, C.J. and the rest of the Court of Queen's Bench. Subsequently, also, in the House of Lords, in the case of *The London and South-Western Railway Company v. Blackmore* (22 L. T. Rep. N. S. 504; 39 L. J. 713, Ch.; L. Rep. 4 E. & I. App. 601), the Lord Chancellor, Lord Hatherley, referred to that definition approvingly, and said: "It amounts to this, that where there is such an amount of continuous occupancy of the ground by houses that the inhabitants may be said to be living, as it were, in the same town or place continuously, there, for the purposes of the Railway Acts, and according to the popular sense of the word (not the legal sense, which would not give at all a sensible definition), the place may be said to be a town." In *The Commissioners of Milton v. The Faversham District Highway Board* (10 B. & S., p. 548, n.), the court intimated its opinion to the justices, in accordance with *Reg. v. Cottle*, that "the proper definition of the word 'town' was a continuous series of houses not necessarily contiguous, but sufficiently so to form a congregation of human habitations." The description of the locality in the present case shows it to be clearly "town" within the definitions of that word in the above-named cases. Again, the rule of construction of an Act of Parliament like the present one is thus laid down by Bailey, J. in *Waterhouse v. Keen* (4 B. & C. 425): "Acts of Parliament such as those now in question" (a Turnpike Act) "must be construed with reference to the particular language

in which they are expressed; but where there is any ambiguity in the language used the construction must be in favour of the public, because it is a general rule that where the public are charged with a burden the intention of the Legislature to impose that burden must be explicitly and distinctly shown." So also in *The Leeds and Liverpool Canal Company v. Hustler* (1 B. & C. 425), the same learned judge says, with reference to a question of toll under a Canal Act: "Those who seek to impose a burden upon the public should take care that their claim rests upon plain and unambiguous language." And in *Bussey v. Storey* (4 B. & Ad. 98; 2 L. J. N. S. 166, K. B.) Parke, B., delivering the judgment of the Court of King's Bench, on a question arising under a Turnpike Act, says: "But as this statute does impose a tax, the usual rule of construction must be applied to it which is adopted in similar cases, and the subject must not be charged unless the intention to charge clearly and distinctly appears." The same doctrine, that there must be no ambiguity in order to make the subject liable to a tax or burden, is laid down in *Dwarris on Statutes*, 2nd edit., p. 646, and 2 Chitty on Statutes (2nd edit. 1851, p. 531, note b., Highway and Turnpike). The appellant here, therefore, is entitled, it is contended, to exemption if there be any doubt whether this gate be within the town of Sutton or not. But further, for forty years, from 1838 to the summer of last year, no toll was ever demanded at this gate. The trustees, therefore, having stood by and permitted the public to use this gate toll free for so long a period of time, and having thereby caused to grow up in the public mind an idea that they intended to let these inhabitants pass toll free, cannot now impose a toll upon them:

The Surrey Canal Company v. Hall, 1 Scott N. E. 284; 9 L. J. N. S. 329, C. P.
Hill v. Smith, 10 East, 475.

At all events, the trustees not having been reasonably vigilant and diligent, the equitable doctrine of acquiescence will apply as against them.

Fitzgerald (with him was Grantham, Q.C.), for the respondents, *contra*, supported the decision of the justices. — The only real question here is, whether or not the appellant is within the exempting proviso in sect. 32 of the Act? To bring himself there he must show that the *locus in quo* is within the town of Sutton, using the word "town" in the popular sense of the term, and that he has not done, and cannot, it is submitted, properly do, having regard to the various authorities on the question. In addition to those which have been cited for the appellants it may be added that, in *Elliott v. The South Devon Railway Company* (2 Ex. 725; 17 L. J. 262, Ex.), Alderson, B. defines a town as follows: "It is where a great body of people within a township are congregated together in houses. It means land continuously built upon. There can be no doubt that the green of Grosvenor-square is in 'town.'" So a railway passing through the Temple-gardens would be passing through a "town;" and Parke, B., in the same case, says: "It would appear that the word 'town' is not to be understood in its strict legal interpretation as a township having a church or a constable, but a place containing a number of houses congregated together, an inhabited spot where the occupation is continuous." In *The Commissioners of Milton v. The Faversham Highway Board*, cited on the

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other side, and which is reported more fully in 81 Justice of the Peace, p. 341, Cockburn, C.J., says: "All that the court can do is to lay down the rule or principle founded upon the definition already laid down, that is, that the houses must be part of a series of houses sufficiently contiguous to form part of the town. The application of this rule raises a question of fact far better determined upon the view by the magistrates than it possibly can be by this court upon any statement." Now here the justices have found as a fact, after hearing both sides and a personal inspection of the spot, that this gate is not within the town, and the court will not interfere with their finding on a matter of fact within their jurisdiction. [He was stopped.]

KELLY, C.B.—The question here depends entirely upon the construction of the proviso at the end of the 32nd section of the Turnpike Act (55 Geo. 3, c. xlvi.), and its application to the unquestioned facts of the case. It appears from the case that a turnpike gate formerly stood within the town of Sutton, and close to a very old and celebrated inn in that town called the "Cock," and that, some forty years ago, namely, in the year 1838, the trustees of the Sutton turnpike road, under the powers vested in them by the last-mentioned Act of Parliament, removed that turnpike gate from its then site close to the "Cock" inn, within the town, to its present position in Sutton-lane, within the parish of Sutton, and about 1200 yards, or five-eighths of a mile in a southerly direction from its original position; and the question is whether, under the proviso in the Act to which I have already referred, the inhabitants of the town of Sutton, who were undoubtedly exempted by that proviso from the payment of toll at the gate in its former position, are also exempted from the payment of toll at the gate in its present position? Now the words of the exempting clause of the Act are, that "no toll shall be demanded or taken by virtue of this Act, of or from any inhabitant of the town of Sutton, at any toll gate or toll bar to be erected in the said town. The question, therefore, is whether this new toll gate, erected in 1838, was at the time of its erection, or has since become, and now is, within "the town of Sutton." To arrive at a decision in this matter, we must look, not only to the position of the gate, but to the statements and findings in the case. The gate was, it appears, upon a spot marked upon the Ordnance map as "Banstead Downs," on the high road from Sutton to Reigate and more distant places, within which district roads were to be made or to be preserved, and turnpike gates to be erected under the Act at one place and another, according to the judgment of the trustees. The case finds that in 1838 there were not any houses between the Cock inn and the said toll gate in Sutton-lane; that is to say, there was not a single house to be found on either side of the road for a distance of 1200 yards from the site of the old gate in the town to that of the new gate in Sutton-lane, the town being 1200 yards to the north of the new gate. Further the case finds—[His Lordship here read from the case the description of the locality and the erection of new houses there since the removal of the gate in 1838 up to the present time, and then proceeded as follows:] Now, looking at the definition of a "town" in the various cases that have been cited, I think as the

result of the whole it may be said that to constitute a "town" there must be a continuity, though not necessarily an absolute contiguity of buildings; that is to say, a spot to be said to be within a town must, in the language of Alderson, B. in *Elliott v. The South Devon Railway Company*, be "where a great body of people are congregated together in houses;" or, as Parke, B. said, in the same case, "a place containing a number of houses congregated together, an inhabited spot where the occupation is continuous." Those expressions correspond with the definition of a "town" given by the late Mr. Russell Gurney, the Recorder of London, in the case of *Beg. v. Ootile*, which was quoted with approbation by Lord Hatherley as Lord Chancellor in the House of Lords, in the case of *The London and South-Western Railway Company v. Blackmore*, in terms which have already been referred to; and surely no one who had to determine the question in this case could say that the description, given in the case of the locality in which this gate is situated, comes at all within either of the definitions of a town as given by either of these learned judges in either of the before-mentioned cases. Clearly this gate is not surrounded by a congregation of houses, nor in point of fact is it surrounded by houses at all; but there are merely here and there a few detached or semi-detached villas throughout a distance of some 1200 yards, with fields of many acres and a reservoir and so forth intervening. I am therefore of opinion that this toll gate was not at the time of its erection at its present site forty years ago, and is not now, within the town of Sutton, and that consequently the respondents are entitled to the judgment of the court. Independently, however, of any conclusion at which we have arrived on this point, I think the cases which have been cited go to show that the question whether a particular spot is within a town or not within a town, is a question of fact to be determined by a jury under the superintendence and with the assistance of a judge, where the case comes before a judge and jury, or by the magistrates where the case comes before them as this case did; and therefore, looking at the terms of this case, and finding that the magistrates, who were a tribunal of judge and jury together, have treated the matter as a question of fact for their consideration, and have found in clear and precise terms that this gate is not within the town of Sutton, I do not think we are at liberty to go further, but that we must treat it as a question of fact, upon which the magistrates had jurisdiction to determine and have determined for themselves. But it has been very acutely and ably argued by Mr. Kyld for the appellant, that there has been a user of this gate, toll free, by the inhabitants for forty years, and so they had acquired a right of exemption from the toll. No length of user, however, even if it were fully and satisfactorily established, can establish a right in any person or class of persons to exemption from tolls unless it be created or sanctioned by Act of Parliament. A duty is imposed by their Act of Parliament upon the trustees to levy the toll on all who pass through the toll gate, and they have no right or power, by negligence or carelessness, or it might be by favour, to exempt any person or class of persons from payment of it, or to grant to any person or any class of persons leave to pass

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through the gate gratuitously, and therefore their having permitted certain persons to pass through the toll gate without paying toll, even if it were altogether unexplainable, would create no right of exemption known to the law; and it is therefore really an immaterial fact in the case. Under these circumstances, therefore, upon all grounds, and upon all the questions which arise in the case, I am of opinion that the respondents are entitled to the judgment of the court.

HAWKINS, J.—I am of the same opinion. By their Act, which was passed in the year 1815, and under which they claim the right to take these tolls, the trustees were at liberty to take the tolls at the toll houses and toll bars duly erected, and they were authorised by another section of the Act to transfer the toll bars then erected to other parts of the road. The toll bar in question, it is admitted, stood in 1815 within the town of Sutton; it is admitted also, and so found in the case, that in the year 1838 the toll bar, which up to that time had stood within the town of Sutton, was transferred to a spot some distance from it, and re-erected at a place without the town of Sutton. Now the appellant is an inhabitant of the town of Sutton, and he claims an exemption from this toll by virtue of a proviso to be found at the end of the 32nd section of the Act. So far as it is necessary to state them here, the words of that proviso are these, "Provided also that no toll shall be demanded or taken by virtue of this Act of or from any inhabitant of the town of Sutton, at any toll gate or toll bar to be erected in the town of Sutton, or for any horses, cattle, or carriages belonging to such inhabitants passing through the same." I have said it is found by the magistrates, and it is not disputed, that at the time this toll bar was removed in 1838 it was removed to a spot, which was then, at all events, without the town of Sutton. The case sets forth the fact, which is beyond all dispute, that since 1838, and chiefly within the last few years, there has been a great deal of building in the neighbourhood between the spot where the old toll bar stood and the place where it was erected in 1838. If the effect of those building operations had been such as to bring the toll bar within the town of Sutton, though it was not so in 1838, I should have been of opinion that the appellant, being an inhabitant of the town of Sutton, was entitled to exemption from the toll, on the ground that at the time the exemption was claimed the toll gate was within the town, although it was not within the town at the time of its removal. In my opinion a town grows with the buildings, and wherever it can be said that the buildings have advanced to such an extent that that which was formerly without the town is now within it, the exemption will apply to that part of the town so newly added. Then comes the question, yes or no, has this toll bar, which avowedly was without the town of Sutton in its new position in 1838, been since brought within the town so as to give exemption to those who claimed it as inhabitants of that town? Now this question is, in my judgment, purely one of fact for the tribunal before whom it is tried. If it had arisen before a judge and jury it would have been a question for the jury to determine under the direction of the judge who tried the case; if the question arises before magistrates, they have to

apply the law which is presented to them, or as it exists, to the facts, and they have to determine whether, as a matter of fact, the place is or is not within the town. That was expressly decided by the Court of Queen's Bench in the case of *Reg. v. Cottle*. Lord Campbell, C.J., in delivering judgment in that case, says: "We are therefore of opinion that the learned judge was bound to leave the question to the jury whether, when the indictment was found, the gate stood across a road which was to be considered as at that time in the town of Taunton." There are one or two cases in which definitions are given of what is considered to be a town. One case is that of *Reg. v. Cottle*, to which reference has already been made, which was tried before the late Recorder of the City of London at the Somersetshire assizes, in which the question was whether the *locus in quo* was within the town of Taunton or not, and the learned judge left that question to the jury as one of fact, telling them that the word "town" in the Act was to be understood in the popular sense of "a collection of houses where people congregate," and that they were to consider whether the spot in question was "surrounded by houses so reasonably near to each other that the inhabitants might fairly be said to dwell together." In my judgment that was a very concise way of stating what constitutes a town. In the case of *Elliott v. The South Devon Railway Company*, Alderson, B. gave what in substance was his definition of a town as follows: "What the walls of towns were in ancient times, that is, a boundary, continuous buildings are now. By continuous buildings I do not mean buildings which touch each other, but buildings so reasonably near that the inhabitants may be considered as dwelling together. Within the ambit surrounded by such houses is town, and when the railway passes through that ambit it passes through town." That is the definition given by Alderson, B. Lord Campbell, C.J., in his judgment in the case of *Reg. v. Cottle*, approved very much of Mr. Russell Gurney's definition, and at p. 420 of 16 Q. B. said: "We think there is no misdirection in this case. The learned judge, with much felicity, comprised in a few words all that was material in the language of the Barons of the Exchequer as to the definition of a town in *Elliott v. The South Devon Railway Company*;" and he added that, "the jury could not be misled" by that definition. I think I need not say more on that subject, except that I entirely concur in the view expressed by Mr. Russell Gurney, and think that his was the true definition. I do not think it is necessary, in order to make a man an inhabitant of a town, that the house in which he resides should be surrounded by other houses; it is quite sufficient if he lives in such proximity to other houses as that his house, with the other houses in its proximity, may be said to form, in point of fact, one congregation of houses. That must be of necessity a question of fact, and it cannot be, as far as I can see, a question of law. In this case the magistrates have found that this turnpike gate, notwithstanding its proximity to a great many houses at the time this toll was demanded, was not within the town, and with that finding, as a matter of fact, I do not think we are at liberty to interfere. The exemption being claimed, and only being

claimed, by the appellant as an "inhabitant of the town" by reason of the turnpike gate being also "within the town," the moment it is found and established that the turnpike gate is without the town, the statutory exemption fails, and the appellant is liable to pay the toll, unless he can rest his exemption upon some other ground. Now, I looked with some anxiety to see whether Mr. Kydd would point out any ground upon which he could rest the exemption, because it undoubtedly seems at first sight a little hard that a man who has not for forty years paid any toll should suddenly be called upon to pay it; but I find that the Act of Parliament, in unmistakeable language, imposes the toll upon him unless he can make out not only that he is an inhabitant of the town, but also that the turnpike gate is situate within the town. The claim of exemption fails him altogether. Then Mr. Kydd says that there has been long neglect on the part of those who had the right to take the toll, in collecting it and enforcing payment of it against the inhabitants. I am at a loss to see that that affords any reason why, when the toll is demanded, it should not be paid. There is no Act of Parliament which extends the exemption, or rather, which, to my mind, in the least degree assists the appellant in his contention that he is exempt from the toll. I find no other circumstances which, by the greatest ingenuity of construction, can justify the appellant in refusing to pay the toll. It may be a hardship upon him, but there is the Act of Parliament which imposes the toll, and unless the exemption is conferred upon him by another Act of Parliament, I think he must pay it; that is to say, he cannot resist the collection of it by those who are placed in authority to collect it. As regards the other points which are set out in the case, I do not really think there is anything that calls for observation. "The town of Sutton" I agree is not co-extensive with the word "Sutton;" and then as to the question of whether, by custom or usage, the inhabitants are entitled to exemption, I have already said I cannot see the slightest ground for the claim. I think, therefore, that upon all grounds the decision of the magistrates was right, and that this appeal ought to be dismissed.

Judgment for the respondents; appeal dismissed with costs.

Solicitors for the appellant, *Kays and Jones.*

Solicitor for the respondents, *J. M. Head.*

CHANCERY DIVISION.

March 17, 18, and 19, 1879.

(Before *Fry, J.*)

KNIGHT v. PURSELL. (a)

Injunction—Party wall—Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), ss. 3 and 88.

On one side of and against a wall within the boundary of his land, the plaintiff had constructed certain closets. On the other side of and against the same wall, the defendant, whose land adjoined that of the plaintiff, had constructed a shed.

Held, that the wall was a party wall within the Metropolitan Building Act 1855, so far as the structures of the plaintiff and defendant were co-terminous.

(a) Reported by *FRANK EVANS, Esq., Barrister-at-Law.*

THE plaintiff commenced an action against the defendant, claiming an injunction to restrain him from pulling down or building upon or otherwise interfering with a wall belonging to the plaintiff and situate at the back of his leasehold messuages Nos. 6 and 7, Surrey-row, Blackfriars-road, in the county of Surrey, and for a mandatory injunction to compel the defendant to pull down the building already erected by him upon the plaintiff's said wall, and to restore the same wall to its former condition.

The action was tried without a jury, and it appeared in evidence that in 1877 a fire occurred on the premises of the defendant's lessor, and that on the 30th Oct. in that year, the defendant, who was the owner of the premises at No. 172, Blackfriars-road, south of the plaintiff's land, sent to the plaintiff the following notice:

I hereby give you notice, as required by the Metropolitan Buildings Act (18 & 19 Vict. c. 122), that is intended to take down such portions of the party walls or all of the same as may be necessary, which divide your premises from the above, and to rebuild the same according to the provisions of the Metropolitan Buildings Act, such said walls now being in a dangerous condition.

The other facts are sufficiently stated in the judgment of his Lordship.

The question was, whether the wall in question was or was not a party wall within the meaning of the statute.

North, Q.C. and *E. T. Holland*, for the plaintiff, argued that the wall was not a party wall, and cited

Metropolitan Buildings Act 1855, ss. 3, 82, 83, 85;
Matts v. Hawkins, 5 Taunt. 20;
Cubitt v. Porter, 8 B. & C. 257;
Standard Bank of Africa v. Stokes, 38 L. T. Rep. N. S. 672; *L. Rep. 9 Ch. Div. 68.*

Fischer, Q.C. and *Maidlow*, for the defendant, contended that user had made the wall a party wall, and cited

Stephens v. Gourley, 1 L. T. Rep. N. S. 33; 7 C. B. N. S. 99;
Weston v. Arnold, L. Rep. 8 Ch. App. 1084;
Angus v. Dalton, 38 L. T. Rep. N. S. 510; *L. Rep. 3 Q. B. Div. 85;*
Sheffield Industrial Society v. Jarvis, W. N. 1871, p. 208; *W. N. 1872, p. 47.*

North, Q.C., in reply, cited

Pattison v. Gifford, L. Rep. 18 Eq. 259.

Fry, J.—The only question which I have to determine is as to the wall. The wall runs east and west at the back of the plaintiff's land. This plot of land was demised to the predecessor in title of the plaintiff. The predecessor left a yard behind his buildings, and at the back of the yard he built a wall well within his own boundary. This wall, no doubt, originally belonged to the plaintiff. It appears to me to be clear from the evidence that, about Sept. 1849, a Mr. Oakey was in occupation of the defendant's land, and constructed, on his side of the wall, a shed or coke-hole. Towards the north of it was a wooden structure supported by beams and covered with feather-edged boards. The roof was a lean-to against the defendant's house. Mr. Oakey's structure was taken down in 1868, and another similar but higher structure was carried up, consisting of a timber weather boarding and a roof, which was made partly of tiles and partly of skylights. In 1877 a fire occurred on the property of

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the lessor of the defendant. The question which arises is this, Had that wall become a party wall within the provisions of the Metropolitan Buildings Act? By the 3rd section of that Act it is provided that the "party wall" shall apply to every wall used or built in order to be used as a separation of any building "from any other building, with a view to the same being occupied by different persons." Upon that clause several questions arise. The object of the Act is to define the wall as a party wall with reference to its user, and not with reference to the rights of ownership possessed by the proprietors of the adjoining land. It is the object of the Act to limit the rights of private owners for the public good, and the physical condition, position, and user of the wall, not the rights of owners, must be considered. The first question is whether that wall was used as "a separation of any building from any other building." I think it was so used as between the defendant's shed and the plaintiff's closets, which were buildings. These structures were built with the intention that they should be used. Mr. North argued that, because the plaintiff had no view that the buildings on each side should be occupied by different persons, the wall was not a party wall within the meaning of the Act; but I think the words mean that the users of the wall on each side have a "view to occupy it" differently. Mr. North also contended that the construction which I have adopted takes away the control of the wall from the owner of it; but the control of property is often taken away from the owner by Acts of Parliament for public purposes. I consider that this wall is a party wall; and the second question which arises is as to the extent to which the wall has become a party wall. The case of *Weston v. Arnold* is a distinct authority that a wall may be a party wall for some part only, and cease to be a party wall when the buildings on each side cease to be co-terminous; and I hold this wall to be laterally a party wall to the extent of the two closets only. The third question is, was there anything in the nature of an easement for the support of the buildings of the defendant? Mr. Oakley's building did rest on the wall, and that was so in the building of 1868, which was supported on half of the wall. But it appears that the building which was there at the time of the fire was preceded by a building of Mr. Oakley in 1849, and he has said that that building rested on supports put in the ground, and I believe that statement, as it is supported by other evidence. The conclusion is, that Mr. Oakley is correct as to the earlier building, and Mr. Davis (another witness) is correct as to the later building, which differed in being higher and resting on the wall. I cannot, from the nature of the structure, infer the existence of acquiescence on the part of the plaintiff. The defendant has failed altogether except as to his contention with regard to the part of the wall behind the plaintiff's closets being a party wall. I think that the defendant has interfered with the right of the plaintiff, who is bound to deliver up his land to his landlord at the end of the term in the same condition as when it was originally demised. The injunction must therefore go as to that part of the wall which is behind the plaintiff's closets until the defendant shall have complied with the provisions of the Metropolitan Buildings Act as to dealing with party walls. As to the remainder of the

wall, there must be an injunction restraining the interference of the defendant.

Solicitors: *Withall and Compton; F. W. Mount.*

CROWN CASES RESERVED.

Saturday, March 22, 1879.

(Before Lord COLERIDGE, C.J., LUSH, J., POLLOCK, B., and HUDDLESTON, B., and FITZJAMES STEPHEN, J.)

REG. v. HERMANN. (a)

Coining—Uttering false and counterfeit coin—Sovereign reduced in weight by filing off the milling—Making a new milling—24 & 25 Vict. c. 99, s. 9.

The prisoner was convicted of uttering two false and counterfeit sovereigns, with guilty knowledge. The two sovereigns were originally genuine, but had been reduced in weight by filing off nearly all the original milling. New millings were then made to them fraudulently, so as to make them resemble genuine sovereigns.

Held, that the two sovereigns when passed in that state were false and counterfeit coins, within sect. 9 of 24 & 25 Vict. c. 99, per Lord Coleridge, C.J., Pollock and Huddleston, BB. (Lush and Fitzjames Stephen, JJ., dissenting).

CASE reserved for the opinion of this Court by the Recorder of Liverpool.

The prisoner, Robert Hermann, was convicted before me at a sessions held on the 7th Jan. 1879, on an indictment under sect. 9 of the Act 24 & 25 Vict. c. 99—"An Act to consolidate and amend the Statute Law of the United Kingdom against offences relating to the Coin," for uttering and putting off two false and counterfeit sovereigns, knowing them to be false and counterfeit.

The evidence of uttering, and of guilty knowledge, was complete; but I desire to submit to the Court the question whether the coins which were uttered could properly be held to be false and counterfeit coins within the meaning of the statute in question.

They were, or had been, real sovereigns, coined at the Mint.

They were both of Her Majesty's reign—one dated 1872, and the other 1875.

They had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part. The effect of the filing was to remove the milling entirely, or almost entirely.

In order to restore the appearance of the coins, a new milling had been made on each coin with tools.

It appeared to me that this was a counterfeit milling, and that a coin upon which any part of the impression was counterfeit, was a counterfeit coin.

The jury convicted the prisoner.

I remanded the prisoner to Her Majesty's gaol at Walton, near Liverpool, without sentencing him until this case shall have been decided.

It may be desirable to add that the prisoner had first been tried under the 4th section of the same Act, and acquitted for want of evidence that the act of lightening or diminishing had been done by himself.

(Signed), JOHN B. ASPINALL,
Recorder of Liverpool.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

No counsel appeared for the prisoner.

Eyre Lloyd for the prosecution.—The prisoner was guilty of uttering or putting off false and counterfeit coins, resembling, or apparently intended to resemble the Queen's current gold coin, within sect. 9 of the 24 & 25 Vict. c. 99. If it is a question of fact for the jury whether the coin uttered by the prisoner was counterfeit, the case is concluded by the verdict of guilty. But if it is a matter of law, it is contended that the filing off the original millings of the sovereigns, and the making of the new milling with the intention that they should pass for genuine sovereigns makes them counterfeit coins within the Act. The intent in making of the new milling was that they might imitate genuine sovereigns. [HUDDLESTON, B.—Your difficulty arises on the meaning of the words, "false or counterfeit coin" in the interpretation clause, sect. 1.] If there had not been a new milling put on, there would have been greater difficulty in contending that the coins became counterfeit, but the new milling was an act of imitation, and gave them a spurious character [POLLOCK, B.—In construing the words, "resemble, or apparently intended to resemble," does it matter that the coin was once a genuine one?] No. By removing the original milling, the sovereign lost one of its essential attributes—weight; and if of less than the authorised weight it ceases to be a legal tender, and any person may cut, break, or deface it if tendered to him in payment, and the person tendering shall bear the loss (33 Vict. c. 10, s. 7). [Lord COLERIDGE, C.J.—What does "counterfeit" mean?] A thing made in imitation of another, and intended to pass for the original.

The Judges differing in opinion, the junior judge first delivered his judgment.

FITZJAMES STEPHEN, J.—I am unable to arrive at the conclusion that there was in this case the uttering of a counterfeit coin within the meaning of the Act. The interpretation clause, sect. 1, enacts that "the Queen's current coin shall include any coin coined in any of Her Majesty's mints, or lawfully current by virtue of any proclamation, &c." Now this piece of coin was certainly a gold coin coined in one of Her Majesty's mints, and not a thing made to imitate such a coin. Therefore, it seems to me that we start with this fact that it was a genuine coin; and then the next thing that appears is that it had been lightened in weight by filing off the edges, and so removing the milling, which constitutes an offence under another section (sect. 4) of the Act. And sect. 5 makes it an offence for anyone to have in his possession any filings or clippings of any gold or silver bullion, &c., which shall have been produced or obtained by impairing, diminishing, or lightening any of the Queen's current gold or silver coin. But I do not find any provision in the Act which seems to me to make a genuine coin which has been fraudulently lightened become a counterfeit coin, or to make a person who passes such a coin guilty of the offence of passing a counterfeit coin. If a man had passed a coin, knowing that it had been fraudulently lightened, he would not have committed the offence of passing a counterfeit coin. Then, would a person by putting on a fresh milling to conceal the fact that it had been so lightened, and to pretend that the coin was of full weight, be guilty of passing a

counterfeit coin? The whole question is, does it thereby become a counterfeit coin within the meaning of the Act? I think that it does not. It seems to me that this was a genuine coin fraudulently lightened in such a manner as to conceal the fact that it had been fraudulently lightened, and that it was not a counterfeit coin within the meaning of the Act. It is very difficult to describe the statutory meaning of a "counterfeit coin."

HUDDLESTON, B.—I think that this conviction ought to be supported. The conviction was under the 24 & 25 Vict. c. 99, s. 9, which makes it a misdemeanour to put off any false or counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit. What the prisoner has been found guilty of is putting off a false and counterfeit coin resembling, or apparently intended to resemble, a sovereign. The evidence was that almost the whole of the milling had been fraudulently removed from a gold coin, and when the milling had been removed that was a coin which no one was bound to take, and in my opinion it then was no longer the Queen's current gold coin. And then in order to make that coin pass for a current coin another milling was put on, so as to make it apparently resemble the Queen's current gold coin. That was an act done to make it resemble, or apparently to resemble, the Queen's current coin, and so it was a counterfeit.

POLLOCK, B.—I think that the prisoner was properly convicted. In dealing with the expression false or counterfeit coin in sect. 9, I think the interpretation clause, in clear and affirmative language, so defines it as to include this case. I agree with my brother Huddleston that when the original milling was taken off for the purpose of deteriorating the coin, the coin ceased to be a current coin; and taking that basis as a starting point, it seems to follow that it becomes something else; and then the putting on a new milling so as to make it pass for a genuine sovereign appears to me to make it a counterfeit sovereign. A person having machinery might take off the milling from a great number of sovereigns and make a new milling so as to make them pass for the current gold coin of the realm. I have no doubt that that would be substantially putting off false or counterfeit coin, apparently intended to resemble the Queen's current gold coin, within the spirit and intention of the Act.

LUSH, J.—I cannot agree with the majority of the Court. In my opinion it would be straining the words "false and counterfeit coin" beyond their legitimate meaning to hold that the prisoner was guilty of uttering false and counterfeit coin within sect. 9 of the Act. Had there been nothing more done to the coins than filing off the original milling, and then passing them in that state the prisoner could not have been guilty of uttering false and counterfeit coin, for they would still have been the Queen's current coin, though deficient in weight. The expression, "false and counterfeit coin" involves the idea of spurious imitation, and the interpretation clause defines that "it shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble, or pass for any of the Queen's current

coin of a higher denomination. If a farthing had been gilt over so as to be apparently intended to resemble a sovereign, it would have been counterfeit coin within the meaning of that clause. But I think the word "counterfeit" alone is not sufficient to include the present case. The prisoner was tried and acquitted for the offence under sect. 4, of impairing, diminishing, lightening coin with intent that it might pass for the Queen's current gold coin. Another section (sect. 5) makes it an offence to have possession of any filings or clippings obtained by impairing, or diminishing, or lightening any of the Queen's current gold or silver coin, but there is no section which makes the attempt to pass off clipped or lightened coin an offence where it is intended to pass for coin of the same denomination. I think that the mere cutting off of the original milling and putting on a new milling, as in the present case, is not sufficient to turn the coin into false and counterfeit coin within the meaning of the Act.

LORD COLERIDGE, C.J.—I am clearly of opinion that this case is within the meaning of the Act, and am content to rest my judgment on either of the two views. First, I say that the prisoner was guilty of passing a counterfeit sovereign. What he did was this: he filed off the milling from a genuine sovereign, and that being done, the sovereign, reduced below the proper weight, in my opinion, ceased to be a genuine current sovereign; he then made a new milling to it, and in that state passed it as a genuine sovereign. That, in my judgment, was putting off a counterfeit, resembling, or apparently intended to resemble, a genuine sovereign. That view may be wrong, however, and if so, I will rest my judgment on the ordinary sense of the word "counterfeit;" that is, imitation. By the act of the prisoner in removing the original milling, and making the new milling, the coin, which by the removal of the milling ceased to be a current coin or sovereign, was made by the new milling to resemble and pass for a current sovereign, that is in my view a counterfeit sovereign. The interpretation clause adds strength to this view; it says in plain language that the expression "false and counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble, or pass for any of the Queen's current coin of a higher denomination." That is an inclusive, but by no means an exclusive definition. It is said only to include such cases as where a farthing is gilt or silvered so as to resemble, or be apparently intended to resemble, the Queen's current coin of a higher denomination. It cannot be limited to mean really imitating a sovereign or coin of higher denomination, because the counterfeit in fact does not imitate them; there are differences in the inscriptions, and other parts of the coins. I think the term counterfeit applies where anyone does anything which shall have the effect of making a coin which is no longer a genuine current coin pass for a genuine current coin. On either of the above views I think the conviction may be supported.

Conviction affirmed.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Wednesday, April 2, 1879.

(Before COCKBURN, C.J. and MELLOR, J.)

HINTON (app.) v. SWINDON NEW TOWN LOCAL BOARD (resps.). (a)

Sanitary authority—Expenses of sewerage and levelling street—Owner at time of completion of work—11 & 12 Vict. c. 63, s. 69—21 & 22 Vict. c. 98, s. 2—38 & 39 Vict. c. 55, ss. 150 and 257.

The appellant, in the early part of 1875, was owner of certain premises abutting upon a street which the respondents then gave him, and the other adjoining owners, notice to sewer and level, under sect. 69 of the Public Health Act 1848; this notice not being complied with, the respondents had the works required executed by contract.

In May 1876 the appellant disposed by sale of the whole of his interest in the premises.

In July 1876 the expenses of this work were duly apportioned upon the adjoining owners, and notice of his apportionment was served upon the appellant.

In Dec. 1876 the final balance for the work was paid to the contractor by the respondents.

Held, upon a case stated, that the appellant was not, in these circumstances, the owner in default under sect. 69 of the Public Health Act 1848, or sect. 150 of the Public Health Act 1875, and that the respondents' remedy under these sections, and sect. 62 of the Local Government Act 1858, or sect. 257 of the Public Health Act 1875, was only against the owner of the premises at the time when the work was completed.

THIS was a case stated by the Court of General Quarter Sessions of the peace for the county of Wilts, holden at Warminster on Tuesday, 3rd July 1877, for the purpose of obtaining the determination of the High Court of Justice.

The respondents on the 22nd March 1875, in pursuance of sect. 69 of the Public Health Act 1848, gave notice to the appellant, who was then the owner of certain premises at Swindon, within the district of which the respondents are now the urban sanitary authority, to metal, level, channel, curb, sewer, and light the street adjoining or abutting on the appellant's said premises.

This notice not being complied with, the respondents contracted with a builder to carry out the works required; these works were completed, and the final balance was paid to the contractor on the 8th Dec. 1876.

The respondent's surveyor, under this sect. 69, duly apportioned the estimated expenses, and on the 3rd July 1876 the respondents served upon the appellant and other owners notice of apportionment, the amount apportioned to the appellant being 27l. 19s. 4d.

The appellant gave no notice to dispute this apportionment under sect. 63 of the Local Government Act 1858 (21 & 22 Vict. c. 98).

On the 15th Dec. 1876 the respondents served upon the appellant notice demanding payment of

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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the sum of money so assessed upon him within fourteen days.

On the 29th May 1877 the respondents made complaint by way of summary proceedings for the recovery of this sum of 27*l.* 19*s.* 4*d.*, and on the 7th June 1877 the justices of Wilts made an order for payment of this amount upon the appellant, the order containing the words, "he being such owner of the said premises before and at the time when the said works were completed.

The appellant did not address any memorial to the Local Government Board in respect of these summary proceedings in pursuance of the 268th section of the Public Health Act 1875; but he duly appealed to the quarter sessions of the county against the said order.

At the said quarter sessions it was proved that the appellant ceased to be owner of these premises by the sale of his interest therein, to one Deacon, before the month of May 1876, and therefore about seven months before the completion of the works and the payment to the contractor of the final balance. The quarter sessions accordingly directed the order of the justices to be quashed with costs, on the ground that the appellant was not the owner, under the facts proved, within the terms of the order appealed against.

Judgment was given by the quarter sessions for the appellant, subject to this special case.

By the Public Health Act 1848 (11 & 12 Vict. c. 63), s. 69, it is enacted

That in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case), in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided.

By the Local Government Act 1858 (21 & 22 Vict. c. 98), s. 62:

Where the local board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by the Public Health Act 1848, or any Act incorporated therewith, or this Act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act 1848, and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of five pounds per centum per annum till payment thereof. In all summary proceedings by a local board for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand.

Mellor, Q.C. and P. Goldney for the appellant.—Sect. 69 of the Public Health Act 1848 is in effect repeated in sect. 150 of the Public Health Act 1875, the summary remedy to recover the amount

expended being given in both Acts against "the owners in default." There is no liability until the works are completed and the apportionment demanded; the owner in default must therefore be the owner at the time of the demand. [Stopped by the Court.]

Charles, Q.C. and Ravenhill for the respondents.

—The owner in default, under sect. 69 of the Public Health Act 1848, is the owner at the time of notice by the board requiring the premises to be sewered and levelled; this appears not only from the words of the section, which necessarily imply that the default mentioned is the omission to do the work required, but also from the 62nd section of the Local Government Act 1858, which expressly empowers the board to recover from "the owner of such premises, when the works are completed for which such expenses have been incurred." This provision of the Act of 1858 would be entirely superfluous if the appellant's contention were correct. This section is in effect repeated in sect. 257 of the Public Health Act 1875, which came into effect on the 11th Aug. 1875, and therefore applies to this case; and it seems from this recent Act, which consolidates the previously existing law on the subject, that boards or sanitary authorities have three remedies for the recovery of these expenses—one against the owner of the premises at the time when notice requiring the work to be done is delivered; one against the owner when the works are completed; and the third against the owner or occupier by instalments over any period not more than thirty years, when the board declare the amount to be private improvement expenses. The respondents in this case claim to enforce the first of these remedies, which by the findings of fact is clearly applicable to the appellant. Although there seems to be no authority on the point, a similar cumulative remedy was recognised under the Metropolitan Acts in

Vestry of Bermondsey v. Ramsay, L. Rep. 6 C. P. 247.

Mellor, Q.C. was called upon to continue his argument for the appellant.—There cannot be a default until a payment is due; the owner is not required to comply with the notice to do the work himself; it is a mere condition preliminary to the board's undertaking it.

COCKBURN, C. J.—I think we can reconcile these somewhat conflicting sections with common sense and justice. An owner, after he has given up all interest in the premises, cannot be an owner in default; but the further remedy against the owner in possession on the completion of the works may well apply to those premises which had a different owner at the time of the notice requiring the work to be done, and was no doubt intended to supplement the first remedy. I cannot think it was the intention of the Legislature that when a person ceases to be owner he should be liable for work not then done to the premises. The person liable should be the owner after the completion of the work; and I do not think that two owners of different periods can be both liable in respect of the same premises. What seems to be meant by the provisions of the Acts of 1848 and 1858, which are repeated in sects. 150 and 257 of the Act of 1875, is that the usual case of an owner who does not himself do the work required shall be within sect. 150; but, if that

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owner gives up possession during the time the work is being done by the board, the new owner comes within sect. 257. The two sections can thus, I think, be brought into harmony.

MELLOR, J.—I am of the same opinion.

Judgment for appellant.

Solicitors for appellant, *Clarke, Woodcock, and Ryland*, for *Kenneir and Tombs*, Swindon.

Solicitor for respondents, *W. Moon*.

Tuesday, March 25, 1879.

(Before MELLOR and LUSH, JJ.)

TAYLOR (app.) v. GOODWIN (resp.) (a)

Highway—Furious driving—Bicycle—5 & 6 Will. 4, c. 50, s. 78.

A bicycle is within the meaning of the words "any sort of carriage" in the 78th section of 5 & 6 Will. 4, c. 50.

The appellant was convicted of driving a bicycle furiously on a certain highway so as to endanger the lives and limbs of passengers thereon.

Held (upon appeal) that the conviction was right, as the words "any sort of carriage" were wide enough to include a bicycle, although that machine had not been invented at the time the Act was passed.

THIS was a case stated by justices under 20 & 21 Vict. c. 43.

CASE.

At a petty sessions held at Highgate on the 31st day of July 1878, Charles Ernest Taylor, hereinafter called the appellant, was duly convicted for that he did on the 8th day of July unlawfully and furiously drive a carriage called a bicycle in a highway at Muswell Hill so as to endanger the lives and limbs of passengers thereon, against the form of the statute in that case made and provided, and he was adjudged to forfeit the sum of forty shillings, and seven shillings costs, for the said offence.

The conviction took place under the provisions of the 78th sect. of 5 & 6 Will. 4, c. 50, which, among other things, enacts that "if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously, so as to endanger the life or limb of any passenger, he shall for every such offence forfeit any sum not exceeding five pounds."

In his defence, it was urged on behalf of the appellant that a bicycle was not a "carriage" within the meaning of the Act 5 & 6 Will. 4, c. 50, which was passed before the introduction of bicycles. That this Act only applies to carriages of any kind drawn by horses or other animals, but not to such as are automatic, and that other Acts of Parliament referring to carriages shew that this kind of carriages was not contemplated.

The justices considered that the appellant was driving by propelling a bicycle on a highway at a furious rate, so as to endanger the lives and limbs of passengers thereon.

The question for the decision of the court is whether a bicycle on which a person is seated, and which is driven by his propulsion is a carriage within the meaning of the 78th section of 5 & 6 Will. 4, c. 50, although it is not drawn by any animal, and had not been introduced (in its pre-

sent form, although of a similar description with the ancient "hobby horse") at the time when 5 & 6 Will. 4, c. 50, was passed in 1836.

If the court shall be of opinion that a bicycle is a "carriage," and that the propulsion of it by means of the person seated on and carried by it is a "driving of a carriage" within the meaning of the said 78th section of the above-quoted Act, the conviction is to be enforced; if the court shall otherwise decide, the complaint is to be dismissed.

John Boss (Poyser with him) for the appellant. The question for the opinion of the court is whether the words "drive any carriage" are wide enough to include a bicycle. It is clear that machines of this kind were not known at the time 5 & 6 Will. 4, c. 50, was passed. If a bicycle comes within the terms of the Act, everything that goes on wheels might be included, e.g., a wheelbarrow, roller skates, a perambulator, or even a wheel trundled along the street by a coach-builder. Moreover, appellant was riding the bicycle, and not driving it, and a rider is not liable to summary conviction:

Reg. v. Bacon, 11 Cox Cr. Cas. 540.

Paterson (*amicus curiæ*) referred to

Williams v. Evans, L. Rep. 1 Ex. Div. 277; 35 L. T. Rep. 384.

The distinction between bicycles and ordinary carriages is recognised by the Legislature in 41 & 42 Vict. c. 77, s. 26, where there is a special authority given for "regulating the use of bicycles."

Gorst, Q.C. (*O. Bowen* with him) for the respondent.—The word carriage is not restricted to a thing on wheels—anything that bears or carries a load is a carriage. In "Hamlet" the word is applied to a small strap. Then, again, the word to drive is an old English word, which signifies to make it move; it is not necessarily applied to animals. Thus an engine-driver causes the train to move, and we have the expression to drive a nail. To drive a carriage, therefore, means in its widest sense to propel or cause to move something on which a thing or person is carried, irrespective of the motive power. That is applicable to bicycles, which are clearly, therefore, within the terms of the 78th section of this Act.

MELLOR, J.—The question we have to determine appears to me to be an exceedingly simple one, and one which scarcely requires to be decided by lawyers. We have to interpret the meaning of the section of the Act of Parliament, and it seems to me that the magistrates were right in the construction they put upon it. After going through a number of provisions, the 78th section says: "If any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger life or limb," then he is to be liable to a penalty. Now the words "any sort of carriage" is the largest description of the word carriage that can be given, and I confess that I myself think that although the bicycle was probably unknown at the time of the passing of the Act, yet clearly it was the intention of the Legislature to prohibit riding or driving of any carriage of any description whatever in such a manner as to endanger life. It does not seem necessary even that the carriage should be on wheels, for the words are wide enough to embrace anything that might be drawn along a road in the manner of a sledge; but beyond a doubt the words "any sort of carriage" are large enough to

(a) Reported by A. H. POYSEY, Esq., Barrister-at-Law.

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include the machine which gives a seat to a person riding on it—which goes on wheels, and which the person on it guides and propels, and therefore drives, just in the way that an engine driver guides and drives a train, although the motive power is supplied from a different source. I do not think it is necessary for us to deal with the numerous cases that have been suggested to us as illustrations to show that a machine of this kind is not within the purview of the Act. The word drive has abundant applications to things similar to that with which we are dealing. I therefore am of opinion that the magistrates were right in holding that the rider of this bicycle was liable under the section—whether a bicycle may be said to be ridden or driven, the mischief is the same. I think that the bicycle was a carriage driven, and driven at such a pace as to endanger life, by the person seated upon it, and therefore that it came within the section referred to. The magistrates therefore were right, and the conviction must be affirmed.

LUSH, J.—I am also of opinion that the magistrates were right. The mischief the Act was intended to prevent was furious riding or driving upon highways, and it was immaterial whether that which was ridden or driven was an animal or a vehicle if it was propelled along the highway at a great pace. Although at the time the Act was passed bicycles were not invented, it is quite clear the Legislature intended to include every kind of vehicle which could do the mischief contemplated by the Act. The words are, "That if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously, so as to endanger life or limb, he shall be liable," and those words are large enough, and intentionally large enough, to include every kind of vehicle that could be propelled along a highway. This particular bicycle was going at the rate of fourteen miles an hour, and well might be dangerous to the public—it clearly comes within the description of "carriage"—it carries its rider, and is propelled by the driver—it is utterly immaterial what may be the motive power. It is embraced in the large words of the Act of Parliament, and the conviction must be affirmed.

Conviction affirmed.

Solicitor for appellant, *S. F. Langham.*

Solicitor for respondent, *Solicitor to the Treasury.*

Tuesday, March 25, 1879.

(Before MELLOR and LUSH, JJ.)

TOMLINSON v. BULLOCK. (a)

Act of Parliament—Commencement of operation of Act—Interpretation—"After the passing of this Act"—Bastardy Act (35 & 36 Vict. c. 65), s. 3.

An Act of Parliament which comes into operation upon a given day becomes law as soon as the day commences, and any event which occurs during that day is, in contemplation of law, an event which takes place after the passing of the Act.

This was a case stated by justices under 20 & 21 Vict. c. 43.

The facts are fully set out in the judgment below.

Lockwood for the appellant.—The statute 35 & 36 Vict. c. 65, must be taken to have come into

(a) Reported by A. H. POTSER, Esq., Barrister-at-Law.

force at the earliest moment of the 10th Aug. 1872, as that was the day upon which it received the Royal assent. This child, which was born on the 10th Aug., was therefore born after the passing of the Act. If that is not so, it will become necessary to ascertain the exact moment at which the Royal assent was actually given, so as to distinguish which of the two events happened first:

Campbell v. Strangeways, L. Rep. 3 C. P. Div. 105; 37 L. T. Rep. 672.

In *Combs v. Pitt* (3 Burr. 1434) Lord Mansfield says, "Though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish." See also on this point

Chick v. Smith, 8 Dowl. 337;

Maxwell on Statutes, p. 311.

A. Crompton, for the respondent, contended that the law would not take cognisance of the fragments of a day, and that the Act, therefore, only came into operation on the day following that on which the Royal assent was given. He referred to 33 Geo. 3, c. 13, as to the date on which an Act of Parliament received the Royal assent.

Our. adv. vult.

March 27.—The written judgment of the court was delivered by

LUSH, J.—This is an appeal from the decision of justices dismissing an application for an order under the Bastardy Act. The application was made on the 5th Sept. 1872, but by reason of the absence of the respondent from England the summons was not taken out till the 26th July, 1878. It appeared on the hearing that the child was born on the 10th Aug. 1872, being the day on which the 35 & 36 Vict. c. 65 received the Royal assent. That Act, which came into operation immediately on its passing, repealed the 7 & 8 Vict. c. 101, and enacted other provisions in lieu thereof. The third section enacts that "any single woman who may be delivered of a bastard child after the passing of this Act, may either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application, &c." The repealing clause excepted anything therefore duly done under the repealed Act, and kept the latter Act alive for the purpose of supporting and continuing any proceeding taken before the passing of the Act in question; but it made no provision as to children born before its passing, and in respect of which no proceeding had been taken, consequently the mother of a child born on the 9th Aug. 1872 had no remedy under the Act then in force (the 7 & 8 Vict. c. 101), because that Act was repealed on the following day; and no remedy under the repealing Act, because that applied only to children born after its passing. To supply this defect another Act was passed at the commencement of the following session. The Act 36 Vict. c. 9. The 3rd section of that Act enacts that any woman delivered of a bastard child on or before the 10th day of August 1872 (the

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day on which the repealing Act was passed), who but for the repeal by the last-mentioned Act would have been entitled to apply for a summons against the putative father of such child, shall be entitled to apply for such summons as follows: "In any case in which she would have been entitled to apply at any time under twelve months from the birth of the child, she shall be entitled to apply at any time within six months next after the passing of this Act." If the 7 & 8 Vict. c. 101, had not been repealed, the applicant would have been entitled to apply for a summons within twelve months from the birth of the child. She might, therefore, have availed herself of the amending Act by applying within six months after its passing, but she did not do so; and although that Act in the 8th section rendered valid all orders made in respect of children born before the 10th Aug. 1872, it says nothing of pending applications, nor does it say anything in respect of children born, not before, but on the day on which the Act of 1872 passed. It seems to have been assumed on all hands that a child born on the 10th Aug. was not within the Act of 1872, and the justices, upon this assumption, considered that, as the applicant had not brought herself within the remedial Act of 1873, she had no *locus standi*. If this assumption were well founded, we should be of opinion that the decision was right. But we think that is an erroneous assumption. At common law all statutes passed in a session of Parliament had relation back to the first day of the session, unless some other day was appointed for the Act coming into operation. This relation was productive of the most serious consequences, many instances of which are found in the books. And in the 33rd year of the reign of Geo. III. an Act was passed which required the clerk of the Parliament to indorse on every Act the day, month, and year when the same received the Royal assent, and enacted that such indorsement should be taken as part of the Act, and should be the date of its commencement where no other commencement was provided. The only point of time which this Act makes material is the day on which the Royal assent was given. It thus recognises the well known maxim that the law takes no notice of fractions of a day, and except in cases where there are conflicting rights between subject and subject, for the determination of which it is necessary to ascertain the actual priority, such is the universal rule. An act which comes into operation on a given day becomes law as soon as the day commences. By the operation of the repealing clause of the Act of 1872, the Act of 7 & 8 Vict. c. 101 was repealed, and the new Act came into effect at the first moment of the 10th of August, 1872. Every event which occurred during that day was, in contemplation of law, an event which took place after the passing of the Act. The same maxim it is true applies to the birth of a child. In computing the age of a person, the day, and not the hour, of his birth is regarded, when no conflicting right is in question. A person born on the 3rd Sept. was held to be of age twenty-one years afterwards, without regard to the fractions of the days (1 Lord Raym. 480). But, on the other hand, a fiction of law is not allowed to prevail against the plain intent of an Act. Now it is clear that the Act of 1872 was not intended to deprive the mother of a child born on the day on which it passed of a remedy against

the putative father. It intended to substitute another remedy for that which it took away, and if that intent can be effectuated without violence to its language, our duty is so to construe the Act as to carry out that intent. We do no violence to its language by holding that a child born at any time during the 10th of August was born "after the passing of the Act," which, in contemplation of law, took place as soon as the clock began to strike twelve in the night of the 9th of August. We are therefore of opinion that the decision of the justices was erroneous, and we remit the case to them to be determined upon the merits.

Decision of justices reversed.

Solicitor for appellant, *G. B. Wheeler.*

Solicitor for respondent, *Backhouse.*

EXOHEQUER DIVISION.

March 4 and 5, 1879.

(Before KELLY, C.B. and POLLOCK, B.)

RILEY (app.) v. READ (resp.). (a)

Inhabited house duty — Act of 1851 — Working men's club.

A working men's reform club, which had never been furnished as a dwelling-house or slept in at night, and which was used in the day time as to the upper floor by an auctioneer for the purposes of his business, and as to the rest of the building for club purposes only, from 9 a.m. to 10.30 p.m., was by the commissioners held liable to be assessed for inhabited house duty.

Held, on case stated for the opinion of the court, that the premises did not constitute an inhabited dwelling-house, and were not liable to be assessed for the tax.

Statutes as to duty on dwelling-houses considered.

CASE stated under part 3 of the statute 37 & 38 Vict. c. 16.

At a meeting of the commissioners for the general purposes of the income tax, and for executing the Acts relating to the inhabited house duties, held at the office of the clerk to the commissioners, Shorrock Ford, in the hundred of Blackburn, county of Lancaster, on the 18th July 1877.

The appellant, on behalf of the Working Men's Reform Club, William-street, in the township of Over Darwen, appealed against an assessment to inhabited house duty for the year ending the 5th April 1877, at 9d. in the pound upon 40l., the annual value of the building occupied by the club.

The appellant claimed exemption on the ground that the building was not an inhabited dwelling-house within the meaning of the Act 14 & 15 Vict. c. 36, inasmuch as the place was not and never had been since its erection furnished as a dwelling-house or slept in at night, and was used during the day time for club and trade purposes only. He stated that the upper floor of the building was let to an auctioneer, who used it during the day time as a place for the sale of goods, and contended that the building being a place used entirely for trade and club purposes was not liable to inhabited house duty.

The surveyor of taxes, the present respondent, stated that he had seen the premises, and found the building to consist of two storeys. The

(a) Reported by W. WILLS, Esq., Barrister-at-Law.

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ground floor was occupied by the appellants as a club, and contained the usual rooms, namely, billiard-room, newsroom, lavatory, &c. The upper floor was let to an auctioneer, and used by him as a place of trade. The club was open each day from 9 a.m. to 10.30 p.m., and then closed for the night, no person remaining inside the premises. The surveyor contended that the building came within the scope of 48 Geo. 3, c. 55, sched. (B.) No. 5, and that it was not necessary for a building to be slept in to render it liable to inhabited house duty. In support of this view he referred to case 2760 decided by the judges on the 15th Feb. 1867 and contended that, as the place was not used for trade, but in the manner above stated, it was not within any of the exemptions contained in the Acts.

The appellant sought to distinguish the present case from the case No. 2760, inasmuch as the present building had never acquired the character of a dwelling-house by reason of its never having been slept in or furnished as such.

The commissioners were of opinion that the club was subject to the duty. The appellant expressed his dissatisfaction with their decision, and requested them to state a case for the opinion of the court, whereupon the above case was stated.

The sections and other portions of Acts of Parliament material to this question are the following:

The 48 Geo. 3, c. 55 (which as to the schedules (A.) and (B.) hereinafter mentioned was repealed by the Acts of 14 & 15 Vict. c. 36, and 4 & 5 Will. 4, c. 19, respectively) enacted that there should be assessed, raised, levied, and paid, &c., upon houses, windows, and lights, as set forth in the schedule (A.) to the Act annexed; and upon inhabited houses as set forth in the schedule (B.) to the Act annexed, the several new and consolidated duties respectively inserted, described, and set forth in the said respective schedules; the schedules and rules were to be deemed a part of the Act.

The schedules and rules, so far as material, are as follows:

SCHEDULE (A.).

A schedule of the duties made payable for every dwelling-house within and throughout Great Britain, according to the number of windows or lights in each dwelling-house, and the offices to be charged therewith.

After the rules characterising the mode of charging, follow the

Exemptions from the said Duties.

Case 1. Any house belonging to His Majesty, or any of the Royal Family, and every public office for which the duties heretofore payable have been paid by His Majesty, or out of the public revenue.

SCHEDULE (B.).

A schedule of the duties made payable on all inhabited dwelling-houses throughout Great Britain according to the value thereof, and of the offices and lands to be charged therewith.

Here follow the duties.

Rules for charging the said last-mentioned Duties.

1. The said last-mentioned duties to be charged annually on the occupier or occupiers for the time being of every such dwelling-house, being of the annual rent of 5l. or upwards, at the respective rates before mentioned, and to be levied on him, her, or them, or on his, her, or their respective executors or administrators, and in like manner, in case of a change in the occupation thereof, as is before directed in respect of the duties on windows or lights, and in addition to the duties contained in schedule (A.).

4. Every chamber or apartment in any of the inns of court, or of Chancery, or in any college or hall in any of the Universities of Great Britain, being severally in the tenure or occupation of any person or persons, shall be charged thereto as an entire house, and on the respective occupiers thereof.

5. Every hall or office whatever belonging to any person or persons, or to any body or bodies politic or corporate, or to any company that are or may be lawfully charged with the payment of any other taxes or parish rates, shall be subject to the duties hereby made payable as inhabited houses; and the person or persons, bodies politic or corporate, or company, to whom the same shall belong, shall be charged as the occupier or occupiers thereof.

Exemptions.

Case 1. [This exemption is the same as the first exemption to Schedule A. already cited.]

The statute 57 Geo. 3, c. 25, s. 1, after reciting the last-mentioned Act, and also that

It is become usual in cities and large towns, and other places, for one and the same person, or for each person where two or more persons are in partnership, to occupy a dwelling-house, or dwelling-houses, for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade, or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses, and to abide therein in the day time only for the purposes of such trades respectively, which have been charged with the said recited duties, although no person shall inhabit or dwell therein in the night time; and it is expedient in such cases to exempt from the said duties such tenements or buildings, or parts of tenements or buildings, as are or shall be solely employed for the purposes herein mentioned,

enacted that persons should not be charged by the commissioners in respect of such last-mentioned buildings.

The statute 5 Geo. 4, c. 44, s. 4, after reciting the exemption granted as above mentioned in the last cited Act, enacts that the same shall be extended

To all and every person, or any number of persons in partnership together, for and in respect of any house, tenement, or building, or part of a tenement or building, in the said Act (57 Geo. 4, c. 25, s. 9) described, which shall be used by such person or persons as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, business, or calling, by which such person or persons shall seek a livelihood or profit, no person inhabiting, dwelling, or abiding therein, except in the day time only, for the purpose of such profession, vocation, business, or calling, such person, or each such persons in partnership respectively, residing in a distinct and separate dwelling-house, or part of the dwelling-house charged to the said duties, provided nevertheless, that the exemption herein authorised shall not extend to any chamber or apartment in any of the inns of court or of Chancery, or to any college or hall in either of the Universities of Oxford or Cambridge, now chargeable with any of the said duties.

By the 2nd and 3rd sections of the statute 6 Geo. 4, c. 7, certain provisions were made for exempting from the duty houses the building of which was completed or the occupation commenced after the beginning and in the course of the year of assessment, and for the exemption of unfurnished houses occupied only by a caretaker.

By the statute 14 & 15 Vict. c. 36, the duties in schedule (A.) of the statute 48 Geo. 3, c. 55, were repealed (those in schedule (B.) having been already repealed by the Act of 4 & 5 Will. 4, c. 19), and it was enacted that there should assessed, raised, levied, collected, and paid, &c., upon inhabited dwelling-houses in and throughout Great Britain the several duties set forth in the schedule annexed to the Act, payable according to

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the annual value of such dwelling-houses; the schedule to be part of the Act.

SCHEDULE.

For every inhabited dwelling-house which with the household and other offices, yards and gardens therewith occupied and charged, is or shall be worth the rent of twenty pounds or upwards by the year, . . . where any such dwelling-house shall not be occupied and used for any such purpose and in manner aforesaid (i.e. for the purpose of a shop, licensed for sale of beer, farm-house, &c., &c.) there shall be charged for every twenty shillings of such annual value thereof the sum of ninepence.

It was under the words of this schedule here set out that it was attempted to charge the building in question.

Bush Cooper for the appellant.—The short point raised by the case is, whether or not a building, which has not been used as a dwelling-house, or slept in by the occupier, is chargeable to the inhabited house duty under the 14 & 15 Vict. c. 36. It is attempted to charge this house under the last part of the schedule to that Act, and in order to see what is the meaning which the Legislature has attached to the term "inhabited dwelling-house," it is necessary to go back to the Act of Geo. 3, by which this duty was first imposed. On referring to the schedules (A.) and (B.) of the Act of 48 Geo. 3, c. 55, we find the distinct on drawn between what is properly called an inhabited dwelling-house and an office or place where no person is sleeping, and rule 5 marks that distinction. Schedules (A.) and (B.) refer to dwelling-houses and inhabited dwelling-houses respectively; and the first rule of schedule (B.) makes the duties under that schedule chargeable on the "occupier or occupiers for the time being" of every such dwelling-house. Then rule 5 of the same schedule, charging the owners in certain cases, draws the distinction between that which is properly called an inhabited dwelling-house and an office or other place where no person is sleeping. In the case of an inhabited dwelling-house properly so called, the occupier is the person to be charged. Then, as it was thought that that would leave exempt offices or halls where no one slept, rule 5 provides for that case, not treating them as dwelling-houses, but making them liable to the same tax. The words of the Act of 14 & 15 Vict. c. 36, are distinct; to come under that statute a house must be an inhabited dwelling-house; it is not even sufficient that it should be built with a view to being dwelt in—it must be actually inhabited, and from rule 5 of the schedule (B.) to the Act of Geo. 3, I say it must be slept in. This house is not, in any sense, an inhabited dwelling-house; no person resides or sleeps in it, from floor to cellar; it is merely resorted to in the day time by the members of the club, and by an auctioneer; and it cannot be brought within the purview of the Act.

Dacey for the respondent.—My first contention is, that this house is an inhabited dwelling-house and comes directly within the Act. On this point my contention is supported by the authority of *Bramwell, L.J.*, in the case of *Rusby v. Newsom* (L. Rep. 10 Ex. 322). There the question was whether there was exemption from inhabited house duty by reason of the premises then in question being used as to some part of them only (not constituting a separate tenement or house) for trade purposes; the court held they were not

exempt. In the judgment of Lord Justice (then Baron) Bramwell, at p. 328, these words occur: "If it is said that our construction is harsh, possibly in one sense it is, but in another sense it clearly is not. The Legislature had said originally that all inhabited houses should be subject to the duty, and it was held, properly, no doubt, that a house which was not occupied at night, but was occupied in the day time for the purposes of trade, was an inhabited house and subject to duty. Very likely it was pointed out that that was in truth taxing the instruments of trade, and perhaps was injudicious as a tax upon machinery or tools, or other means by which trade was carried on; and thereupon the Legislature thought that it was reasonable to exempt buildings which were solely used for purposes of trade and for the other purposes mentioned," &c. I cite it to show what was the view entertained by that learned judge as to the construction that had been put on the statute, and that it was a construction in which he acquiesced, namely, that occupation at night was not necessary to constitute inhabitancy. Further, by dwelling-house is meant any house used for human habitation for any considerable time or the whole day; that is the natural sense of the word, and it appears that the house in question was dwelt in from 9 in the morning till 10.30 at night. It is necessary to refer to the provisions of 48 Geo. 3, c. 55, which first imposed the duty, to discover the meaning of these terms, and as it is said that, "the exception proves the rule," so I rely on the exemptions from the tax to show what was the extent of the tax. The first exemption under schedules (A.) and (B.) includes "public offices" which presumably were used as offices only, but which were evidently deemed to be covered by the charging words of this enactment. It is clear from these exemptions that the word "dwelling-house" was used in the Act in a somewhat wider sense than that ordinarily given to it. Further it appears from the recital and first section of the statute 57 Geo. 3, c. 25, which is, I think, the first exempting Act, that "separate and distinct tenements or buildings, or parts of tenements or buildings," occupied "for the purpose of trade or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses" in which persons abode "in the day time only for the purposes of such trades respectively" had been charged with duty under the former Act as dwelling-houses, although no person inhabited or dwelt in them in the night time. The term "dwelling-house," therefore, bore a meaning far more extensive than is ordinarily given to it. This explains and corroborates the statements made by *Bramwell, L.J.* in the judgment I have cited. The next Act I wish to refer to is the 5 Geo. 4, c. 44, s. 4; that section shows that houses or buildings used as offices or counting-houses for business purposes, and in which no person inhabited, dwelt, or abode except in the day time, and for the purposes of such business only, had been taxed as dwelling-houses, although in the ordinary sense of the word they would not be considered dwelling-houses, and that, too, in spite of the former exemption. Again, there are a series of exceptions in respect of warehouses and houses occupied solely for the purposes of trade, all of which are houses. The very question which has arisen in the various cases under the enactments has been, Are those houses occupied solely

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for the purpose of trade? and they all rest on the assumption that a house may, unless it can come within some specific exemption, be an inhabited dwelling-house even though it is a house used for the purposes of trade, and in fact for the purposes of trade in the day time only. It need not be a house in which a man actually has his residence. No one would say that a house used as a club-house or a coffee-house or an auctioneer's office thereby became a residence; yet the case of a club would go a good deal further in respect of "residence" than the case of a mere office; and yet—and that is my point—offices are distinctly within the purview of the Act. The next Act which I will cite is the 6 Geo. 4, c. 7. Ss. 2 and 3 tend to show that the meaning given to dwelling-house was very wide, and that the test of a dwelling-house chargeable under the Act was the fitness of the house for habitation, and its actual occupancy. See also sect. 7. See also rules 4 and 5 of schedule (B) of the Act of 48 Geo. 4, c. 55. The terms "dwelling" and "inhabited" have different values, and must be considered separately. First I say this is a dwelling-house, for it is a house built for human habitation. It is further an inhabited house, for it is inhabited for more than twelve hours in the day by a large number of persons who resort to it.

KELLER, C.B.—This claim of inhabited house duty by the Crown cannot be sustained. It appears from the case that this house has never been furnished as a dwelling-house, that no one sleeps in it, or has ever slept in it, and it is occupied and used for trade purposes and those of the club only. The effect of the statutes is that what is chargeable is an inhabited dwelling-house within the meaning of those statutes. If the word "inhabited" were there alone, we should have to consider whether there might not be an inhabitancy, and I am not prepared to say that there might not be an inhabitancy, which would make the building an inhabited house within these Acts of Parliament, as far as the word "inhabited" goes. But it appears from all the statutes that in order to be taxable a building must be an inhabited dwelling-house, so that we must put a construction not only on the word "inhabited," but also on the word "dwelling-house." Is, then, any part of this building a dwelling-house? I think it is not. In the absence of any interpretation by Act of Parliament and of any binding authority we are compelled to consider what is the proper meaning of this term. In my judgment the meaning of the word to "dwell" is to live in a house; that is to live there day and night, to sleep there during the night, and to occupy it for the purposes of life during the day. And there is nothing to show that that is not the natural meaning; and there is nothing shown to compel us to put any but this natural and well-established meaning on it. As to the recital in the Act of 5 Geo. 3, c. 25, it would seem that in the cases to which it refers the persons therein mentioned were assessed in respect of the value or rental of those separate buildings, in addition to the rental or value of the house in which they resided and lived; but if it mean anything else we should, I think, be compelled to conclude that the words of the recital, which is not grammatical in its composition, were incautiously used by the framers of the Act, and were misapplied; and it cannot under these circumstances avail to impose the tax which is war-

ranted by no statute and no authority besides. I think the plain and natural meaning of the words in question is to dwell and live in a building day and night, to reside there, and occupy it as a residence, and, as this place has never been so occupied, in my opinion it is not a dwelling-house, and therefore the assessment must be disallowed.

POLLOCK, B.—In my opinion the members of this club are not assessable to the inhabited house duty. If in order to decide this it were necessary also to decide that, to charge a building as an inhabited dwelling-house, some person or persons must sleep in that house as well as occupy it by day, I should pause before I came to that conclusion, for the counsel for the respondent has certainly shown that there are passages in certain statutes, and certain dicta of learned judges, both in England and in Scotland, which are unfavourable to that conclusion. But the present case at any rate is quite different from those in which such a conclusion might possibly be applicable; for this is the case of a club, the members of which use this building not in any sense for the purposes of a dwelling-house. The purposes and object of such institutions, and the character of the occupation, are perfectly well known, and I am clearly of opinion that words should be used which properly and clearly comprehend such a case, if it is intended to bring it within the scope of the tax. When, however, I consider the ordinary meaning of the words "inhabited house," it seems to me that it is altogether a misapplication of language to say that it applies to the case of a club consisting of a great number of persons who simply have a house to carry out the purposes of their club. On these grounds, therefore, I think that the assessment is wrong, and cannot be supported.

Judgment for the appellant with costs.

Solicitors for the appellant, *Pritchard, Englefield, and Co.*

Solicitors for the respondent, *Solicitors for the Inland Revenue.*

May 10 and Dec. 4, 1878.

(Before KELLY, C.B. and HUDDLESTON, B.)

Re DUTTON; *Ex parte* PEAKE AND ANOTHER. (a)

APPEAL FROM INFERIOR COURT.

Will—Gift of money to trustees of a mechanics' institution—To be applied towards the building fund connected therewith—Charity—Mortmain Act (9 Geo. 2, c. 38)—Perpetuity—Literary and Scientific Institutions Act 1854 (17 & 18 Vict. c. 112), ss. 30, 33—Void bequest—Construction.

The Tunstall Athenæum and Mechanics Institution was established and maintained by the donations and subscriptions of its members for the purpose of providing a lending and reference library and reading room and lectures, for the use and mutual improvement of the members. By some of the rules of the institution all the property of the institution was vested in the trustees thereof for the time being, and the institution was not to be dissolved except by the resolution of nine-tenths in number of the members present at a specially called general meeting, to be confirmed by a like resolution at a subsequent meeting of the same character. There was no building fund in connection with the institution, but there was a

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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"sinking fund" established to pay off a mortgage on the premises occupied by, and which was the property of, the institution. A testator having bequeathed a sum of money "unto the trustees for the time being of the institution, to be applied by them towards the building fund in connection therewith," it was

Held, by the Exchequer Division (Kelly, C.B. and Huddleston, B.), that the institution was not a charitable institution so as to bring the case within the terms of the Mortmain Act (9 Geo. 2, c. 36), but that the bequest was void as tending to create a perpetuity.

The cases of *Carne v. Long* (2 L. T. Rep. N. S. 552; 2 De G. F. & J. 75; 29 L. J. 503) and *Thomson v. Shakespeare* (1 L. T. Rep. N. S. 398; 2 De G. F. & J. 399; 29 L. J. 276, Ch.) in point and followed.

THIS was an appeal from the decision of the judge of the County Court of Staffordshire, holden at Hanley, Burslem, and Tunstall, on the petition of John Wade Peake and J. Beech, the trustees of the Tunstall Athenæum Mechanics Institution, and the facts of the case were as follows:—The testator, one Thomas Dalton, by his will bearing date the 10th Aug. 1874, after the bequests of divers pecuniary legacies, gave, devised, and bequeathed the residue and remainder of his personal estate, and all his real estate, to his wife and one Allen Beckett Lowndes, their heirs, executors, administrators, and assigns, upon trust to get in, sell, and convert the same into money, and to invest the proceeds and pay the annual income thereof to his said wife, for her separate use during her life, and from and immediately after her decease, the said testator gave and bequeathed the capital as well as the income of the said proceeds of his said trust estate, after the payment of the legacies hereinbefore bequeathed, "unto the trustees for the time being of the Tunstall Athenæum Mechanics Institution, to be applied by them towards the building fund in connection therewith," and it was declared that the receipts of the trustees of the institution should be sufficient discharges to the trustees of the said will.

The testator died on the 13th Aug. 1874, not leaving any real estate, but his residuary personal estate amounted to the sum of 431l. 2s. 2d. His wife survived him, and on her death, on the 26th March 1877, disputes and questions arose touching the validity of the above bequest to the trustees of the Tunstall Athenæum, and thereupon the surviving executor and trustee of the testator's will, the said Allen Beckett Lowndes, paid the 431l. 2s. 2d. into the Post Office Savings Bank under the provisions of the Trustee Relief Acts and the County Court Act 1867. Thereupon the trustees of the Tunstall Athenæum and Mechanics Institution, presented their petition praying that the money should be paid to them as such trustees, to be applied by them in accordance with the directions of the testator's will. The surviving executor and the next of kin of the testator were made respondents to and opposed the said petition, which came on for hearing before the County Court judge, when it appeared from the evidence that the institution was founded for the purpose of providing the members of the institution with a library consisting of a library of reference, and a circulating library, and a reading room, and for holding public lectures and

classes for mutual improvement. The institution was managed by a committee appointed under rules in accordance with the Literary and Scientific Institutions Act 1854, and occupied a house which was purchased, ready built, by the committee. There was no "building fund," but there was a "sinking fund" formed by a resolution of the committee for the purpose of paying off a mortgage debt on the premises.

The following were the rules relating to the constitution of the society, so far as material to this report:

1. The members of this institution shall consist of (a) Donors of 10l. or upwards in money or books at one time, who shall be invested with all the privileges of class b for life. (b) Honorary subscribers of 1l. and upwards annually, who shall be eligible to any office, and entitled to all the privileges of the institution. (c) Subscribers of 10s. per annum, with 1s. entrance fee, who shall be entitled to all privileges as above. (d) Subscribers of 5s. per annum and 6d. entrance fee, entitling them to the use of the reading room or library separately, as may be determined upon at the time of entering. . . .

4. The institution shall not be dissolved without the consent of nine-tenths in number of the members present at a general meeting to be specially called for that purpose, such consent to be confirmed by the like majority at a special general meeting, to be called within not less than one or more than three calendar months from the passing of such first resolution. . . .

5. The property and effects of the institution shall from time to time be vested in the trustees for the time being in trust for the general benefit of the members. . . .

45. No member, on withdrawing from this institution by forfeiture, expulsion, or otherwise, shall be entitled to claim any share or interest in the property of the institution.

The learned judge of the County Court held that the testator's gift to the trustees of the institution was void under the 9 Geo. 2, c. 36, as being a bequest of money to be laid out in land for a charitable purpose, and dismissed the petition of the Athenæum trustees, and directed that the property should go the testator's next of kin.

From that decision the trustees of the Tunstall Athenæum appealed, and a rule *nisi* was obtained, calling on the surviving executor and next of kin of the testator to show cause why the judgment or order of the judge of the County Court should not be set aside, and an order made in the terms of the petition on the ground that the institution was not a charity, and that the gift was not void for perpetuity, or on the ground that, if the institution was a charity, the gifts was not void under the 9 Geo. 2, c. 36, and accordingly

May 10.—*Arthur Charles*, Q.C. appeared for some of the next of kin and showed cause against the rule.—The question for the court's determination here is, whether or not this is a good and valid trust, or whether the gift to the trustees of the Tunstall Athenæum is or is not a void bequest. There are two grounds on which it is contended on the part of the next of kin that the bequest is void: first, as being a bequest to a charity of money to be laid out in the purchase of land; and, secondly, as tending by the terms of the bequest to create a perpetuity. With regard to the first point, the will contains no direction that land is not to be purchased with this money, nor is there anything in the will to prevent such an application of it, and therefore it is void within the meaning of the statute 9 Geo. 2, c. 36. With regard to the second point, it can hardly be contended on the part of the trustees of the institution that the terms of the bequest do not contemplate the per-

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petual continuance of the institution, though it is true that by the 4th rule of the institution there is a power to dissolve it if a majority, consisting of not less than nine-tenths of the majority of the members present at a specially called general meeting, resolve that that shall be done. The present case clearly tends to create a perpetuity, and it cannot be distinguished from the decision of Lord Campbell, L.C. in *Carns v. Long* (2 L. T. Rep. N. S. 552; 2 De G. F. & J. 75; 29 L. J. 503, Ch.) [He was then stopped.]

English Harrison on the same side, for others of the next of kin, added nothing.

Julian Robins, for the surviving executor and trustee of the testator's will, submitted to abide by the decision of the court.

A. D. Tyssen and Sidney Woolf, for the trustees of the Tunstall Institution, supported their rule.—A gift such as that in this case to an association of this kind in such a way as to make the subject-matter of the gift become part of the property of the association so as to come under their free disposition, as is the case here, is a perfectly good and valid gift. The present case differs from that of *Carns v. Long*, which was the case of a corporation where there was no right to divide the property. The present association is a voluntary unincorporated body, and may divide the property amongst themselves as co-owners on dissolving the society. They are a mere club. There is nothing in the nature of the association that infringes the rule against perpetuities, the members having a power to dissolve at any moment, as in the case of *Brown v. Dale*, before the Master of the Rolls (L. Rep. 9 Ch. Div. 78). The present case is within the decision of Wickens, V.C., in *Cocks v. Manners* (24 L. T. Rep. N. S. 869; L. Rep. 12 Eq. Cas. 574; 40 L. J. 640, Ch.), in which the distinction between that case and *Carns v. Long* was pointed out by the learned Vice-Chancellor, the gift in *Carns v. Long* being to the trustees and their heirs for ever, and the members there having no power to sell the land the profits of which were given in trust for the benefit of the institution. [KELLY, C.B. refers to *The Mayor, &c., of Gloucester v. Wood*, 3 Hare, 131; s.c. nom. *The Corporation of Gloucester v. Osborn and another*, in the H. of L., affirming the decision below, 1 Cl. & Fin. 272.] They cited also

Stewart v. Green, 5 Ir., Eq. Rep. 470, at p. 485; and *Wigram on Wills*, 3rd edit. p. 51, proposition 5, 4th edit. p. 65,

and contended that this bequest was not void within the rule against perpetuities, and that the decision of the County Court judge was wrong.

A. Charles, Q.C. in reply.—Nothing that has been urged on the other side has upset the authority of the decision in *Carns v. Long*, or its applicability to the present case. This money surely could never become the property of the trustees or members of the institution under any circumstances, for the institution comes within and is subject to the provisions of the Literary and Scientific Institutions Act 1854 (17 & 18 Vict. c. 112), by the express terms of sect. 33 of the Act, by sect. 30 of which the property on dissolution would go to some other institution, and could not be divided among the members.

Cur. adv. vult.

KELLY, C.B.—This case came before us on appeal from a decision of the judge of the County Court of Staffordshire, and the question we have to decide is, whether a bequest under the will of one Thos. Dalton to the trustees for the time being of the Tunstall Athenæum and Mechanics Institution can or not be supported as valid. Two questions upon which the bequest might be held to be invalid were presented to us in the course of the argument, viz.: first, that it was void under the Mortmain Act as a bequest to a charitable institution; and secondly, that it was void as tending to create a perpetuity. If the bequest should be held to come within either of these two grounds of objection, it would be a void bequest, and the next of kin of the testator would be entitled to the money or fund which was the subject of it. The trusts of the bequest are "to the trustees for the time being of the Tunstall Athenæum and Mechanics Institution, to be applied by them towards the building fund in connection therewith." The first question, therefore, that arises is, what is the nature and character of this Athenæum, and is it a charitable institution? Upon that point, having regard to the terms of the bequest, I think that, if the institution were a charity, this bequest would probably be held to be void under the Mortmain Act. But when we look to the rules of this society, which set out at great length the objects and purposes of the institution, we find that it is in reality a species of club in which a number of people meet together, and agree to occupy and use a certain house and premises for the purposes of mutual literary instruction, amusement, and improvement. Under these circumstances I am of opinion that this institution is not a charitable institution, and that it comes clearly within the decision of Hall, V.C., in the case of *Re Clark's Trusts*, (45 L. J. 194, Ch.; L. Rep. 1 Ch. Div. 497,) in which the learned Vice-Chancellor deals with the question which arises in the present case, and decides that an institution for mutual benefit is not a charity. But even if this institution were to be held to be a charitable institution, I am by no means sure that this particular bequest would be void. The other and principal question, however, that was argued before us was, whether the bequest was valid, or whether it was void, on the ground that, having regard to its express terms, it tended to the creation of a perpetuity. Now, with regard to that question, I am clearly of opinion that this bequest is certainly void on that ground. The case of *Carns v. Long* is strongly in point. In that case there was a devise of freeholds to the "trustees for the time being of the Penzance Public Library to hold to them and their successors for ever for the use, benefit, maintenance, and support of the said library," and the Lord Chancellor (Lord Campbell) in his judgment in that case said: "I look upon this as a devise for the benefit of a society of individuals in Penzance. My objection to it is that it leads to a perpetuity, an objection with which the Vice-Chancellor does not appear to have dealt, but which appears to me wholly fatal to the devise. The clear intention of the testator, as expressed by the will, is that there should be a gift in perpetuity to this institution at Penzance. The gift is to the trustees for the time being of the society and their successors for ever, they holding it for the use, benefit, maintenance, and support of

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the library." Now, without doubt, these are stronger words than those which appear in the bequest in the present case; but nevertheless, looking to the rules and constitution of the society with which we are dealing, it appears to me that there is nothing here to prevent this society lasting for ever, or that should necessarily cause it to cease to exist, and I think, therefore, that, though the bequest in this case does not contain the strong words of the one in *Carne v. Long*, the principle of that case does and must apply. Lord Campbell then went on to say: "If the devise had been in favour of the existing members of the society, and had they been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition, and not tending to a perpetuity. But looking to the language of the rules of this society, it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to have known what the regulations were. By one of these it is provided that the society is not to be broken up so long as the members remain. The devise is for the benefit of a subsisting society, and one which is intended to subsist so long as the members remain, and the property comprised in the devise is therefore to be taken out of commerce, and to become inalienable, not for a life or lives in being and twenty-one years afterwards, but for so long as ten of the members of the society shall remain." On that ground the decision of the Vice-Chancellor in *Carne v. Long* was reversed accordingly. There are many other cases also, and amongst them that of *Thomson v. Shakespeare* (1 L. T. Rep. N. S. 398; 1 De G. F. & J. 399; 29 L. J. 276, Ch.) which are in point even more directly upon the present case, and go to show that where by the constitution of a club, society, or other institution, not a charity, there is nothing necessarily to put an end to its existence, so that it may last an indefinite time, and the gift is made in such terms as to make the subject of it an accession to the capital or permanent property of the club, or other institution, and not a sum to be brought into the annual accounts of the institution as part of its yearly income to be disposed of by the then existing members, then there is in such a case a tendency to a perpetuity, and the bequest is void. For these reasons, therefore, I am of opinion that the judgment of the County Court judge was right, that the next of kin are entitled to our judgment, and that this appeal must be dismissed.

HUDDESTON, B.—I am of the same opinion. Upon the argument it was almost conceded that this institution was not in any sense a charitable institution, its object being solely social and literary, and that the case therefore did not fall within the Mortmain Act (9 Geo. 2, c. 36). It was, however, urged upon us that the County Court judge was right in holding the bequest to be void as tending to a perpetuity, and I agree entirely with my Lord in holding that that is so. It was contended on the part of the appellants, the trustees of the Athenæum, that there were no words in the present case showing that the testator contemplated anything in the nature of a perpetuity, and that in that respect the case resembled the case of *Cocks v. Manners*, where there was a bequest to a voluntary association of ladies for pious and charitable purposes, and that there was, as in that case, nothing in the rules of

the present institution to prevent the dissolution of the society and the division of the property, and in that respect establishing a great distinction between the present case and that of *Carne v. Long*. That argument, however, if it were well founded, was met and answered by Mr. Charles on the part of the respondents, the next of kin, who referred to the Literary and Scientific Institutions Act 1854 (17 & 18 Vict. c. 112), and pointed out that that Act, which by sect. 33 is made applicable to all such institutions as the present one, expressly provides by sect. 30 that upon dissolution the property of an institution under the Act shall not be paid to or distributed among the members of the institution, or any of them, but shall be given to some other institution to be determined by the members at the time of dissolution, or in default thereof by the judge of the County Court. I agree with Mr. Charles that it is not necessary that a bequest should contain the express words "for ever" in order to bring it within the rule against perpetuities. The real object of the present testator clearly was to do something which should be a benefit to the institution or society for ever, and so to create a perpetuity; and I am therefore of opinion that the County Court judge's decision was right, and this appeal therefore should be dismissed.

Judgment below affirmed. Leave to appeal refused.

Solicitors for the petitioners (appellants), *Llewellyn, Acltūll, and Hammack*, agents for *Llewellyn and Acltūll, Tunstall*.

Solicitors for the testator's next of kin (respondents), *H. Tyrrell*, agent for *E. Tennant and Co.*, Hawley; and *J. Burton*, agent for *Tomkinson and Furnival, Burslem*.

Solicitors for the executor and trustee of the will, *Norris, Allen, and Carter*, agents for *G. Smith, Tunstall*.

Wednesday, March 5, 1879.

(Before KELLY, C.B. and POLLOCK, B.)

JONES (app.) v. THE CWMORTHIN SLATE COMPANY, LIMITED (resps.). (a)

Property tax—Quarries and mines—Rules under schedule (A.), No. 3, of 5 & 6 Vict. c. 35.

Where a slate quarry, originally worked in the open, had for some years been worked by means of levels driven straight into the mountain to a distance of from 250 to 300 yards, and the whole process of quarrying was carried on underground, the commissioners held that the concern was a mine, and came within the 2nd rule of schedule (A.), No. 3.

Held, on case stated for the opinion of the court, (reversing the decision of the commissioners), that the concern was a quarry, and therefore within the 1st rule of schedule (A.), No. 3.

CASE stated for the opinion of the court under part 3 of the 37 & 38 Vict. c. 16.

At a meeting of the commissioners of income tax for the division of Arudwy Uwch, in the county of Merioneth, held at Penrhyndendraeth, on the 28th March 1878,

Mr. Albert Bromwich, as cashier to, and on behalf of the Cwmorthin Slate Company

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(Limited), appealed against a charge of 6373L., made upon the company in the assessment under schedule (D.) for the parish of Ffestiniog for the year 1877-8 in respect of profits as a slate company under rule 1 of No. 3 of schedule (A.) 5 & 6 Vict. c. 35.

The appellant contended that the concern was a mine, and claimed to be assessed on the average profits of the five preceding years under rule 2 of No. 3 of schedule (A.) 5 & 6 Vict. c. 35, as coming within the terms "and other mines."

It appeared that originally the quarry was worked in the open, but for some years the slates had been got by means of levels driven straight into the mountain to a distance of from 250 to 300 yards; those levels are about 5ft. wide and 7ft. high; the whole process was carried on underground.

Mr. Jones, the surveyor of taxes, on the part of the Government, held the concern to be a quarry, and that the wording of rule 1 of No. 3 of schedule (A.) 5 & 6 Vict. c. 35, as follows "Of quarries of stone, slate, limestone, or chalk, on the amount of profits in the preceding year," was decisive of the question, and that it was impossible to regard a slate quarry as a mine for income tax purposes.

The commissioners were of opinion that the concern was a mine, and gave their decision accordingly; whereupon the surveyor of taxes, being dissatisfied, requested a case for the opinion of the court, which they stated accordingly.

The following are the rules and schedule of the Act 5 & 6 Vict. c. 35, referred to in the case.

Schedule (A.) is as follows:

For all lands, tenements, and hereditaments, or heritages in Great Britain, there shall be charged yearly, in respect of the property thereof, for every twenty shillings of the annual value thereof, the sum of sevenpence.

No. 3. Rules for estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned, which are not to be charged according to the preceding general rule.

The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited.

First. Of quarries of stone, slate, limestone, or chalk on the amount of profits in the preceding year:

Secondly. Of mines of coal, tin, lead, copper, mundic, iron, and other mines, on an average of the five preceding years, subject to the provisions concerning mines contained in this Act.

Dicey for the appellant.—The whole question arises under these two rules of schedule (A.), and resolves itself into this, whether a stone quarry ceases to be one on being worked underground, and becomes a mine. The place from which stone is got is *prima facie* a quarry. A quarry is described in Johnson's Dictionary as a "stone mine," and the burden is on the respondents of showing that it is a mine. Further, the distinction which has been drawn in the two rules is one determined by the nature of the produce; and to say that the words "and other mines" in the second rule comprehend quarries, makes it overlap the first rule, and violates the reasonable construction.

A. L. Smith for the respondents.—The question whether this is a mine is a question of fact, and has already been determined; it is not now open. [KELLY, C.B.—You must take it that the question

is whether it is a mine within the meaning of the Act. POLLOCK, B.—Assume in your favour that these workings are such that if they were workings of coal they would be called a mine, is it then a mine and not a quarry when the produce that is got from it is slate?] That question is decided by authority. Whether a working is a mine depends on the mode of working, and not on the nature of the produce:

Duchess of Cleveland v. Merrick, 37 L. J. Ch. 125.

The case of *Sims v. Evans*, in which the now respondents were defendants, was a proceeding under the Metalliferous Mines Regulation Act (35 & 36 Vict. c. 77). That Act does not specify quarries. By sect. 3 it is to "apply to every mine of whatever description other than a mine to which the Coal Mines Regulation Act 1872 applies." The proceeding was for non-compliance with the provisions of the 11th section, and the question was whether the Act applied to a slate quarry where the slates were got by underground working. By sect. 41 the term "mine" includes "every shaft in the course of being sunk, and every level and inclined plane in the course of being driven for commencing or opening any mine, or for searching for or proving minerals, and all the shafts, levels, planes, work, machinery, tramways, and sidings, both below ground and above ground, in and adjacent to a mine, and any such shaft, level, and inclined plane, and belonging to the mine." It was held that slate was a mineral, and that this was a "mine," to which the Metalliferous Mines Regulation Act applied.

KELLY, C.B.—If we construe the words of these two rules in a popular sense, and put on them the interpretation which in common parlance is given them, we must hesitate in adopting the view of the respondents; for no one ever hears the expression "slate mines," and without very special circumstances we cannot hold that the word "mines" can be extended to comprise quarries. Further, when we look at the precise terms of these rules, we find two distinct descriptions of property given; and if the Legislature, or the framers of the Act, had considered slate quarries to be properly described as mines, and intended to include them in the second class, they would surely have done so. If we look at the popular signification of the word mines we must conclude that it does not include slate quarries, and when we consider the Act of Parliament we must say that its provisions are to bear a natural and popular construction; and we must hold that quarries of slate, limestone, &c., are to be taxed in accordance with the first rule, mines of coal, tin, &c., according to the second. The present case falls entirely within the former rule.

POLLOCK, B.—We have to look at the terms of the Act of Parliament, and considering the whole scope of the Act, discover the intention of the Legislature; always giving such meaning as would best effect the object to be carried out by the Act. Now the cases which have been cited give us little assistance. In the case of *The Duchess of Cleveland v. Merrick* there was no antithesis between mines and quarries, and, had not the testator's shares in the slate quarries passed under the word mines, the codicil would have failed of its effect with regard to that property. Again, the Metalliferous Mines Regulation Act, considered in the case of *Sims v. Evans*, was a statute in-

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tended to shield persons from the dangers incident to improper sinking of shafts and carrying of adits and levels. Regulation of the mode of working therefore, and not the character of the materials produced, was contemplated by the statute. See also the interpretation of the word "mines" in the 41st section. Now in the Act before us there is a strong antithesis between "quarries" in the first rule and "mines" in the second, and the distinction is marked by the different products which are got from the quarries and from the mines. And there is a further distinction besides that drawn in the Act, namely, that the workings of quarries are not commenced by shafts, as mines are, and that when they subsequently are worked underground it is not by shafts, but by adits, a process after all more like a deep quarrying than mining.

Judgment for the appellant, with costs.

Solicitors for the appellant, *The Solicitors for the Inland Revenue.*

Solicitors for the respondents, *Gregory, Rowcliffe, Rowcliffe, and Rawle.*

Dec. 19, 20, and 21, 1878, and Jan. 28, 1879.

(Before POLLOCK, B.)

HILL (Kt.) AND OTHERS v. THE MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT. (a)

Nuisance—Metropolitan Asylum District—Erection of smallpox hospital—Injury to adjoining property—Liability of Managers of Asylum District—Poor Law and Local Government Boards—Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6)—Injunction.

The defendants were a body duly constituted and incorporated by the name of "The Managers of the Metropolitan Asylum District" under and by virtue of the Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6), pursuant to an order of the Poor Law Board, dated the 15th May 1867, whereby certain unions and parishes within the metropolis, as defined by the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), including the parish of Hampstead, were "combined into a district termed 'the Metropolitan Asylum District,' for the reception and relief of the poor in the said district infected with or suffering from . . . smallpox . . . to be under a board of management to be constituted for the said district," and in the execution of their duties as such managers, the defendants, under the authority of the said Act of 1867, and with the sanction and by direction of the Poor Law Board, purchased in 1868 a plot of land at Hampstead for hospital purposes, in the north-western district, and thereon by the like direction erected, on a sudden outburst of smallpox in the metropolis, temporary buildings which they opened and used as a smallpox hospital from Dec. 1870 to July 1872. In 1874, by direction of the Local Government Board, who had been substituted for the Poor Law Board, the defendants erected on the site of the said temporary buildings, and in lieu thereof, permanent and substantial buildings specially designed and fitted up by them for the reception of patients suffering from contagious or infectious diseases, and in March 1876 opened the same as a hospital for smallpox patients, from which time

to the present large numbers of persons suffering from smallpox had been brought from all parts of the metropolis to, and been received and detained and many still were at, the said hospital, with the consent and by the authority of the defendants.

The plaintiffs, severally owners and occupiers of houses and lands adjoining the hospital, brought an action against the defendants in which they claimed damages in respect of injuries sustained by them from the erection and maintenance of the hospital, which the plaintiffs alleged was a nuisance to the neighbourhood in general, and to the plaintiffs in particular, owing to the probable spread of disease by infection, to the effect of the dead-house, and to the bringing to and from the hospital of the patients in ambulances, and to the visiting of the patients by their relatives; and they claimed also an injunction to restrain the defendants from using their said lands and buildings as a hospital for smallpox or any other infectious or contagious disease; the defendants, on the other hand, denying that the hospital was a nuisance or a source of danger, and contending that, if it were, they were justified and protected from liability in what they had done by having acted bona fide in the execution of duties imposed upon them by the Legislature and in obedience to the orders of the Local Government Board.

The jury having found that the hospital was a nuisance occasioning damage to the plaintiffs per se, and also by reason of the patients coming to and going from the hospital; and secondly, that, assuming the defendants were legally entitled to erect and carry on the hospital, they had not done so with all proper care and skill with reference to the rights of the plaintiffs, it was, after argument on further consideration,

*Held, by Pollock, B., that on the above findings of the jury, and it not having been shown or found that the intention of the Legislature could not have been carried out without necessarily creating a nuisance, it could not be taken that the creation of a nuisance was impliedly, though not in express words, authorised by the statute, and the plaintiffs were therefore entitled to have the verdict entered for them with costs, and also to an injunction restraining the defendants from carrying on the hospital so as to be a nuisance to the plaintiffs or any of them; but, following the course adopted in *The Attorney-General v. Colney Hatch Asylum* (ubi infra), the issue of the injunction would be suspended for three months, with liberty to either side to apply.*

Held, also, that an authority amounting to a discretion was vested in the managers of the asylum district, and the Legislature could not have intended to make them mere irresponsible instruments to carry out the orders and directions of the Poor Law and Local Government Boards; which orders and directions must be taken with reference to the statutory powers conferred upon those bodies respectively, and cannot be so dealt with as to vary the provisions of the statute, or to enlarge or cut down the responsibility arising out of anything done by the board or the managers.

Hawley v. Steele (37 L. T. Rep. N. S. 625; L. Rep. 6 Ch. Div. 521; 46 L. J. 782, Ch.) distinguished.

This was an action by the three plaintiffs, Sir Rowland Hill, knight, Alfred Downing Fripp, and William Lund, severally owners and occupiers of certain dwelling-houses and lands in the parish of

(a) Reported by HENRY LING, Esq., Barrister-at-Law.

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Hampstead, in the county of Middlesex, against the defendants for an alleged nuisance, created and caused by the defendants, in the erection and maintenance by them of the Hampstead Smallpox Hospital upon land belonging to the defendants, situated in the said parish of Hampstead, adjoining the said houses and lands of the plaintiffs, in which action the plaintiffs claimed damages for the injuries sustained by them from the said nuisance, and also an injunction to restrain the defendants from using their said land and the buildings thereon as a hospital for smallpox or scarlet fever or typhus fever, or any other infectious or contagious disease.

The case, on the part of the plaintiffs, as it appeared from their statement of claim, was, that in 1868 the defendants were owners in fee simple, by purchase in that year, of a plot of land at Hampstead, and that prior to 1868 the plaintiff Hill had been and then was owner in fee and occupier of a dwelling-house and several acres of land adjoining the land of the defendants, the principal entrance to which latter land, at which all the hospital patients afterwards entered, being at the end of a short *cul de sac*, forming a private road the property of the defendants, one side of which was bounded by the plaintiff Hill's property, and the entrance to whose said house was on the high road adjoining the point where the said *cul de sac* leaves the high road. That the plaintiff Lund had been, prior to 1868, and still was the owner, in fee of many acres of land and houses built thereon adjoining the said land of the defendants, and had, previously to 1868, let many of the said houses for different terms, and laid out and dedicated to the public divers roads over the said land, and past his said houses, and had from time to time relet divors of the said houses during the times of the occurrences after mentioned, occupying as his own dwelling-house one of the said houses on the said land, the entrance to which was on the high road, out of which the before-mentioned *cul de sac* turned at a short distance from the turning; and on the date of the defendants' said purchase, and at the time they first began to use the said land as a hospital for infectious diseases, the plaintiff Lund had entered into building agreements for erecting additional houses on the said land, which houses were then in course of erection. That in 1870 the plaintiff Fripp took a lease of the house and land a few yards from the said land of the defendants, and had since occupied the same as a residence and place for carrying on his profession as an artist, and in 1871 built at great cost a studio for that purpose, the sole entrance to the said house and studio being in the high road closely adjoining the said *cul de sac*, he being at the time he took the said lease unaware that the defendants were about to use their said land for the purpose of a smallpox hospital: (paragraphs 1, 4.)

Between Dec. 1869 and Dec. 1870 the defendants erected on the said land temporary buildings, which in the last-mentioned month they opened and continued to use as a hospital for smallpox patients up to the 20th July 1872 (paragraph 5), during which time large numbers of persons suffering from smallpox were, at the instance and invitation, and with the consent of, the defendants, brought from all parts of the metropolis to the hospital, and there received and detained by the authority of the defendants (paragraph 6);

and that during 1876 the defendants commenced, and were still continuing, to erect permanent administrative buildings, with the purpose of using their said land and buildings as a hospital for smallpox, scarlet fever and typhus fever patients and persons suffering from other infectious and contagious diseases (paragraph 7); and that in March 1876 they again opened the buildings for the reception of smallpox patients, from which time to the present large numbers of persons suffering from smallpox had been, at the instance, &c., of the defendants, brought to, and by the authority and invitation of the defendants had been and still were detained at, the said hospital (paragraph 8). Further, that during the time of such use of their land by the defendants, noxious vapours and matters dangerous to health had escaped from the said hospital on to the said lands of the plaintiffs, and rendered their houses and lands unhealthy, and prevented the plaintiffs and their families and tenants from occupying and enjoying the same with safety to their health, putting them to great expense in protecting themselves from illness, and otherwise interfering with their due use and enjoyment of their said houses and lands; and that patients and persons who had been in contact with patients, such patients and persons giving off germs of disease and being liable to spread infection, had, partly with the knowledge and consent and partly by the negligence of the defendants, from time to time got from the defendants' lands on to the lands of the plaintiffs, thereby rendering the lands and houses of the plaintiffs unsafe for occupation, and endangering the health of the plaintiffs, their families and tenants, and preventing their free use and enjoyment of their said houses and lands; and that during the said time a disagreeable and unwholesome smell spread from the said hospital to the lands and houses of the plaintiffs, and seriously interfered with their enjoyment of the said houses and lands: (paragraphs 9, 10, and 11.)

It was further alleged that, in consequence and as the natural result, foreseen by the defendants, of their said use of their land and buildings for a hospital, large numbers of persons suffering or recently suffering from smallpox, and of persons recently in contact with or shut up in vehicles or in the said building with persons suffering from smallpox, all such persons being in a state to spread infection and giving off into the air unwholesome vapours and germs of disease, had, on foot and in cabs, &c., frequented and passed over the said high road and up and down the said *cul de sac*, and over the said roads of the plaintiff Lund, and cabs, &c., in which smallpox patients had been conveyed, and being in a state to spread disease, had frequented the said roads, &c., the whole to the great danger of persons frequenting the said roads, &c., which had thereby become dangerous and unsafe for persons to walk or drive in; and noxious and infected air and germs of disease had spread into the houses and gardens at the sides of the said high road and other roads and *cul de sac*, and in particular into the houses and lands of the plaintiffs and their tenants: (paragraph 12.)

The plaintiffs alleged also that persons suffering from smallpox and spreading infection and the germs of the disease in the air around had, at the invitation and with the consent of the defendants, walked and been conveyed to the hospital along the said highway and roads, &c., thereby

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rendering the said roads, &c., dangerous, and spreading infection into the houses and gardens on each side; and that persons bringing patients to the hospital, and thereby themselves becoming liable to spread infection, had, at the invitation, &c. of the defendants, come along the said roads, &c., to the hospital, and by their orders and consent returned from the said hospital along the said roads and *cul de sac*, whereby the dangers, inconveniences, and injuries to persons in the said roads and *cul de sac*, and in particular to the plaintiffs and their property, had been increased; and that friends visiting the patients and others entering the hospital, and the nurses and other servants of the defendants in the hospital, and who respectively were thereby liable to spread infection, and patients who had recovered but were still liable to spread infection, had, with the defendants' consent, gone out of the hospital along the said *cul de sac* and roads, thus further increasing the dangers, &c., to persons generally, and in particular to the plaintiffs and their property: (paragraphs 13, 14, and 15.)

By reason of the above-mentioned facts the plaintiffs had been prevented from having safe and undisturbed ingress and egress for themselves, their families, visitors, and tenants, to and from their said lands and houses, and persons whom they desired to see for personal and professional reasons had been prevented from coming to them, and the said lands and houses had been rendered unhealthy and unfit for habitation, and filled with noxious air and germs of disease; and by reason of such danger and inconvenience the enjoyment by the plaintiffs and their tenants of their said land and houses had been seriously interfered with, and the value of the said property greatly diminished: (paragraphs 16 and 17.)

That such dangers, inconveniences, injuries, and losses, and each of them, were partly the necessary consequences of the use of the said land and buildings of the said defendants as a smallpox hospital, and had been greatly increased by the negligent and improper manner in which the said hospital had been and was conducted by the defendants, and the absence of rules for the protection of persons living in the neighbourhood from infection, and the want of strictness in enforcing such rules: (paragraph 18.)

The plaintiffs severally claimed damages for the injuries sustained by them respectively from the said nuisance, viz., Sir Rowland Hill, 4000*l.*; Alfred D. Fripp, 2000*l.*; and William Lund, 25,000*l.*; and also an injunction to restrain the defendants from using their land and buildings as a hospital for smallpox, or any other infectious or contagious disease, and also such other relief in the premises as the circumstances of the case might require.

The case on the part of the defendants, as set forth in their statement of defence, was that they were a body of persons incorporated under and by virtue of the Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6) pursuant to an order of the Poor Law Board issued on the 15th May 1867, directing that the several unions and parishes set forth in the schedule thereunto annexed, being all wholly or for the greater part thereof respectively included within the metropolis as defined by the Metropolitan Management Act 1855, should be combined into a district, to be termed "The Metropolitan Asylum District," for the reception and relief of the classes of poor persons, chargeable

to some union and parish in the said district respectively, who might be infected with or suffering from fever or the disease of smallpox, or might be insane, to be under a board of management to be constituted for the said district and to consist of sixty members, forty-five of whom were to be elected by the guardians of the several unions and parishes comprised in the district, and fifteen to be nominated by the Poor Law Board.

That the parish of Hampstead was within such district, and the defendants, having been duly appointed, entered upon their duties as imposed by the Metropolitan Poor Act 1867, and, having resolved to provide three fever and smallpox hospitals, two of which were to be to the north and one to the south of the river Thames, appointed in Aug. 1867 a committee of their body to report upon the matter who, afterwards reported that sites he purchased for hospital purposes in the north-east district, in the north-west district, as near as might be found convenient to the Regent's Park, and in the southern district; and the committee subsequently, in Jan. 1868, reported that the most eligible site in the north-western district was the land in question, and the defendants authorised the committee to enter into a contract for the purchase of the said land for hospital purposes at a certain price, subject to the approval of the Poor Law Board, and subsequently, with the sanction and under direction of the said board, the purchase was completed; and the defendants, having purchased also sites at Homerton for the north-east and at Stockwell for the south-east district, employed architects to prepare proper plans for the erection of permanent hospitals on the said three sites; and in Feb. 1869, by direction of the Poor Law Board, they postponed the erection of a permanent hospital at Hampstead, but proceeded with the erection of permanent buildings at Homerton and Stockwell; and the Poor Law Board also directed that in the event of a sudden outbreak of fever the defendants should erect temporary buildings on the site at Hampstead.

That in Nov. 1869, a sudden outbreak of relapsing fever occurring in the metropolis, the defendants, by direction of the Poor Law Board, and for the purpose of providing accommodation for the poor of the north-western district suffering therefrom, erected the temporary buildings referred to in paragraph 5 of the statement of claim; and that until June 1870, when such temporary hospital was closed, a great number of fever patients were to the knowledge of the plaintiffs received therein. That in Nov. 1870 a sudden outbreak of smallpox occurred in the metropolis and, the smallpox and other hospitals being crowded with patients, it became necessary to provide immediate accommodation for the large number of poor persons suffering from the epidemic; and the defendants being directed by the Poor Law Board to utilise the temporary hospital at Hampstead for the reception of smallpox patients, and to erect additional temporary buildings for the like purpose, and being solicited by several boards of guardians of the metropolis to open the said hospital for smallpox patients, they did, as alleged in paragraph 5 of the statement of claim, open and use the said buildings as a small-pox hospital, and early in 1871, the epidemic still continuing, an addition was made by them to their said premises at

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Hampstead by the erection, with the sanction of the Poor Law Board, of further temporary buildings for the accommodation of patients; the defendants also said that their acts referred to in paragraph 6 of the statement of claim were done by them *bonâ fide* in the exercise of their duties as managers of the said hospital, pursuant to the powers conferred upon them by the Metropolitan Poor Act 1867, and by the said order of the 15th May 1867, and pursuant to and in order to comply with divers orders and directions of the Poor Law Board.

That after July 1872 the said buildings were not further used as a smallpox hospital, but the defendants were specially directed by the Local Government Board, who had been substituted for the Poor Law Board, to keep the said buildings in readiness to meet any future outbreak of smallpox; and in 1874 they were directed by the Local Government Board to replace the aforesaid temporary buildings by buildings of a permanent and substantial character, to be specially designed for the reception of patients suffering from contagious or infectious disease. One permanent building was (as stated in paragraph 7 of the statement of claim) erected, but it was erected pursuant to the direction aforesaid, and after a select committee of the House of Commons, appointed to inquire into and report upon the action of the Metropolitan Asylum's Board in respect of the establishment of a fever and smallpox hospital at Hampstead, had, upon evidence taken by them, including the evidence of the plaintiffs by themselves or their agents on their behalf, reported (*inter alia*) that on the whole there was no reason why this particular district (meaning Hampstead) should claim the interference of Parliament for the removal from it of an inconvenience to which it had been subject by reason of the due execution of a wise and beneficent law.

The defendants also alleged that the plaintiffs were, during the time of the erection of the temporary and also of the said permanent buildings, well aware that they were being erected for the express purpose of being used for the reception of persons suffering from contagious or infectious disease, and were also aware of the alleged directions of the Local Government Board, and from time to time saw the said several buildings being erected; that the defendants have incurred great expense in the erection thereof, and in making the same suitable and fitted for the purpose of receiving such patients, and they submitted that under those circumstances the plaintiffs were not entitled to the relief by injunction claimed by them. The defendants admitted the opening of their buildings in Nov. 1876 for the reception of smallpox patients as stated in paragraph 8 of the claim, there being then a sudden increase in the number of poor persons affected by the disease in the metropolis, for whose provision and reception the defendants, pursuant to their duty in that behalf and to the directions of the Local Government Board, made provision in the buildings aforesaid; and they said that all the acts of the defendants referred to in the said paragraph 8 were done by them *bonâ fide* in the exercise of their duties as managers of the said hospital, pursuant to the powers conferred upon them by the Metropolitan Poor Act 1867 and by the order of 15th May 1867, and pursuant to and in order to comply with divers orders and directions of the Poor Law

Board and the Local Government Board respectively. But they did not admit any of the statements contained in paragraph 9 and the subsequent paragraphs of the statement of claim.

That in the management of the said hospital, during the times mentioned in the statement of claim, they acted *bonâ fide* in the execution of their duties, and in many things under the direction of the Poor Law and Local Government Boards, by whom rules were from time to time issued for such management, and they craved leave to refer to all orders and directions of the said boards respectively.

That the alleged causes of action of the plaintiffs did not arise from any default or wrongful act of the defendants entitling the plaintiffs to recover damages from the defendants, but arose from the exercise by the defendants and the Poor Law and Local Government Boards of the powers vested in them respectively by the Metropolitan Poor Act 1867 and other Acts of Parliament incorporated therewith.

And further, that the alleged causes of action arose from the existence of the smallpox hospital, and not from any neglect or default of the defendants in the conduct or management thereof; that the said smallpox hospital at Hampstead was erected for the public benefit, and at the time of the alleged causes of action was not a nuisance, and any damage which might have resulted therefrom to the plaintiffs did not afford ground of relief either by injunction or otherwise.

At the trial of the action before Pollock, B., and a special jury, at the Michaelmas sittings for Middlesex at Westminster, on the 18th Nov. last, and several following days, evidence was adduced on the part of the plaintiffs in support of their case as hereinbefore stated, and showing the number of patients received into the hospital during the time in question; and numerous medical witnesses were called who stated that in their opinion the existence of the asylum, as carried on by the defendants, was a source of danger to the neighbourhood generally, and to the plaintiffs in particular, owing to the probable spread of the disease by infection, to the effect of the dead-house; and also to the bringing of the patients to and from the asylum in ambulances, and to the visiting of the patients by their friends. &c. Evidence was also given of patients being allowed to walk in the asylum grounds so near to the fence separating such grounds from the plaintiffs' property as to endanger the safety of the latter; of the existence of bad smells from the dead-house; and of the wife of one of the plaintiffs having, shortly after noticing the smell, been attacked by smallpox, but it appeared that about the same time she had examined an empty ambulance standing in the high road, wherein a smallpox patient had been conveyed. On the other hand the defendants, who contended that they were protected from liability by the statute under which they had acted, adduced a large body of medical and other evidence showing that no danger was occasioned to the plaintiffs by the asylum, and that it was built and carried on with all possible care and skill, and so as to avoid any evil consequences.

In summing up the case, the learned Baron told the jury that the question as regarded the alleged nuisance was, whether the defendants had so used their land as materially to interfere with the

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comfort and enjoyment of the plaintiffs in the use and occupation of their houses and lands, and that, in order to constitute a nuisance, there must be a sensible and real damage done to the property or persons alleged to be injured, something which did in a sensible degree affect the legal rights of the owners. It was (he told the jury) admitted that there might be some things which were inconvenient, and which disturbed the owner of land in his occupation of it, and which might undeniably depreciate its value, and which yet might be no nuisance. That in the present case the Legislature had conferred powers on the defendants and the Local Government Board to do certain things, but gave them no power to make compensation for injuries that might thereby accrue to other persons. In the case of railways powers were given to the companies to compensate owners for land taken, but none for the whistling or noise of the engines, because private interests must yield to the public good. They must treat this case as one between two individuals. If they found that the hospital was *de facto* a nuisance, it would be no excuse that the defendants did what they did in a fit and proper place, because the Legislature did not say what was a fit and proper place.

The learned judge then left five questions to the jury, which questions, together with the answers thereto, are fully set forth in the judgment; the finding of the jury being in substance, first, that the existence of the hospital was a nuisance and caused danger to the plaintiffs *per se*, and also by reason of the patients coming to and going from the hospital; and secondly, that there had been negligence in the management of the hospital, proper and reasonable care and skill with reference to the rights of the plaintiffs not having been exercised, and particularly in not disinfecting the ambulances before leaving the hospital. The defendants contended that they had acted under their statutory powers, and that, notwithstanding the above finding of the jury, they were entitled to judgment. The learned Baron, however, reserved his decision as to entering the judgment until the points of law involved in the case had been more fully argued before him on further consideration; and now

Herschell, Q.C. (with whom were *Bompas*, Q.C. and *Finlay*) moved to enter judgment for the plaintiffs, and argued that there was nothing in the statutory power given by the Metropolitan Poor Act 1867, that allowed the Metropolitan Asylum Board to create a nuisance, or enabled the Poor Law Board to direct them to do so. No Act of Parliament could do that. Proper care should have been taken as to the choice of the site and the access to the hospital, neither of which things had been done here. The erection of a hospital on this spot was not contemplated by the Legislature in the Act of Parliament in question, and, whether it were or not, certainly not so as to be a nuisance and a danger to the inhabitants of the neighbourhood, as the medical testimony clearly proved it to be. The defendants' contention, if it be right, would enable them to kill a considerable number of persons outside the hospital for the sake of the patients within it, and would render all the land and houses in the vicinity practically of no value. The finding of the jury was in accordance with the evidence and was right.

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The *Attorney-General* (Sir J. Holker, Q.C.) with whom were *Willis*, Q.C., *Anderson*, and *Proudfoot*, for the defendants, *contra*, argued that the defendants were protected by the Metropolitan Poor Act 1867, and were merely in all they had done the servants and agents of the Poor Law and Local Government Boards. It had not been proved that there was any infection of the air, or that the health of any one had actually suffered. The germ theory of disease could not be supported, and no effluvia or anything else dangerous to health had been sent from the hospital on to premises of the plaintiffs so as to constitute a trespass. The plaintiffs had had the full enjoyment of their houses and lands, and no rights of theirs had been disturbed or interfered with in any way by the defendants; and, even if they had been, the defendants were protected from liability by having acted under the authority of the Act of Parliament and in obedience to the orders of the Poor Law and Local Government Boards.

The following cases and authorities were cited, relied on, and distinguished respectively, by counsel on each side, during the argument:

- The Attorney-General v. The Corporation of Leeds*, 22 L. T. Rep. N. S. 390; L. Rep. 5 Ch. App. 583; 39 L. J. 711, Ch.;
Clowes v. The Staffordshire Potteries Waterworks Company (on appeal before the Lord Justices), 27 L. T. Rep. N. S. 521; L. Rep. 8 Ch. App. 125; 42 L. J. 107, Ch.;
The Attorney-General v. The Directors of Colney Hatch Lunatic Asylum, 19 L. T. Rep. N. S. 708; L. Rep. 4 Ch. App. 147; 38 L. J. 265, Ch.;
The Caledonian Railway Company v. Ogilvie, 2 Macq. H. L. Cas. 229;
The Attorney-General v. The Hackney Local Board, 33 L. T. Rep. N. S. 244; L. Rep. 20 Eq. Cas. 626; 44 L. J. 545, Ch.;
The Attorney-General v. The Gas Light and Coke Company, 37 L. T. Rep. N. S. 746; L. Rep. 7 Ch. Div. 1; 47 L. J. 534, Ch.;
Reg. v. Pease, 4 B. & Ad. 30; 2 L. J. N. S. 26, Mag. Cas.;
Vaughan v. The Taff Vale Railway Company (in the Exch. Cham.), 2 L. T. Rep. N. S. 394; 5 H. & N. 679; 29 L. J. 247, Ex.;
The Hammersmith and City Railway Company v. Brand (in the H. of L.), 21 L. T. Rep. N. S. 238; L. Rep. 4 E. & L. App. 171; 38 L. J. 265, Q. B.;
Brown and others v. The Mayor, &c. of New York (American), 3 Barbour's Sup. Ct. Rep. 254;
Geddis v. The Proprietors of the Bann Reservoir (in the H. of L.), L. Rep. 3 App. Cas. 430;
Sollau v. De Held, 2 Sim. Rep. N. S. 133; 21 L. J. 153, Ch.;
Hawley v. Steele, 37 L. T. Rep. N. S. 625; L. Rep. 6 Ch. Div. 521; 46 L. J. 782, Ch.;
Boulton v. Crowthor, 2 B. & C. 703; 2 L. J. 139, K. B.; 4 Dowl. & Ry. 195;
Reg. v. The Poor Law Board; *Re The Newport Union*, 6 A. & E. 54;
Reg. v. The Proprietors of the Bradford Navigation, 33 L. J. 191, Q. B.; 6 B. & S. 601;
The Metropolitan Local Management Act 1855 (18 & 19 Vict. c. 120);
The Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6).

Cur. adv. vult.

Jan. 28, 1879.—POLLOCK, B.—This action was brought to recover damages in respect of, and to obtain an injunction against the recurrence of, what the plaintiffs alleged to be a nuisance affecting their rights, by the erection and maintenance of an asylum consisting of several buildings, which were erected and maintained for the reception and treatment of paupers suffering from smallpox. The rights of the three plaintiffs, who occupy land and houses adjoining the land and buildings

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occupied by the defendants, were independent and differed in their character. For the purpose of this judgment it will be sufficient to refer to them as set forth in the statement of claim. At the opening of the case it was arranged by counsel that, in the event of a verdict passing for the plaintiffs, the amount of the damages should be referred to an arbitrator; and before the case had proceeded far it was further arranged that the question to be tried should be limited to this, viz., whether the asylum was a nuisance occasioning damage to the plaintiffs, either *per se*, or by reason of the patients coming to or going from the asylum; and, further, assuming that the defendants were entitled to erect and carry on the asylum, did they do so with all proper and reasonable care and skill with reference to the rights of the plaintiffs? The plaintiffs proved that between Dec. 1870 and July 1872 there were 7352 patients admitted into the asylum, of whom 1379 died, and that there were for a considerable period as many as 560 patients under treatment at the same time. They also adduced evidence to show that, during this period, the proportion of small-pox cases in the neighbourhood of the hospital was far larger than in other parts of the parish, and they called a number of medical witnesses who stated that, in their opinion, the existence of the asylum as carried on by the defendants was a source of danger to the neighbourhood in general and to the plaintiffs in particular, owing to the probable spread of the disease by infection, to the effect of the dead-house, and also to the bringing to and from the asylum of the patients in ambulances, and the visiting of the patients by their relatives in cases where death was apprehended. With regard to the plaintiff Sir Rowland Hill, some evidence was also given that patients within the grounds of the asylum were allowed to walk so near to the fence which separated the asylum grounds from those belonging to Sir Rowland Hill, as to interfere with the safety of the latter. With regard to the plaintiff Fripp, he deposed to having perceived when in his own house a bad smell from the dead-house, whereby his family and others were compelled to leave, and that on a particular day in 1871 the smell was specially noticed by himself and his wife, and shortly afterwards she sickened and was attacked by smallpox. He also stated, however, that about the same period Mrs. Fripp had examined an empty ambulance standing in the high road, wherein a patient, suffering from smallpox, had been conveyed. The defendants called a great number of witnesses, consisting of those who had the superintendence and personal management of the asylum, and also medical men, who stated that in their opinion no danger to or disturbance of the rights of the plaintiffs was occasioned by the asylum, and that it was built and carried on with all possible care and skill so as to avoid any evil consequences. At the end of the case on both sides, I left to the jury five questions, which, with the answers to them, were as follows: First, was the hospital a nuisance, occasioning damage to the plaintiffs, or either and which of them, either *per se*, or, secondly, by reason of the patients coming to or going from the hospital? To which the jury answered that "It was a nuisance and caused damage to each of the plaintiffs *per se*, and also by reason of the patients coming to and going from the hospital." Thirdly,

assuming that the defendants were by law entitled to erect and carry on a hospital, did they do so with all proper and reasonable care and skill with reference to the rights of the plaintiffs? To which the jury answered "No." Fourthly, assuming that the defendants were by law entitled to erect and carry on this hospital, did they do so with all proper and reasonable care and skill with reference to the rights of the plaintiffs? To which the jury answered "No." Fifthly, did the defendants use proper care and skill with respect to the ambulances? To which the jury answered, "No, we consider that the ambulances ought to have been disinfected before leaving the hospital." For the purpose of this judgment, I must assume that the answers thus given are supported in point of fact by the evidence which was laid before the jury; and, further, that the direction given to them was sufficient in point of law, any objection upon either of these heads being available only upon motion before the divisional court. At the further argument of the case, which took place before me during the last Michaelmas sittings, the learned counsel for the plaintiffs contended that the plaintiffs were entitled to have the verdict and judgment entered for them, and also to an injunction, and that the answers of the jury to the first two questions were sufficient to show that a legal cause of action had been established. The learned counsel for the defendants, on the other hand, denied this, and, with respect to the answer to the first two questions, asserted that no case had been made out, for the following reasons: First, they argued that, even were it admitted that the building and carrying on of the hospital were a nuisance, and one which was not authorised and protected by law, yet the defendants were not liable, because in all that they did they had acted simply in obedience to the Local Government Board, whose orders they were bound to obey; and the position of the defendants was likened to that of a constable executing a warrant and officers carrying out the orders of their Government. Secondly, it was argued, on broader and more intelligible grounds, that the defendants were not liable, because in all that they did they acted *bonâ fide* in the execution of a duty cast upon the Local Government Board, and themselves by a statute which required certain things to be done for the public welfare. Now, before I consider whether either of the points contended for by the defendants can be supported, it is necessary to examine what is the exact position, both with relation to the Local Government Board, and also to the members of the public whose property and rights may be affected by their acts. The statute, by which the defendants are incorporated, and under which they seek to exercise the powers and do the acts complained of, is the Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6). But this statute is only in continuation of a course of legislation, commencing with the Poor Law Act of 1834 (4 & 5 Will. 4 c. 76), whereby a Poor Law Board was first established, and power given to such board, amongst other things, by sects. 23 and 25, to direct overseers and guardians to build, hire, enlarge, or alter workhouses according to such plans and in such manner as the board shall deem most proper. Similar powers will also be found in the Poor Law Act of 1844 (7 & 8 Vict. c. 101), s. 43, whereby the Poor Law Board is authorised to order district boards to

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"purchase, hire, or build, and to fit up and furnish buildings for asylums or schools." The Act of 1867 is limited to the metropolis, and provides, by sect. 5, for the establishment of asylums for the reception and relief of "sick, insane, or infirm paupers" chargeable in the metropolitan unions. This is carried out in sects. 6, 7, and 8 by the formation of asylum districts, and the constitution of a body of managers for the asylum of each district, and by directing that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time by order direct." By sect. 15 "The Poor Law Board may from time to time by order direct the managers to purchase or hire, or to build and (in either case) to fit up a building or buildings for the asylum, of such nature and size and according to such plan and in such manner as the Poor Law Board think fit, and the managers shall carry such directions into execution." And by sect. 16, "The managers shall have the like powers as are for the time being vested in guardians of unions in the metropolis relative to the purchase or hiring of land or buildings." The following sections are also material: Sect. 20 enacts that "The managers shall from time to time provide for the asylum necessary fixtures, furniture, and conveniences, and such as the Poor Law Board from time to time by order direct." By sect. 21, "The mode of admission into the asylum shall be such as the Poor Law Board from time to time by order direct." Sect. 22, "The managers shall have the like powers as guardians for the relief, maintenance, and management of the inmates of the asylum, and shall from time to time provide such medicines, appliances, and requisites for the medical and surgical care and treatment of the inmates, and cause the same to be furnished and used according to such rules as the Poor Law Board from time to time by order direct." Sect. 51 provides that "The provisions of the Act 5 & 6 Will. 4, c. 69, to "facilitate the conveyance of workhouses and other property of parishes, and of incorporations or unions of parishes in England and Wales" relative to the acquisition of sites or buildings for workhouses, and of all Acts extending or amending the same, shall apply to lands and buildings required to be purchased, hired, or otherwise acquired for any of the purposes of this Act, and shall have effect as if managers under this Act were guardians, and as if an asylum or dispensary were a workhouse." Sect. 53 enacts that "So much of the Lands Clauses Act as relates to the purchase of lands otherwise than by agreement shall not be put in force except for the purchase of lands for the purpose of enlarging a workhouse, hospital, or school existing at the passing of this Act, and then not without a previous order of the Poor Law Board directing such purchase." By the Local Government Board Act of 1871 (34 & 35 Vict. c. 70) the powers and duties vested in the Poor Law Board are transferred to the Local Government Board which was established by that Act. It will be seen from these provisions that the scope and intention of the Act is to create and carry on within the metropolis asylums for the "sick, insane, or infirm," by district managers under the direction and control of the Poor Law Board, much in the same way as workhouses, asylums, and schools have been carried on by the guardians and district boards; and it is observable that the

only reference to smallpox is contained in sect. 69, which provides for the repayment out of the common poor fund of certain expenses, including those incurred "for the maintenance of patients in any asylum specially provided under the Act for patients suffering from fever or smallpox." It is under this Act that the defendants were appointed and have acted, and it is under the provisions contained in it, and under the orders of the Local Government Board made in pursuance of it, which were given in evidence at the trial, that the defendants seek to shelter themselves, on the ground that they acted only as the innocent agents of a public board, and in pursuance of their orders carried out what they have done, and therefore are irresponsible. I am unable, upon what seems to me to be a fair construction of the statute and a proper appreciation of its meaning, to arrive at that conclusion. Upon comparing sects. 15 and 16 it is clear that, whereas the former empowers the Poor Law Board to direct the managers to purchase, hire, or build buildings for the asylum, by the latter section the managers alone have the power similar to that vested in guardians of unions or parishes of the metropolis relative to the purchase of lands. So far as I can gather, the policy and provisions of the Poor Law Acts (beginning with the 59 Geo. 3, c. 12, s. 8, and continued and enlarged by the 5 & 6 Will. 4, c. 69, ss. 4 and 5, and the 6 Vict. c. 57, s. 16) have been that, formerly, churchwardens and overseers, and now guardians, should be the persons to acquire and hold lands or buildings required for workhouses, hospitals or other like places, although since the establishment of the Poor Law Board the guardians must exercise their rights under the control of the Poor Law Commissioners. It would appear from these and the other sections of the Act of 1867, that, although the intent is clear that the Poor Law Board are to have, so far as is possible, the ultimate control and to give their sanction to all that is done, yet the managers are the body who have power, subject to the orders of the Poor Law Board, to take and hold land; and it is they who, subject to such orders, are to purchase, hire or build, and to fit up the asylum, to provide the fixtures, conveniences and medicines, and, moreover, they are to have the like powers as guardians for the relief, maintenance, and management of the inmates, and in the appointment, control, and payment of officers. All these provisions appear to show that the asylum managers have authority and power vested in them amounting to a discretion, and that it could not have been the intention of the Legislature to make them mere irresponsible instruments to carry out the orders and directions of the Poor Law Board. It is quite true that each act that was done by the defendants with reference to the promotion of the asylum, and in particular the purchase of the land whereon it was built (which was authorised by an order, dated Feb. 13, 1868), was done by the express directions of the Local Government Board; but these directions must be taken with reference to the statutory powers and duty which are conferred upon those bodies respectively, and cannot be so dealt with as to vary the provisions of the Act or to enlarge or cut down the responsibilities which arise out of anything done by the board or the managers, whose acts must be dealt with as referable to the

legal right that is vested in them. The first point made by the defendants is, so far as I can find, wholly new; and, were it tenable, would lead to very serious consequences as affecting the rights of property; for it amounts to this, that a body of managers constituted for the purpose of carrying out a public object under the direction and supervision of a public department, may do acts which are admitted to be a nuisance and injurious to the owner of neighbouring property, and are also admitted to be unauthorised by law, but yet are not to be liable because they did the acts by the mandate of the department under which they act. In dealing with a contention so novel in character and so serious in its consequences, it will be well to examine shortly the only principle and authorities which are said to be analogous. The immunity of ministerial officers for acts committed by them has long been established, and is founded upon the clearest principles of reason and justice, namely, that the officer of a court is bound to obey the writ of a court acting within its jurisdiction, and has no means of ascertaining whether it proceeds upon a valid judgment or not. Moreover, he is punishable if he does not so obey, and it would be unjust that a man should be punished if he does not do a thing, and be liable to an action if he does do it. This was clearly pointed out by Willes C.J. in the case of *Moravia v. Sloper* (Willes Rep. 30), and in the judgment of the Court of Queen's Bench in the case of *Andrews v. Morris* (1 Q. B. 3; 10 L. J. N. S. 225, Q. B.). In the present case, whether the defendants were bound to obey the orders of the Local Government Board would depend upon the question whether those orders were legal or not, and therefore to say that the defendants were bound to obey such orders is to beg the question. The exemption from liability of officers carrying out Government orders has always been rested upon the ground that their conduct, under such circumstances is an act of state for which, on grounds of public policy, they cannot be made liable. In the present case, assuming that the Local Government Board were not authorised by the Act of 1867 to do the act of which the plaintiffs complain, the defendants were bound to inquire into their legal position, and were also bound to take care that they so exercised their rights as not injuriously to affect the rights of others, and they are in this respect in the same position as all other persons are by whose wrongful acts a nuisance is created. The second ground upon which the defendants rested their case involves a much more important question, namely, whether the defendants are protected in doing what they did by the provisions of the Act of 1867. That there are no provisions in that Act requiring them to build the very hospital, and on the very site, and to carry it on in the very manner in which it was carried on, was admitted. Had this been so, the case would have come within the well-known rule that, if the Legislature authorises the doing of a particular thing, it cannot be wrongful—a rule which is continually acted upon where the construction of roads, railways, canals, or other public works has been authorised by Act of Parliament. But it was said that, looking at the purview and legal intent of the Act, and the fact that it was passed with the view of obviating, or, at least, lessening a great public danger, the statute must be construed in a liberal spirit, and so

as not unduly to place difficulties in the way of those to whom its execution is entrusted. With regard to this last argument, if it is meant that this statute is to receive a construction different from that which would be put upon a statute authorising the carrying out of an agreement or public work, I see the greatest difficulty in giving effect to it, for there could not be a more dangerous doctrine, or one more contrary to the true rules of construction, than that which required or allowed a judge to give a different effect to the same words, wider or narrower, in proportion as he might think that the general object of the Act in which they were found was of great or small public importance. The principle which governs these cases is, as was stated by Lord Blackburn (then Blackburn, J.), in delivering the joint opinion of all the judges who heard the argument in the case of *The Mersey Docks Trustees v. Gibbs*, in the House of Lords (14 L. T. Rep. N. S. 618; L. Rep. 1 E. & I. App. 112; 35 L. J. 225, Ex.), namely, "that the action is not wrongful, not because it is for a public purpose, but because it is authorised by the Legislature." Moreover, when stress is laid upon the general prevalence of smallpox in the metropolis, and the desirability of removing patients suffering from it to the hospital, it must be remembered that there is nothing in the general scope of the Act, or in any particular provisions of it, that points specifically to smallpox; the class for the reception and relief of whom the Act professes to provide asylums is the "sick, insane, or infirm, or other class or classes of the poor," &c. There is another consideration which also affects the question at issue. The dispute here is not between the Asylum Board and any person or body of persons with whom any relation is established by the statute. It is not as though the persons complaining of the acts of the board were officers of the asylum or patients, in which case it might fairly be said that, if there were two ways of carrying out the intention of the statute, or the orders of the Local Government Board, it must be assumed that a discretion was vested in the Asylum Board to do that which seemed to them best under all circumstances, though not best for some particular person or persons. Here the plaintiffs are strangers to the defendants, and to the whole matter over which the defendants have control; their rights are simply those of owners and occupiers of land, and they assert that they have suffered damage by reason of the defendants acquiring land adjoining, and so using it as to create an actionable nuisance. To meet this, therefore, the defendants must certainly make out a clear case of right; for, if the defendants could at any place and in any manner carry out the requirements of the Act without creating a nuisance, it cannot be supposed that the Legislature armed them with an option so to perform their duty as to create or not to create a nuisance affecting the rights of others, as it might seem to the gentlemen of the Local Government Board fitting and proper with reference to the internal advantage or economy of the asylum. If the principle were once admitted, it is difficult to see where any line could be drawn. A statute justifying the defendants in creating a nuisance to neighbours would seem, by parity of reasoning, to justify the diminution of light or air, and this, although the statute contains no provisions compensating those who

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might be injured by its operation. The real question, therefore, seems to come to this : Looking at that which was done by the defendants, and which the jury have found to be a nuisance injurious to the rights of the plaintiffs, can it be truly said that the doing of it was, in substance and impliedly, though not in express words, authorised by the statute? Now, no evidence was tendered by the defendants to show, nor was there any finding of the jury, that the defendants could not have carried out what the Legislature intended them to carry out without necessarily creating a nuisance. It is clear from the facts proved that no such conclusion could have been arrived at; for, although to build and carry on the hospital where and in the manner in which it was built and carried on, and with its large number of patients, may have been the most proper and convenient mode of complying with the intentions and provisions of the Act, in so far as the patients, the officers, medical staff, and nurses were concerned, and the least expense to the ratepayers, it cannot be affirmed that, if several small hospitals had been built instead of one large one, or if a larger area around the hospital had been obtained, that which has been found to be a nuisance might not have been avoided. Hitherto I have dealt with the case apart from authority. Several cases were, however, cited in the course of the argument, and so far as these offer any assistance they appear to me to support the view which I have taken. In some of them the nuisance complained of was considered to have been expressly authorised by the Legislature. Thus in the case of the *King v. Pease* (*ubi sup.*), where a company was empowered to make a railway according to the deposited plans, and to use locomotives thereon, and the jury found that the engines used were of the best construction known, and that the defendants used due care and diligence in the using of them, the court held that, inasmuch as an unqualified power was given to use the engines on the particular railway, the defendants were not liable to be indicted for a nuisance, and that it must be presumed that the Legislature intended that those of the public who used an adjacent highway should sustain some inconvenience for the sake of the greater good to be obtained by those who used the railway. The same principle was followed in the case of *Vaughan v. The Taff Vale Railway Company* (*ubi sup.*) in the Court of Exchequer, and by the House of Lords in a Scotch case, *The Caledonian Railway Company v. Ogilvie* (*ubi sup.*), and *The Hammer-smith Railway Company v. Brand* (*ubi sup.*). Where a nuisance is not shown to be the absolutely necessary consequence of what is authorised to be done by the statute, the courts have been slow to admit of any argument by which it has been contended that the creation of a nuisance must be taken to be implied. This appears from what was said in the case of *Reg. v. The Bradford Navigation* (*ubi sup.*), and by the judgment of the Court of Appeal in the case of the *Attorney-General v. The Colney Hatch Lunatic Asylum* (*ubi sup.*), and in the case of *Clowes v. The Staffordshire Potteries Waterworks Company* (*ubi sup.*), where Mellish, L.J. dwells much upon the absence of any compensation clause, as indicating that the Legislature could never have intended to justify an injury to a private right. I agree also with what was said by Fry, J. in the case of *The Attorney-General v. The*

Gas Light and Coke Company (*ubi sup.*), that the full burden of proof in such a case rests entirely upon those who say that they cannot, without creating a nuisance, do a thing which they are bound to do. Whether the proposition be so framed as to assert that the Legislature never intended the act complained of to be done, or to say that those to whom the Legislature has entrusted the carrying out of a public work could do so without doing that particular act, the result is the same. In *Geddis v. The Proprietors of the Bann Reservoirs* (*ubi sup.*) Lord Blackburn says, "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although that does occasion damage to anyone. But an action does lie for doing that which the Legislature has authorised, if it be done negligently; and I think that, if by a reasonable exercise of the powers either given by statute to the promoters or which they have at common law, the damage could be prevented, it is within the rule of 'negligence' not to make such a reasonable exercise of their powers." I do not think that it will be found that any of the cases (I do not now cite them) are in conflict with that view of the law. My attention was particularly called by the learned Attorney-General for the defendants to the judgment of the Master of the Rolls in the case of *Hawley v. Steele* (*ubi sup.*), declining to grant an injunction on motion to restrain a general in Her Majesty's army, and the officers under his command, from causing or permitting rifle practice on a common in close proximity to the plaintiff's house, which, as he alleged, was a serious nuisance, and occasioned damage to his property. The principle upon which this injunction was refused has no doubt a material bearing upon the present case, and I in no way differ from what was there stated by the Master of the Rolls. But I cannot follow the course of the argument by which it is submitted that any true analogy exists between the case of lands vested in the Secretary of State for War "for the purpose of the defence of the realm," and a power given to acquire or build an asylum for sick paupers. In the first case it would be extremely difficult to contemplate the user of land for military purposes which does not carry with it the right to fire guns. In the present case I cannot, upon the materials presented to me, draw the inference that an asylum for sick paupers, including those suffering from smallpox, cannot be maintained without the creation of a nuisance. I have thus far dealt with the answers given by the jury to the first two questions. The remaining findings, assuming the legal right of the defendants to erect and carry on the asylum, would raise the question whether the defendants in so doing used all proper and reasonable care and skill with reference to the rights of the plaintiffs. Here, again, I must assume that the jury received a proper direction, and that the findings were not contrary to the evidence adduced; and the only question that remains is, whether that evidence disclosed any legal cause of action? As to this, the counsel for the defendants argued that the evidence for the plaintiffs was too general in its character, and that, although it might establish that some nuisance existed, yet it was not shown that the plaintiffs had sustained any special damage in consequence

of it. I cannot think that either of these contentions is established. As to the first of them: some of the plaintiffs' witnesses spoke fairly to the creation by the asylum of a nuisance, not merely affecting the comfort but endangering the healths of the plaintiffs, as to which in their evidence it would be impossible to see to what extent it arose necessarily from the existence of the asylum or from its being carried on in a manner more injurious to the plaintiffs than it might have been. This would and must have been a matter of inference for the jury. Upon the second point the plaintiffs would be entitled to a verdict, and to at least nominal damages, if the jury should think the nuisance created by the defendants rendered the enjoyment of life or property unsafe, although no special damage was proved. The result of the conclusion at which I have arrived, is that the plaintiffs are entitled to have the verdict entered for them, and also to judgment with costs. With respect to the injunction which is sought, I propose to adopt the course which was followed in the case of *The Attorney-General v. The Colney Hatch Lunatic Asylum* (*ubi sup.*). I therefore grant an injunction to restrain the defendants, their servants or agents, from carrying on the asylum so as to be a nuisance to all or any of the plaintiffs, and I suspend the issue of it for three months, with liberty to either side to apply.

Judgment for the plaintiffs with costs; injunction suspended for three months; liberty to either side to apply.

Solicitors for the plaintiffs, *Bischoff, Bompas, Bischoff, and Co.*

Solicitors for the defendants, *Few and Co.*

HOUSE OF LORDS.

Feb. 28, March 3, 4, 6, and May 5, 1879.

(Before the LORD CHANCELLOR (Cairns), Lords SELBORNE and GORDON.)

THE GOVERNORS OF THE MAGDALEN HOSPITAL v. KNOTTS AND OTHERS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Lease by charitable corporation—Void or voidable—Stat. 13 Eliz. c. 10—Statute of Limitations.

The appellants were the governors of a charitable hospital founded in 1758, and incorporated by Act of Parliament in 1768.

In 1783 the then governors of the hospital granted a lease of certain lands of the hospital to the respondents' predecessors in title for ninety-nine years at a peppercorn rent. In an action to recover possession of the demised premises:

Held, that the appellants being a "hospital" within the meaning of the stat. 13 Eliz. c. 10, as explained by 14 Eliz. c. 14, the lease was void ab initio by virtue of sect. 3 of the former Act, and that the Statute of Limitations ran from the execution of the lease, and that the action could not be maintained.

Judgment of the Court of Appeal affirmed, for different reasons.

The appellants in this case were the governors of a charitable corporation founded in the year 1758, and incorporated in 1768 by an Act of Parliament, 9 Geo. 3, c. 31. The action was brought by them with the sanction of the Charity Commissioners,

to recover possession of a house and premises known as The Tower public-house, situate in Tower-street, Westminster Bridge-road.

The defendant Knotts was the tenant in occupation of the house, and the other defendants were the landlords, and the mortgagees of Knotts' interest, who severally obtained leave to appear and defend the action.

The action was commenced on 11th July 1876, on the ground that a lease of the premises granted by the corporation in 1783 to one Charles Gilbert, through whom the defendants derived title, for ninety-nine years, at a peppercorn rent, was void under the Act 13 Eliz. c. 10, sect. 3.

That section enacts that

All leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or other having any spiritual or ecclesiastical living, of any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral, church, chapter, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate, other than for the term of one and twenty years or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term, shall be utterly void and of none effect, to all intents, constructions, and purposes, any law, custom, or usage to the contrary anywise notwithstanding.

Down to the issue of the writ in the action, no act had been done by the plaintiffs to avoid the lease.

The defendants demurred to the statement of claim, on the ground that the plaintiffs' right was barred by the Statute of Limitations; but Jessel, M.R. overruled the demurrer, holding that the effect of the statute of Elizabeth was only to make the lease voidable, and that the Statute of Limitations consequently did not begin to run till the issue of the writ. His judgment is reported in 36 L. T. Rep. N. S. 139, and 5 Ch. Div. 175.

The action then came on for trial before Fry, J., who gave judgment for the plaintiffs (37 L. T. Rep. N. S. 428).

The defendants appealed from both these decisions, and the Court of Appeal (James, Cotton, and Thesiger, L.JJ.) adopting the same construction of the statute of Elizabeth that the Master of the Rolls had done, held that the Statute of Limitations ran against the lessors from the date of the lease, and entered judgment for the defendants (38 L. T. Rep. N. S. 624; 8 Ch. Div. 709).

From this decision the present appeal was brought.

Cookson, Q.C., Davey, Q.C., and Sturges appeared for the appellants, and contended that, assuming that the hospital was within the statute, as explained by the 14 Eliz. c. 14, which must be admitted, the lease was not "void" ab initio, but only "voidable;" many authorities show that the words were interchangeable at the time when this Act was passed, as also appears from the cases in which a distinction has been drawn between such corporations as have a head and such as have not: unless such a lease were voidable, no question as to estoppel by acceptance of rent could ever have arisen. Either the lease was only voidable, or the lessee entered as a stranger without any title, and continued in possession as a tenant at will; in

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

neither case did the statute begin to run till the issue of the writ, which either avoided the lease, if voidable, or determined the tenancy at will if the lease was originally void. They cited

Case of Magdalen College, Cambridge, 11 Rep. 87 ;
Dean and Chapter of York v. Middleborough, 2 Y. & J. 196 ;
Attorney-General v. Glyn, 12 Sim. 84 ;
Chapter of Southwell v. Bishop of Lincoln, 1 Mod. 504, 2 Mod. 56 ;
Moore v. Clench, 1 Ch. Div. 447 ; 34 L. T. Rep. N. S. 13 ;
Archbold v. Scully, 9 H. of L. Cas. 360 ; 5 L. T. Rep. N. S. 160 ;
Case of Lincoln College, 3 Rep. 58 ;
Edwards v. Dick, 4 B. & Ald. 212 ;
Pennington v. Taniers, 12 Q. B. 998 ;
Doe v. Barrell, 12 Q. B. 1011, n. ;
Pennington v. Cardale, 3 H. & N. 656 ;
Bishop of Chichester v. Freeland, Bridg. 29 ;
Lyn v. Wyn, Ib. 181 ;
Hunt v. Singleton, Cro. Eliz. 473 ;
Bishop of Salisbury's case, 10 Rep. 59 ;
Carter v. Claycole, 1 Leon. 306 ;
Bacon's Abr., tit. Leases ;
Attorney-General v. Warren, 1 Wils. 387 ;
Kemp v. Westbrook, 1 Ves. sen. 278 ;
Earl of Abergavenny v. Brace, L. Rep. 7 Ex. 145 ;
 26 L. T. Rep. N. S. 514 ;
Rickman v. Garth, Cro. Jac. 173 ;
Abbot of Westminster's case, Dyer, 126 ;
Roe v. Archbishop of York, 6 East, 86.

Sir H. Jackson, Q.C. and Warrington (Oozens Hardy and Hilbery with them) appeared for the respondents, and argued that, this being in fact an action of ejectment, and the respondents being in possession, the appellants must show a title on the strength of which they are entitled to succeed. They produce a lease signed by Gilbert, but they must show that Gilbert entered under the lease, and that there is a privity of estate between him and the respondents. It is at least doubtful if such a case as this falls within the statute of Elizabeth, which was intended to restrain improvident alienations ; but, if it does so, then the Act makes the lease absolutely void. Judicial decisions have held that in some cases the actual grantors of such a lease may be estopped in equity from taking advantage of their own wrong, but they do not go further. In this case the right to bring the action accrued as soon as the lease was granted, and the Statute of Limitations began to run from that time. The old line of authorities makes no distinction between void and voidable, but suspends the operation of the Act in certain cases, such as corporations sole and corporations with heads, where such a lease was only held void as against the successor. In other cases it is void at all intents and purposes, and the Statute of Limitations began to run before the demand was made. They cited

Attorney-General v. Foundling Hospital, 2 Ves. jun. 42 ;
Bacon's Abr., tit. Leases ;
Crossley v. Arkwright, 2 T. R. 608 ;
Co. Litt. 45a ;
Dumpror's case, 4 Rep. 120 ;
Viner's Abr., tit. Leases and Estates ;
Morris v. Antrobus, Hardr. 325 ;
Doe v. Collings, 7 C. B. 939 ;
Commissioners of Charitable Donations v. Wybrants, 2 J. & Lat. 182 ;
Magdalen College, Oxford, v. Attorney-General, 6 H. of L. Cas. 169 ;
Chadwick v. Broadwood, 3 Beav. 308 ;
Attorney-General v. Payne, 27 Beav. 168 ;
 and also the cases of *Lincoln College*, *Edwards v. Dick*, *Attorney-General v. Glyn*, *Dean of York*

v. Middleborough, *Magdalen College, Cambridge*, *The Chapter of Southwell*, *Hunt v. Singleton*, *Pennington v. Taniers*, *Doe v. Barrell*, *Pennington v. Cardale*, and *Rickman v. Garth*, cited on the other side.

Oookson, Q.C. was heard in reply.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

May 5.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Cairns).—My Lords, the facts of this case are stated by Thesiger, L.J., in delivering the judgment of the Court of Appeal, with so much care and accuracy, that I do not propose to repeat them ; but I will at once approach that which is the main question in the case : Is the claim of the appellants to recover the premises known as the "Tower" public-house, in the parish of St. George the Martyr, in the county of Surrey, barred by the Statute of Limitations ? I may in the first place say that I entertain no doubt that the appellants are a hospital within the meaning of the statute 14 Eliz. c. 14, and therefore also of the 13 Eliz. c. 10. Irrespective of the decision in the case of the *Attorney-General v. Glyn* (12 Sim. 87), it appears to me to be clear that upon the wording of sect. 3 of the latter statute an eleemosynary corporation, like that of the appellants, is distinctly brought within the operation of the enactment. This being so, it is too clear for argument, and indeed it was not disputed, that the lease of Dec. 4, 1783, by the charity of the property in question, is a lease which is rendered invalid by the operation of the statute. So far as anything appears upon the face of the lease, it is an alienation of the charity estate for ninety-nine years, which plainly could not be supported. The question then arises, was the lease voidable or void ? The Court of Appeal, considering themselves bound by an authority in this respect, have treated the lease as voidable ; but, treating it as voidable, have held that the right to enter and avoid it accrued to the hospital immediately after the lease was made, and was therefore barred at the end of twenty years under the statute 3 & 4 Will. 4, c. 27, sect. 2. I do not think it necessary to examine the reasoning by which the Court of Appeal arrived at this construction of the Statute of Limitations, or to say how far I should be prepared to concur in it, because I must submit to your Lordships that the lease was, *ab initio*, not merely voidable, but void. The words used by the Legislature in the statute of Elizabeth are precise, and as strong as it is possible to make them. The statute declares that every lease, such as is the one before your Lordships, shall be "utterly void and of none effect to all intents, constructions, and purposes, any law, custom, or usage to the contrary anyways notwithstanding." The onus lies, as it seems to me, upon those who would cut down or qualify the effect of these words to show some ground, either from the nature of the case, or from authority, for doing so. As to the character of the evil which it is sought by the statute to prevent, it is clear that in the case of an eleemosynary corporation, the whole property of which is devoted to charity, where the office-bearers and other members of the corporation have no personal interest whatever, the object must be to make the property of the corporation absolutely inalienable in any way other than by the particular form of lease which is

H. OF L.]

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authorised. There is no intention to protect a successor against a predecessor; there is no ground for admitting an intention that individual office-bearers of the corporation granting the lease should be bound, but that their successors should be free either to affirm or disaffirm it. The intention is to condemn the lease as a wrong and a void thing, even though every member of the corporation should have committed himself to it, and should be anxious to maintain it. These considerations show how inapposite, as applied to these Acts of Parliament, is any analogy drawn from the ordinary stipulation between lessor and lessee, that if the lessee breaks certain covenants the lease shall be void. The object in such a case is to give the lessor an opportunity of terminating the lease if he is disposed to do so, but not to terminate it against his will or against his interest; and to hold that the lease must become void, even against the lessor's will, would enable the lessee to get rid of an onerous lease by wilfully breaking the covenant contained in it. So also with regard to cases (of which a great number were cited at your Lordships' bar) where a lease not warranted by the statutes of Elizabeth is made by an ecclesiastical corporation having a head, and where it has been held, while the same head continues, not indeed that the lease is voidable, but that it cannot be avoided even if the corporation desires it, and that after the death of the head the corporation as constituted under his successor may enter and avoid the lease, but may, on the other hand, so act as again to stop itself from so doing. A large number of these cases is collected in Bacon's Abridgment, title "Leases." There may be some difficulty in understanding how some of these cases with regard to ecclesiastical corporations with a head came originally to be decided as they were; probably they proceed on the principle of a personal estoppel by reason of a personal interest in the head of the corporation; but they appear to me to have no application to the case before your Lordships. There is indeed a case mentioned in Bacon's Abridgment under this title—the case of *The Collegiate Church of Southwell* (1 Mod. 204, 2 Mod. 56), which has some application to a corporation like the appellants, but it is an authority that the lease would be void and not voidable. It runs thus: "Where there is a chapter that hath no dean, as the chapter of the collegiate church of Southwell, there grants or leases made by them contrary to 13th Elizabeth, cap. 10, are void *ab initio* against themselves, and so the leases or grants by any other corporation aggregate who have no head or principal person; for they must be either void *ab initio* or good for ever, because they continue always the same, and one has no superiority or power more than another." To hold, in opposition to the precise words of the statute, that a lease by a corporation like the appellants was voidable would not merely be unmeaning—for to say that a lease is voidable implies a right to affirm which the corporation would not possess—but it might also inflict serious injury on the corporation. A valuable estate of the corporation might be alienated in utter recklessness or something worse, and when the corporation was put in motion to reclaim it, then, as the grant was valid until avoided, the right to mesne profits would not exist. The Court of Appeal, as the authority for the view that the lease is voidable only, refer to what they state was

a principle of the decision and not a mere *obiter dictum* in *Pennington v. Cardale* (3 H. & N. 656). I cannot agree that it was any necessary part of the decision in *Pennington v. Cardale* that the lease was voidable. The question in that case was the meaning of an exception of certain premises in a lease granted by a dean and chapter in 1849. The excepted premises were described as rents reserved in any building leases granted by the dean and chapter; and the court held that these words upon the whole context meant leases which *de facto* had been granted by the dean and chapter, whether interests were lawfully created by them or not. The inquiry whether these leases were void or voidable was immaterial. It is true that, in delivering the judgment of the court, Martin, B. says of a lease granted by the dean and chapter contrary to the statute, "It seems quite clear from the authorities cited upon the argument that this lease was not void but voidable only." These observations do not appear to me to have been necessary for the decision of the case, and even if they were accurate, they did not relate to the effect of leases or grants by a corporation such as the appellants, but they referred to the class of cases as to ecclesiastical corporations with a head of which I have already spoken. Holding as I do that the lease of 1783 was absolutely void, the respondents, or those whom they represent, must be taken to have been in possession of the property from 1783 without any title whatever, and not having paid rent to the appellants, or in any way entered into the relation of tenants, there is nothing to prevent the full operation of the second section of the Statute of Limitations, and the right of the appellants to recover the land is, in my opinion, effectually barred. I shall therefore move your Lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed with costs.

LORD SELBORNE.—My Lords, I am of the same opinion, and I only desire to make two observations. The first is, that the explanation of the doctrine laid down in the authorities as to leases by deans and chapters, and by colleges in the universities, is probably to be found in the fact that they were corporations coming within the original restraining Act of Queen Elizabeth, the governing members of which received the rents reserved on their leases for their own benefit; and that the succession in them of one head, having a principal share in the beneficial interest, after another, was thought—though by a process of reasoning which I cannot think accurate—to justify the courts in holding that the declared policy of that statute was satisfied so long as those particular successors were protected. That, however, cannot apply to a corporation under the government of persons of whom none has the beneficial interest; and the *Southwell* case is *à fortiori* an authority for not extending that doctrine to such a corporation. The other observation which I wish to make is, that the present case is one for which there was probably never any precedent, and is never likely to be followed by another similar to it, a long term having been attempted to be granted by a charitable corporation at a peppercorn rent. If any rent had been reserved and received, however small, the legal relation of tenant from year to year would have been created, and the Statute of Limitations could not have run.

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Lord GORDON.—My Lords, I concur in the judgment which has been delivered by the Lord Chancellor. I am of opinion that the provisions of the statute of Elizabeth apply to the Magdalen Hospital, and to the lease in question; and that being so, I can entertain no doubt that the lease is not only voidable, but that it was from the beginning void. The terms of the Act are, I think, so express as to leave no room for any other construction. If the lease was *ab initio* void, it follows that the respondents and their predecessors have been all along in possession of the property without any title; and as they have not paid rent to the appellants, or in any other way entered into the relation of tenants, I think that sect. 2 of the Statute of Limitations applies, and that all rights on the part of the appellants are effectually barred. I think, therefore, that the result arrived at by the Court of Appeal, though on different grounds, is right, and that their judgment should be affirmed.

Decree appealed against affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Wordsworth, Blake, Harris, and Parson.*

Solicitors for the respondents, *Pownall, Son, Cross, and Knott; Owtis and Betts.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Feb. 18, 19, 20, and March 28, 1879.

(Present: The Right Hons. Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

THE BANK OF NEW SOUTH WALES v. OWSTON. (a)
ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Malicious prosecution—Authority of bank manager—Evidence—Misdirection—Practice—Appealable amount—Interest on judgment.

An authority in an agent to arrest offenders, and to institute criminal proceedings, can only be implied where the duties which he has to perform cannot be efficiently discharged for the benefit of his employer unless he has power promptly to apprehend offenders on the spot.

W., the acting manager of the appellants, commenced criminal proceedings against the respondent, a merchant at Sydney, on a charge of stealing a bill of exchange, which proved to be groundless. In an action for malicious prosecution brought by the respondent against the bank,

Held (reversing the judgment of the court below), that such proceedings not being in the ordinary routine of banking business, and the evidence not showing any case of emergency, the judge misdirected the jury in telling them that such authority was to be inferred from W.'s position alone; and, in the absence of direct evidence of such authority, the bank was not liable.

When interest on the amount of a verdict is given, and included in the judgment, such interest must be taken into account in considering whether the amount at issue reaches the limit allowed for an appeal.

THIS was an appeal from a judgment of the Supreme Court of New South Wales (Hargreave and Manning, JJ., Martin, C.J. dissenting), discharging a rule *nisi* to set aside a verdict for the respondent for 500*l.* and costs, and to enter a nonsuit, or for a new trial, in an action brought by him against the appellants, the New South Wales Bank, for malicious prosecution under circumstances which appear fully in the judgment of their Lordships.

Benjamin Q.C. and Arbuthnot (J. C. Mathew with them) appeared for the appellants.

J. D. Wood (McIntyre, Q.C. with him), for the respondent, took the preliminary objection that by the Order in Council of 13th Nov. 1850, the Supreme Court of New South Wales had no power to grant leave to appeal, except in cases in which judgment had been given in respect of any sum or matter at issue above the amount or value of 500*l.*, without obtaining special leave from the Privy Council, which had not been done in this case.

On this point their LORDSHIPS gave judgment as follows:—In this case an objection has been made to the leave granted by the Supreme Court of New South Wales to appeal to Her Majesty on the ground that the sum involved is below the appealable amount. By the Order in Council of the 13th Nov. 1850, which regulates appeals from the Supreme Court of New South Wales, an appeal is given from any final judgment, decree, order, or sentence of the Supreme Court, subject to certain regulations and limitations, the first being that such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of 500*l.* sterling. In the present case the action was for malicious prosecution, and the damages were laid at 500*l.* On the trial the jury found a verdict for the plaintiff, with 500*l.* damages. A rule *nisi* was applied for to set aside that verdict, which was granted, but upon argument discharged by the court. The rule was discharged on the 12th March 1877, and on the 13th the judgment was entered. The judgment so signed was as follows: "Judgment after verdict for the plaintiff, damages 500*l.*; interest on the above amount from the date of verdict, 15th May 1876, to date, 33*l.* 1*s.* 11*d.*; taxed costs, 317*l.* 12*s.* 10*d.*" It is plain from previous decisions of this tribunal that the costs may not be added to the amount recovered in estimating the appealable sum; and it is now contended at the bar that interest on the sum awarded by the verdict ought not to be added. Their Lordships, however, think that interest under the laws existing in New South Wales is to be considered in estimating the amount. Interest on a verdict is given by the statute (24 Vict. No. 8), the first section of which enacts that—"Every plaintiff who shall hereafter obtain a verdict in an action in the Supreme Court, upon which he shall hereafter obtain judgment, shall be entitled to interest at the rate of 8*l.* per cent. per annum on the amount of such verdict from the time of obtaining such verdict until the time of entering up judgment thereon, and the amount of such interest shall be included in the judgment." The interest therefore is payable upon the amount of the verdict from the time of obtaining it until the time of entering up the judgment. It is to be in-

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.
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cluded in the judgment, and forms part of it. What, then, is the sum "in issue," to use the words of the statute, in the present appeal? The verdict is only a step towards the judgment. The sum cannot be recovered upon the verdict, but is recovered in execution upon the judgment. The foundation of the judgment is the verdict, and the rule that was obtained to set aside that verdict must be understood as involving the whole sum which the verdict would carry, and which would be included in the judgment. That sum is not the original sum only, but, by virtue of the statute, that sum and interest. A similar question was before this tribunal in certain appeals from India (*Gooropersad Khoond v. Juggutchunder* (8 Moo. Ind. Ap. 166.)) The part which is material is at page 168: "Where the appeal is from the whole decree, and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs. 10,000, it is clear that the matter which is in dispute in the appeal must exceed the sum of Rs. 10,000; for the question to be tried upon the appeal must be whether the decree is or is not right; that is to say, whether the decree has or has not properly ordered payment of a sum exceeding Rs. 10,000. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the Sudder Court is an amount exceeding Rs. 10,000, there, in their Lordships' judgment, the case clearly falls within the terms of the Order in Council." In the same judgment their Lordships state that they "must not, of course, be understood to intimate that the Sudder Courts ought to give leave to appeal in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree." Here their Lordships think that the sum involved in the judgment appealed from does exceed, for the reasons they have stated, the sum of 500*l.*, and they are therefore of opinion that the appeal ought to proceed.

The appeal was then heard upon the merits.

For the appellants it was contended that the verdict was against the weight of the evidence, there being no evidence that the prosecution had been directed by the bank. It cannot be contended that it is within the general authority of the manager of a bank to institute a criminal prosecution, and there was no evidence of implied authority, or any ratification of his act. The learned judge misdirected the jury. The following cases were cited:

- Mackay v. The Chartered Bank of New Brunswick*, 30 L. T. Rep. N. S. 180; L. Rep. 5 P. C. 394;
Eastern Counties Railway Company v. Broom, 6 Ex. 814; 20 L. J. 196, Ex.;
Roe v. The Birkenhead, &c. Railway Company, 7 Ex. 36;
Giff v. Great Northern Railway Company, 3 L. T. Rep. N. S. 850; 3 E. & E. 672;
Poulton v. London and North-Western Railway Company, 17 L. T. Rep. N. S. 11; L. Rep. 2 Q. B. 534;
Walker v. South-Eastern Railway Company, 23 L. T. Rep. N. S. 14; L. Rep. 5 C. P. 640;
Edwards v. London and North-Western Railway Company, 22 L. T. Rep. N. S. 656; L. Rep. 5 C. P. 445;
Allen v. London and South-Western Railway Company, 23 L. T. Rep. N. S. 612; L. Rep. 6 Q. B. 65;
Moore v. Metropolitan Railway Company, 25 L. T. Rep. N. S. 951; L. Rep. 8 Q. B. 36;
Green v. General Omnibus Company, 2 L. T. Rep. N. S. 95; 7 C. B. N. S. 290;

Bolingbroke v. Swindon Local Board, 30 L. T. Rep. N. S. 723; L. Rep. 9 C. P. 575.

For the respondents it was argued that the manager must be taken to have authority to institute such proceedings. The appellants were incorporated by an Act of Parliament, giving them very wide powers, which of necessity must be exercised by some one on their behalf. It was for them to show that these powers were not vested in the general manager. It is unnecessary to go through all the cases cited on the other side, but the case of *The Eastern Counties Railway Company v. Brown* (*ubi sup.*), which is an authority against the respondent, was distinguished in the case of *Giles v. The Taff Vale Railway Company* (2 E. & B. 822; 23 L. J. 43 Q. B.) The direction of the learned judge at the trial was right.

Benjamin, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 28.—Their LORDSHIPS gave judgment as follows:—This is an action for a malicious prosecution brought against the Bank of New South Wales, an incorporated company. The circumstances leading to the prosecution, which it is now admitted was groundless, are the following: In March 1876 a bill at thirty days sight for 1500*l.* was drawn by Messrs. Morgan, Connor, and Glyde, a firm trading at Adelaide in South Australia, upon the plaintiff Mr. Owston, a merchant trading at Sydney under the firm of Owston and Co. The bill was drawn against a consignment of wheat shipped on board the *Sea Gull*, and was sent with the shipping documents by the Adelaide branch of the defendants bank to the head bank at Sydney. On Saturday the 18th March, the bank left the bill with the plaintiff for acceptance. He wrote his name upon it, but it was not called for until the morning of Tuesday the 21st. Meanwhile, on the afternoon of Monday the 20th, the plaintiff had received the following telegram from the drawers: "*Sea Gull* put back leaky;" and on the same afternoon he telegraphed in reply, "Do you wish us to accept draft, or will you instruct extension of sixty days?" On the morning of Tuesday the 21st, about eleven o'clock, a clerk from the bank called for the bill, and the plaintiff showed him the telegrams. He did not give the bill to him, but sent a clerk to the bank to explain the matter, and it was arranged that the bank should wait until one o'clock for the return of the bill. About that hour, and before the plaintiff had received an answer to his telegram, he returned the bill to the bank, having previously cancelled his acceptance. In the afternoon of the same day the following telegram from Adelaide reached the plaintiff:—"Bank instructed extend draft to sixty days." A telegram to the same effect was received by the bank. The bill, when returned to the bank by the plaintiff, was sent on the same afternoon by Hobbs, one of its clerks, to Messrs. Allen, Bowden, and Allen, who are notaries, and also solicitors of the bank, to be presented by them for noting, and what took place with respect to this presentation produced the misunderstandings which led to the prosecution complained of. On the following day, Wednesday the 22nd, a clerk of Messrs. Allen and Bowden, a lad called Muir, brought the bill to the plaintiff for acceptance. The plaintiff's evidence is to the effect that he understood the lad to be one of the bank clerks,

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and having in his mind the telegrams as to the alteration of the days of sight, he inquired of him how the bank wished the acceptance to be. The clerk said he knew nothing about that. The plaintiff then told him that he would accept the bill, and send it round to the bank, and it was left with him. Shortly afterwards Bishop, another clerk of Messrs. Allen and Bowden, came for the bill, and demanded to have it returned. According to the plaintiff's evidence he was not aware that Bishop was other than a bank clerk. He says that he again inquired how the bill was to be accepted, and told Bishop he would accept and send the bill to the bank. He says Bishop behaved in a violent manner and declared that he should treat what he had said as a refusal to return the bill. The plaintiff's account of these conversations is contradicted, but for the purpose of this general statement may be assumed to be correct. The plaintiff in fact soon after sent the bill to the bank, accepted, having first made it payable at sixty days sight, and it appears to have reached the bank about one o'clock. Unfortunately the fact of the return of the bill was not communicated by the bank to Messrs. Allen and Bowden, as it ought to have been, and they remained under the impression that the plaintiff was still keeping it in his possession. Another interview took place between Bishop and the plaintiff; they met in the street. The plaintiff declined to have anything to say to Bishop, and unfortunately did not tell him what would have prevented further trouble—that the bill had been sent to the bank. Bishop said, on parting, that he would go for the police. A consultation was held in Messrs. Allen and Bowden's office, and apparently on the assumption that the plaintiff was improperly withholding the bill, and that they as notaries were responsible to the bank for its return, it was resolved to take criminal proceedings. Bishop and Muir then went to the police magistrate and applied for a warrant to apprehend the plaintiff on the charge of stealing the bill. The magistrate refused to grant a warrant, but issued a summons to the plaintiff to appear on the next day to answer a charge of feloniously stealing a bill of exchange of the value of 1500*l.*, the property of the bank. The information was laid by Muir. As soon as he was served with the summons, the plaintiff went to the bank, and after inquiring for the general manager, who was engaged, saw Mr. Wilkinson, the acting manager, and complained to him of the course which had been taken. There is great conflict of testimony as to what occurred at this interview, but an explanation then took place, and there seems no doubt that after the interview it was resolved not to press the charge. Application was made by the solicitors to the magistrate to be allowed to withdraw it, which was refused, and upon the case being called on the next morning, the plaintiff being present in obedience to the summons, no evidence was offered in support of the charge, and the case was dismissed. The plaintiff then brought the present action against the bank. On the trial Manning, J. properly held that the prosecution was without reasonable cause, and it was found by the jury to have been commenced from improper motives, and was therefore malicious. No question now arises on this part of the case. The two questions which were mainly contested at the trial and argued at their Lordships' bar are: (1) whether the pro-

ceedings of Messrs. Allen and Bowden were authorised by Wilkinson on behalf of the bank; and (2) if they were, whether the bank was responsible for Wilkinson's acts. At the trial the jury specially found the first question in the affirmative. Upon the second question, the learned judge told the jury, according to his own statement of his direction, "that it was to be inferred from Mr. Wilkinson's position as manager that he had sufficient power under the circumstances for directing a prosecution," and the verdict passed in accordance with this ruling. A rule nisi to enter a nonsuit or for a new trial was granted on the following grounds: 1. That the special finding of the jury (that Mr. Wilkinson authorised the prosecution) was against evidence, and had no evidence to support it. 2. That the judge was in error in directing the jury that the acts of Mr. Wilkinson, the acting manager, were, as regards the prosecution, the acts of the bank for which the bank was responsible. 3. That there was no evidence that the prosecution was in fact or in law a prosecution by the bank. This rule, after an argument before Martin, C.J., Hargreave and Manning, J.J., was discharged. The court was unanimous in refusing to disturb the finding of the jury as to Wilkinson having authorised the proceedings; but on the question of the correctness of the ruling of Manning, J., as to the responsibility of the bank for his acts, which that learned judge and Hargreave, J., sustained, the Chief Justice dissented from his colleagues. One point argued in the court below was that the bank, being a corporation, could not in any case be liable to an action of this kind. The Chief Justice (the other judges taking the opposite view) held the law to be so, to use his own words, "on the plain ground that malice being a state of mind, cannot be attributed to a corporation which has no mind," and he relied on the judgment of Alderson, B., in *Stevens v. The Midland Counties Railway Company and Lander* (10 Ex. 352) which, as reported, no doubt supports this view. The learned counsel for the appellant acknowledged that, after recent decisions, he could not support this broad proposition, and confined his argument to the two questions above indicated. Upon the first of these questions their Lordships cannot say that there is not some evidence to support the finding of the jury; and that finding having been sustained by the judgment of the court below, they intimated to the learned counsel at the close of the argument for the appellants that they should not feel justified in sending the case to a new trial upon this point, if it stood alone. The point remaining for consideration, viz., the liability of the bank for the acts of Wilkinson, is of more general importance. The first question which arises on this point is whether the direction of the learned judge to the jury to the effect that it was to be inferred from Wilkinson's position that he had authority to direct the prosecution—thus practically withdrawing the question from the jury—was correct, and their Lordships think that upon the evidence given at the trial it was not. No proof was offered by the plaintiff of the position, duties, and powers of the acting manager; but the defendants examined him, and also the general manager, who gave evidence on the question of his authority. Before considering the effect of this evidence, it will be convenient to refer to the series of authorities cited at the bar.

They all related to the liability of railway companies for wrongful arrests by their servants. In each of the two earliest cases, *The Eastern Counties Railway Company v. Broom* (6 Ex. 314), and *Roe v. The Birkenhead, &c., Railway Company* (7 Ex. 36), the plaintiff, who had been arrested at a station for refusal to pay the fare demanded, brought an action for false imprisonment. In both the question arose as to the authority of the officers at the station to make the arrest, and in both it was held there was not sufficient evidence of such authority to go to the jury. The decision in the first of these cases, upon the insufficiency of the evidence for the consideration of the jury, is scarcely consistent with later authorities. In the last of them, Parke, B. thought there was no proof that the servant "had ever received any general authority from the company to arrest any person who did not pay his fare, nor was there any evidence of any course of dealing to show that, as a servant of the company, he was authorised to make any arrest on their behalf." In the later cases a more particular inquiry was made into the character of the employment of the officer, whose acts were in question, and the nature of the duties entrusted to him. In *Goff v. The Great Northern Railway Company* (3 El. & El. 672; 3 L. T. Rep. N. S. 850) the plaintiff had been arrested for travelling on the line without a proper ticket by an inspector of the company acting under the direction of the superintendent of the station. By the Railway Clauses Act (10 Vict. c. 20), s. 8, a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to defraud, and power is given to all officers and servants on behalf of the company to apprehend such persons. There was evidence that the superintendent was the person in supreme authority at the station, and the jury having found for the plaintiff, the court refused to set aside the verdict, on the ground that there was no evidence for their consideration. Blackburn, J., in delivering the judgment of the court, observes: "The court thought that, as from the nature of the case the question whether a particular passenger should be arrested or not must be made without delay, and as the case may not be of unfrequent occurrence, it was a reasonable inference that in the conduct of their business the company should have on the spot officers with authority to determine, without the delay attending on convening the directors, whether a person accused of this offence should be apprehended." And the court held there was evidence for the jury that the persons who apprehended the plaintiff had such authority, observing that it was difficult to see why the company paid the police if the inspector of their police was not to act for them to this extent. This case turns therefore on the considerations that the summary power of apprehension given for the protection of the company could only be exercised (practically) on the spot, and instantly, and that the officers who acted were the fittest and indeed the only representatives of the company on the spot who could exercise it, and upon these considerations it was held that the jury might infer the necessary authority. In the later case of *Edwards v. London and North-Western Railway Company* (L. Rep. 5 C. P. 445; 22 L. T. Rep. N. S. 656), it was held that there was no evidence of the officer who had made the arrest having such authority. There a foreman

porter who had the superintendence of the station yard in the absence of the station-master, gave the plaintiff into custody on a charge of stealing timber which the foreman porter suspected to be the property of the company. The timber was in a van at the station. It did not appear that any timber was in the special charge of the foreman. The plaintiff was well known, and in fact a gate-man in the service of the company. It was held that there was no evidence of implied authority arising from the foreman's position to give into custody persons whom he might suspect to have stolen the company's goods. The apprehension in this case was not in pursuance of any special duty entrusted to the servant, to enforce laws or bye-laws. The court recognised the distinction that in the case of such a duty, authority might under certain circumstances be presumed, but held that the general authority sought to be inferred from the position of the foreman could not be so presumed. Other decisions adopt this distinction. In *Moore v. Metropolitan Railway Company* (L. Rep., 8 Q. B. 36; 25 L. T. Rep. N. S. 951), the facts of the case were held to bring it within the authority of *Goff v. The Great Western Railway Company*. The case of *Poulton v. The South-Western Railway Company* (L. Rep. 2 Q. B. 534; 17 L. T. Rep. N. S. 11) was a peculiar one. The station-master had arrested the plaintiff for non payment, not of his own fare, but that of his horse; the law giving power to detain only for the former. Although it appeared that the station-master acted in the belief that the law authorised the arrest, and that he was protecting the interests of the company, it was held that his act was not within the scope of his authority, since it could not be inferred that the company had authorised him to do an act which under no circumstances could be lawful, and which they had no power to do themselves. A question in some respects similar arose in *Allen v. The London and South-Western Railway Company* (L. Rep. 6 Q. B. 65; 23 L. T. Rep. N. S. 612). It is to be observed that although in both these cases the defendants happened to be railway companies, the questions involved in them might equally arise in the case of other masters. In the last it appeared that a clerk whose duty it was to issue tickets and put the money received in a till, which was kept under his charge, having given some money in change to the plaintiff, who objected to one of the coins, a dispute arose, and the plaintiff, it was alleged, put his hand into the till. The clerk thereupon seized the plaintiff and gave him into custody, and the next morning charged him before a magistrate with feloniously attempting to rob the till. Blackburn, J., who tried the cause, left it to the jury to say whether the clerk acted for his own ends and out of spite in consequence of the dispute, or whether he acted in furtherance, as he supposed, of the interests of his employers to protect their property. The jury found that the clerk was acting in defence of the company's property, and returned a verdict for the plaintiff. The court set this verdict aside and entered a nonsuit. It does not appear whether the clerk when he gave the plaintiff into custody believed or suspected that he had actually taken any money, though the finding of the jury affords an inference that he acted under that belief. The charge however was for the attempt only, and the decision assumed there had been no

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more than an attempt. Blackburn, J. put two cases, as supposed cases only, and his so putting them shows how little questions of this kind have been before the courts. He said he was disposed to think that if a servant in charge of money found another attempting to steal it, and could not prevent him otherwise than by taking him into custody, he might have an implied authority to arrest him, or if he had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, that also might be within the authority of the person in charge of it. The learned judge, however, declined to pronounce a decided opinion on these cases, and held that there was clearly no implied authority to give the plaintiff into custody for an attempt to steal which had failed. In none of the cases referred to did the question of the authority of a manager or agent entrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal, or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority. The liability of the bank in this case must rest either on the ground of some general authority in the acting manager to prosecute on behalf of the bank, or on a particular authority so to act in cases of emergency. The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shown, to be within the scope of his authority; and his employers would be liable for his mistakes, and, under some circumstances, for his frauds, in the management of such business (*Mackay v. The Commercial Bank of New Brunswick*, L. Rep. 5 P. C. 394; 30 L. T. Rep. N. S. 180). But the arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In the case of a chief or general manager, invested with general supervision and power of control, such an authority in certain cases affecting the property of the bank might be presumed from his position to belong to him, at least in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. But whatever may be the case in instances of this kind, their Lordships think that

such a presumption cannot properly be made from the evidence given at the trial as to the position held by Mr. Wilkinson. It appears that the board of directors held their meetings at the bank office, and the general manager, Mr. Smith, also sat there; and the clear inference from the evidence (if believed) is that the acting manager was subordinate to the general manager, and that the latter was, as he presumably would be, subject to the superior authority of the directors. Supposing this to be so (and if the facts were disputed, the opinion of the jury should have been taken upon them), their Lordships think it cannot be presumed, from his position alone, that the acting manager had general authority to prosecute on behalf of the bank, and therefore that evidence was required to show that such a power was within the scope of the duties and class of acts he was authorised to perform. The plaintiff offered no evidence whatever on this point; and the testimony of the two managers directly negatives the possession of such a power by the acting manager. Their statements at the most raise the question whether Wilkinson had authority so to act in cases of emergency, where immediate action is required, and the opportunity of arresting the offender might be lost if reference was made to the general manager or the directors. Granting that these statements afford some proof of such an authority, the further question would arise whether there is evidence that an emergency in fact occurred. An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere fact that the agent acted on behalf of and in the supposed interest of the principal; were it otherwise, the special authority would be equivalent to a general one. What then was the situation when these unwarrantable proceedings took place? It cannot possibly be considered that it raised a case of emergency requiring immediate action by criminal proceedings against a person in the plaintiffs' position, or afforded reasonable ground for supposing that such a case had arisen. There was no necessity for immediate action, nor was immediate action in fact taken. The plaintiff was not at once given into custody, but an information was laid before a magistrate, and when he very properly refused a warrant to apprehend him, the summons complained of was taken out when there could evidently be no urgency either to obtain or serve it. It was obviously an attempt of the notaries and solicitors to recover the bill by means which were thought by them to be more effectual for the purpose than civil proceedings would be. Their Lordships therefore think, upon facts which appear upon the evidence to be beyond dispute, that there was no necessity or apparent necessity for immediate action from which authority in the acting manager to instruct the solicitors (if he really did instruct them) to

take these proceedings on behalf of the bank could be inferred. It is to be observed also that the bill in question was not under Wilkinson's special charge. He says "the matter was not in his department. It was a branch business; the general manager takes that." There being then no evidence of any emergency, the case in their Lordships' view is brought to the issue that the bank would not be liable for the acts of Wilkinson unless it could be established that he had some general authority to institute criminal proceedings. They have already said that they think such an authority cannot be inferred from his position alone as it appears upon the evidence, and that the direction of the learned judge was wrong. The verdict therefore cannot stand. In case the action should be again tried, the jury should be told, if the evidence on the point should be to the same effect as on the first trial, that the facts do not present a case of emergency, or apparent emergency, from which authority could be derived, and consequently that the bank would not be liable for the act in question unless it is proved, or can be inferred from the evidence, that general authority to prosecute offenders for stealing the bank's property connected with its business at Sydney, without consulting the general manager or the board of directors, was within the scope of Wilkinson's employment and duties, and the powers entrusted to him in relation thereto. The question whether Wilkinson in fact authorised the solicitors to prosecute the plaintiff will of course be open on the second trial. In the result their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court discharging the rule, and to direct that the rule be made absolute for a new trial. The respondent must pay the costs of this appeal.

Solicitors for the appellants, *Wallons, Bubb, and Wallon*.

Solicitor for the respondent, *W. H. Gatty Jones*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Feb. 27 and March 22, 1879.

(Before BRETT, COTTON, and THESIGER L.JJ.)

GIRDLESTONE v. THE BRIGHTON AQUARIUM COMPANY. (a)

Profanation of the Lord's-day—21 Geo. 3, c. 49, ss. 1, 4.—Action for penalties—Covin and collusion.

A judgment recovered in an action by arrangement between the parties in order to protect the offenders against bona fide actions for the penalties is covinous and collusive.

The plaintiff sued the defendants to recover a penalty under 21 Geo. 3, c. 49, s. 1. for keeping open the Brighton Aquarium on a Sunday, 15th Aug. Subsequently to the issuing of the writ in the plaintiff's action, the solicitor of the defendants obtained permission from one R. to instruct a solicitor to bring an action in R's name for penalties

incurred for keeping the Aquarium open on the 15th Aug. and the several Sundays intervening between that date and the 7th Oct.; it being understood that R. should not issue execution or claim the penalties, but that the company might do what they pleased with the judgment so to be obtained in R's name. At the time of making this arrangement neither R. nor the solicitor to the company were aware of the plaintiff's action. The object of the arrangement with R. was to protect the company against any action which might be brought for any of the several penalties, and also to obtain as early as possible a remission of the penalties by the Home Secretary under 38 & 39 Vict. c. 80. R. had nothing more to do with the action brought in his name. Judgment was signed by default on 28th Oct. This judgment the defendants pleaded in bar of the plaintiff's action, and the plaintiff replied that the judgment was obtained by covin and collusion.

Held, that the judgment obtained under R's name was no bar to plaintiff's action, because it was in reality no judgment, as R. was only a nominal plaintiff, and the plaintiff and defendants were in substance identical.

And per Cotton and Thesiger, L.JJ., that, inasmuch as the result of the proceedings in R's action was to defraud and prejudice a third party, the judgment could not be a bar to plaintiff's action, being covinous and collusive.

THIS was an appeal by the defendants from a judgment of the Exchequer Division, in an action to recover a penalty under 21 Geo. 3, 49. The facts (a) are stated as far as material in the report of the proceedings in the court below (reported 38 L. T. Rep. N. S. 358; 1. Rep. 3 Ex. Div. p. 137), and in the judgment of Cotton, L.J.

O. Russell, Q.C. and O. F. Macdonell (McMillan with them) for the appellants.—The true definition of covin is "a secret assent determined in the hearts of two or more to the defrauding and prejudice of another" (Co. Lit. 357 a). Therefore, such a plea as this cannot be established without proving fraud, which is also implied in the word collusion. Covin and collusion are made penal by stat. 4 Hen. 7, c. 20, and therefore the plaintiff who alleges them must prove as strictly as upon an indictment, and he must prove these ingredients, none of which are present here, viz, two parties (*Tresham's case* 9 Rep. 195); fraud essential (*Meddowcroft v. Huguenin*) (4 Moo. P.C. 386); prejudice to third party. If two persons take a case by consent, and on proper materials, this is not collusive:

Shaw v. Gould, L. Rep. 3 H. L. 55;

Donegal v. Donegal, 3 Phill. Eccl. Cas. 601.

(a) By 21 Geo. 3, c. 49, s. 1, "Any house, room, or other place which shall be opened or used for public entertainment or amusement . . . upon any part of the Lord's-day, called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place shall forfeit the sum of 200l. for every day that such house, room, or place shall be opened or used as aforesaid on the Lord's-day to such person as will sue for the same. . . ."

By 38 & 39 Vict. c. 80, s. 1, "It shall be lawful for her Majesty to remit in whole or in part any penalty, fine, or forfeiture imposed or recovered for any offence under the said Act;" 21 Geo. 3, c. 49, "Whether on indictment, information, or summary conviction, or by action, or any other process."

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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Secondly, the rule that the first writ in point of date acquires a vested right is repealed by implication by the Uniformity of Process Act (2 Will. 4, c. 39). But even if the rule did exist, the plaintiff could not avail himself of it, because his writ does not specify for what Sunday he sues. They also cited

Perry v. Meadowcroft, 10 Beav. 123;
Garth v. Cotton, 3 Atk. 756;
Hutchinson v. Thomas, 3 Lev. 141;
Sperry's case, 5 Rep. 123;
Combe v. Pitt, 3 Barr. 1423;
Viner's Abr. VI. p. 475.

Sir *Hardinge Giffard* (Solicitor-General), *Waddy, Q.C.*, and *Bosanquet* for the respondents.—There can be no question that the 15th Aug. was the day in respect of which the plaintiff sued, and the point was not taken at the trial. Covin does not *ex vi termini* require two parties. It is enough that the action was not brought *bond fide* for the purpose of recovering the penalties, and it is immaterial that the motives of the parties were in other respects good. Here Rolfe was merely nominal plaintiff, and for the purpose of overriding an Act of Parliament, therefore the action was not *bond fide*. Protective actions are expressly within the meaning of the statute of Hen. 7, and for this purpose it is enough that there was an agreement that no penalty should be recovered. The priority of respondent's writ makes him entitled, and the company should have pleaded this against plaintiff. He cited

Chaucer's Prologue;
Year Books, 39 Hen. VI. Mich. Term, No. 26, p. 19.

Macdonell in reply.

March 22.—The following judgments were delivered.

BRETT, L.J.—This case was tried before Cleasby, B., and it seems to me that his direction to the jury amounted to this, that they might find that the previous judgment which had been obtained had no effect, although they might be of opinion that there was no fraud. The Exchequer Division, after the jury had found a verdict for the plaintiff, confirmed this ruling. Now if it were necessary, in order to support the judgment of the court below, to say that there had been any fraud, or anything which could be called fraud, on the part of anyone, I could not agree to that, for in my opinion there was not a symptom of any fraud, but what was done was an honest transaction, and there was no harm in it morally. There was a division of opinion among different people as to the propriety of suing for and recovering the penalties imposed by this Act of Parliament, and that being so, the solicitor for the defendants requested a person, to whose mind it appeared that the penalties ought not to be recovered, to sue the defendants for a penalty under the Act. He had two intentions in so doing, first, that the judgment which he recovered should be an answer to any other action which might be brought against the defendants for the same cause; and, secondly, that the Home Secretary might remit the penalty which the defendants had incurred. Neither object was illegal or immoral; what was done was done for the purpose of protecting the company. It was not shown that the person who sued the defendants at the request of their solicitor knew that the other action had been commenced, but in my opinion that would be imma-

terial. I think the defect was brought about by the over caution of the defendant's solicitor, for, if Rolfe had instructed some other solicitor, and had sued the defendants, although he might have been bound in honour not to exact the penalty when he had obtained judgment for it, I think there would have been no covin and collusion. But the defendants' solicitor requested Rolfe to allow him (the defendants' solicitor) to bring the action, using Rolfe's name as plaintiff; but Rolfe had no control over the proceedings, and did not instruct any one to act on his behalf, but only lent his name for the purpose of the action. This shows, in my mind, that the suggested plaintiff, Rolfe, was really no plaintiff at all, but that the company were in reality both plaintiffs and defendants. Therefore, although in form there is a judgment, there is in reality no judgment whatever. If the plaintiff in this case had pleaded in reply, not that there was covin and collusion, but had pleaded a reply in which the facts were stated, it would have been shown that there was no judgment which could be held to be valid. Therefore I am of opinion that there was no judgment, and on that ground alone I am a party to affirming this decision.

COTTON, L.J.—This was a motion by the defendants by way of appeal from the decision of the Exchequer Division for a new trial on the ground of misdirection by the judge before whom the case was tried. The action was to recover a penalty under the Act 21 Geo. 3, c. 49. This Act makes the penalty a debt due to the person who sues for it. The defendants pleaded a judgment in respect of the same offence, that is, keeping open the Aquarium on Sunday the 15th of August obtained at the suit of Rolfe. The plaintiff replied that the judgment was obtained by covin and collusion, and the jury found for the plaintiff on this issue, and there was a verdict and judgment for the plaintiff. There was an application to the Exchequer Division for a new trial, but that court refused to interfere, hence the appeal to us. This action was commenced on the 17th Aug. 1875. There was evidence at the trial, that in October the solicitor of the defendants saw Rolfe, and that at his request Rolfe authorised him to commence in the name of Rolfe an action against the company for penalties incurred for keeping open the Aquarium on the 15th Aug. and on the Sundays intervening between that day and the 20th Oct., that the solicitor of the company accordingly instructed the solicitor who appeared on the record for Rolfe, that this solicitor received no instructions in the matter from Rolfe, that on the 28th Oct. the company suffered judgment by default, that this judgment had never been enforced, and that although there was no positive agreement that the judgment should not be enforced against the company, there was an honourable understanding between Rolfe and the company that the action brought in his name was to be a protective action, and that Rolfe should not issue execution. One of the objects in allowing Rolfe to obtain judgment was to ascertain in an action in which the plaintiff was not hostile whether the Home Secretary would exercise the power given to him by a recent Act, of preventing penalties being enforced, and it was proved that till after the judgment pleaded was confessed, neither Rolfe nor the solicitor who appeared as his solicitor on the record knew of the present action.

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On this evidence the defendants contended that Rolfe had no intention of defeating the claim of the plaintiff in the present action, and that his intention to protect the company was not sufficient to support the reply of covin and collusion. The learned judge, in summing up, in effect, told the jury that it was not necessary for the support of this reply of covin and collusion to show that Rolfe knew of the plaintiff's action, that even though the object of the company in procuring the action to be brought was to obtain the decision of the Home Secretary, the judgment would be one obtained by covin and collusion, if in fact there was no intention to take out execution, or otherwise enforce the judgment, and if the intention was to protect the company. The jury on this direction found for the plaintiff, and I am of opinion that there was no misdirection, and that there was ample evidence to support the verdict. There was much argument before us as to the meaning of the word covin. It may be assumed that the meaning of the reply is that the judgment was obtained by an agreement between Rolfe and the defendants the company. For even if the word covin does not of itself import an agreement between two, covin and collusion do. I am also of opinion that to make an agreement covinous, there must be something in it which in the view of the law is deceit. Now, in an action for penalties the plaintiff is, ordinarily and in the absence of agreement between him and the defendant, a person independent of and adverse to the defendant, seeking to obtain a judgment as a means of enforcing for his own benefit payment of the penalty. If in such an action, though the plaintiff is apparently independent of the defendant, he has by agreement with the defendant allowed his name to be used as plaintiff, and authorised the defendant, or his solicitor, to instruct a solicitor to act for him, the nominal plaintiff, and there is an agreement, or understanding, that judgment in the action shall not be enforced, but used as a protection to the defendant against other actions, either already brought, or which may be brought, to recover a penalty given by statute; then the action is one in which the company are in substance both plaintiffs and defendants, and this agreement or arrangement is an agreement or arrangement that the position of the parties to the action, apparently hostile, shall be friendly; that the action and judgment, which purport to be an attack on, shall in fact be a protection to the defendant, an agreement that the reality shall be different from what is represented. This, in my opinion is, even in the absence of any intent to defraud, deceit, and, in my opinion, though the agreement or arrangement be not legally binding, the judgment confessed or obtained under it will have been obtained by covin and collusion, and cannot be relied on by the defendant in answer to an action in respect of the same matter brought by any other person, and the learned judge so directed the jury. It was urged upon us that, to support the reply of covin and collusion, it was necessary that the agreement should be intended to deprive or defraud the plaintiff in the present action of his claim, that Rolfe had no such intention, and that neither he nor his solicitor knew of the present action till after judgment was confessed in Rolfe's action. But it was stated by the solicitor of the defendants that the object of the action com-

menced in Rolfe's name was to protect the defendants, that is, to defeat the claim of any person who might endeavour to obtain judgment for penalties for keeping open the aquarium on any Sunday covered by Rolfe's action, and, if so, in law the parties to the agreement must be considered to have intended to defeat the claim of the plaintiff as one of the general body against whose claims Rolfe's action was intended to protect the defendants. It was strongly pressed in support of the appeal that the object of Rolfe's action was to obtain a judgment on which the decision of the Home Secretary could be taken as to the course which he would adopt, and that this was disregarded by Cleasby, B. In my opinion he was right in so doing. It is unnecessary to consider whether the intention to apply to the Home Secretary, as if Rolfe were an independent plaintiff, seeking to enforce payment of the penalties, while in fact he was, as plaintiff in the action, a mere name used by the company, by means of which name the company had obtained a judgment for their own protection, was not of itself an argument against the validity of that judgment. But the circumstance that one of the objects was to apply to and obtain the decision of the Home Secretary does not, in my opinion, make the judgment less covinous and collusive if it was obtained in an action in which there was not any real plaintiff, and under an arrangement that it should be used, not to recover penalties from the defendants, but to protect the defendants from the claims of others who might probably sue. I may add that the decision might, independently of the grounds to which I have already referred, be supported on the ground that in substance there was no judgment, the plaintiff on the record having been under the circumstances the defendant under another name. In my opinion the appeal fails, and must be dismissed with costs.

THESEER, L.J.—I also am of opinion that the judgment of the court below ought to be affirmed. The defendants plead in bar to an action to recover a penalty, a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced at the request of the defendants' solicitor while the plaintiff's action was pending, and was carried through to judgment by the intervention of a solicitor employed by the defendants, and without the interference, in any way, of the nominal plaintiff. It was an action not brought for the purpose of giving the person named as plaintiff the fruits of it, or indeed any benefit whatever from it, but immediately for the protection of the defendants from any action brought, or to be brought against them in respect of the penalties which were claimed in it, and mediately for the purpose of taking the Home Secretary's opinion upon the point whether he would remit such penalties. Apart from any question upon the pleadings, is it possible that a judgment so obtained, and in such a suit, can bar the plaintiff's action? Was the action in which it was obtained in substance anything more than one in which the defendants were the real plaintiffs as well as the nominal and real defendants? I think not, and if it was not, then the mere statement of the character of the action is a sufficient argument against the judgment obtained in it operating as a bar to the present action. But the plaintiff has, in his reply to the statement of defence, impeached the judg-

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ment upon the special ground of covin and collusion. The argument, therefore, before us has been addressed to the question whether the facts of the case establish that the judgment is so impeachable. In dealing with this question, I assume that Rolfe, when he assented to an action being brought in his name, was unaware of the fact that the present action had been commenced. I assume, too, that the jury have negatived fraud in the sense of there having been a wicked mind and intent on the part of Rolfe and the defendants, or either of them, in instituting, or assenting to the institution of the proceedings which led to the judgment. I think, nevertheless that they were legally guilty both of covin and collusion. Although the word "covin" is sometimes, and especially by old writers, used in the sense of a trick or contrivance devised by one person alone, I think that in a case like the present, when it is used in conjunction with the word "collusion," it does import a trick or contrivance planned by both the parties to the transaction which is alleged to be tainted by it. I go further, and take it to mean a trick or contrivance which must be proved to be—using the language in Co. Litt. 357 (b)—"to the defrauding and prejudice of another." Even if we assume all this, the contention of the defendants still appears to me to be inadmissible. If Rolfe had known of and intended to defeat the plaintiff's *bonâ fide* action by permitting a sham action to be brought in his own name, it is clear that he would have been a party to a trick or contrivance for defrauding the plaintiff. Prejudicing a *bonâ fide* action for a statutory penalty by the secret contrivance of a sham one can be nothing less than defrauding. Indeed, it is hardly disputed on the part of the defendants that, under such circumstances, the allegation of covin and collusion would be established. But, if so, surely the intention to prejudice or defraud a class of persons, including the plaintiff, must equally establish the allegation, although the plaintiff was not known to form one of the class intended to be prejudiced or defrauded. There is legislative authority for this view;—the stat. 4 Hen. 7, which was passed for the purpose of preventing proceedings taken in good faith to recover penalties being defeated by sham protective actions, made punishable, under the name of covin and collusion, such actions, not only when brought for the purpose of defeating *bonâ fide* proceedings already taken—in other words, prejudicing a particular individual—but also of defeating such proceedings, although not yet commenced—in other words, of prejudicing an individual not yet identified and known. The statute also provided that such covin and collusion might be averred in answer to any plea setting up a recovery in a covinous and collusive action in bar to *bonâ fide* proceedings. I would only add that, although, as has been suggested, the motive of the defendants and Rolfe in endeavouring to obtain the decision of the Home Secretary as to the remission of penalties may have been good, and the end, the keeping the Aquarium open on Sundays, may have been a desirable one, it appears to me impossible to hold with reason that the co-existence of such motives or such an end, with motives, ends, and acts which, standing by themselves, constitute covin and collusion, can make this case any the less one of covin and collusion, or in any way remove

or lessen the legal consequences which covin and collusion entail.

Appeal dismissed.

Solicitors for defendants, *Benham and Tindell.*

Solicitors for plaintiffs, *Bridges, Sawtell, Heywood, and Co.*

Thursday, March 27, 1879.

(Before BRETT, COTTON, and THESIGER, L.JJ.)

LAMB v. BREWSTER AND ANOTHER. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Landlord and tenant—Property tax—Agreement by landlord to repay tax not deducted from rent—Legality of contract—5 & 6 Vict. c. 35, s. 103.

If a landlord agrees with his tenant to repay him property tax at some future time instead of allowing a deduction from the rent of the amount of the tax, such an agreement is not illegal, and the tenant may recover the amounts paid in accordance therewith.

THE plaintiff gave notice under Order XXI., r. 4, that his claim was that which appeared from the indorsement on the writ.

The claim was against the defendants as executors, for 37*l.*, for six years' property tax paid by the plaintiff as tenant of the testator for him, and which the executors had refused to return to the plaintiff.

The statement of defence alleged that, assuming that the property tax was paid by the plaintiff as alleged, no demand or application was ever made by the plaintiff for the said property tax to be paid or allowed, or deducted out of the rent, which became due and payable by the plaintiff to the testator, next after each payment of the said property tax respectively; that the said plaintiff made each payment of rent without making or claiming any such deduction of the amount liable to be deducted in respect of property tax, according to the statutes in such case made and provided.

In his reply the plaintiff stated that demands or requests were frequently made by the plaintiff for the said property tax to be paid, allowed, or deducted out of the rent which became due and payable by the plaintiff to the testator next after such payment of the said property tax respectively. That the said testator promised the plaintiff that if he would continue to pay the said rent in full, without deducting anything for the said payment of property tax, the testator would pay to him all sums which he had paid or should pay for such property tax; and that the plaintiff did continue to pay the rent in full, yet the testator did not repay such sum as agreed.

To this reply the defendants demurred.

The Divisional Court (Mellor and Field, JJ.) held that the reply was good, and gave judgment for the plaintiff (reported 40 L. T. Rep. N. S. 457). The defendants appealed.

F. Meadows White, Q.C. and A. P. Stone for the defendants.—The contract set out in the reply is void by the 103rd section of the Property Tax Act (5 & 6 Vict. c. 35). (b) The policy of the

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.

(b) 5 & 6 Vict. c. 35, sect. 103 enacts "That if any person shall refuse to allow any deduction authorised to be made by this Act out of (*inter alia*) any rent or other annual payment mentioned in the 9th and 10th rules of No. 4, schedule A. . . . every such person shall forfeit the sum of fifty pounds; and all contracts, covenants,

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Legislature is to prevent all private arrangements by which the mode of assessment prescribed by the Act may be interfered with. This is a contract to pay the rent in full without any deduction within the meaning of sect. 103, and the only possible consideration for it is the doing by the landlord of something which would expose him to penalties, that is, refusing to allow the deduction of the property tax when the tenant paid the rent. They cited

Denby v. Moore, 1 B. & A. 123.

Dodd, for the plaintiff, was not called upon to argue.

BRETT, L.J.—I think the judgment in this case ought to be affirmed. In the absence of the specific agreement which is put forth in the reply, the fact of the tenant having paid the rent in full would not either him to recover the amount of the property tax from the landlord; but the question is, not whether on mere payment of the rent in full the tenant can recover the amount of the property tax from the landlord, but whether, when the tenant pays the rent in full, on an understanding that the landlord will repay him the amount of the property tax, he can recover that amount from the landlord. The question turns entirely on the construction of sect. 103 of the Property Tax Act (5 & 6 Vict. c. 35), and sect. 73 has no bearing on the case. Now, in construing an Act of Parliament, just as in construing any other document, we ought to see what is the substantial reason of the Act, and, unless we are prevented by the words, we ought to try to give effect to it; the fulfilment of the substance of the enactment is sufficient. Here, although by the provisions of the Act the tax is imposed upon the tenant in the first instance, the landlord is finally to pay it, and no agreement, of which the effect is that the tenant is to pay both the rent and the tax, is valid; but there are no words to show that a contract that for a time the tenant is to pay the tax is void, for by such an agreement, in substance, although the liability is in the first instance on the tenant, in the result the landlord would pay the amount of the tax, and so the object of the statute is fulfilled, for the tax is collected from the tenant, but the landlord pays it. No doubt the word "deduction," if construed in the most strict sense, would mean a deduction of the amount of the property tax before or at the time of the payment of rent, so that the full amount of the rent should never pass from the tenant to the landlord; but, if we carry this construction to its strict result, it follows that if the tenant pays the rent in full, and the landlord immediately gives him back the amount of the tax, this would not be a deduction within the meaning of the Act; but I think the fair meaning is, that the landlord shall in the result pay the amount of the property tax, and therefore there is nothing in sect. 103 of the Act which can have the effect of invalidating the contract set out in the reply, and therefore, if that contract is proved in fact, the plaintiff is entitled to recover, and the reply is good, and the judgment ought to be affirmed.

COTTON, L.J.—The question is, whether the express promise contained in the agreement set out and agreements, made or entered into, or to be made and entered into for payment of any interest, rent, or other annual payment aforesaid in full, without allowing such deduction as aforesaid, shall be utterly void."

out in the reply is void. Some question was raised as to the terms of the agreement, but in substance it comes to this, that if the tenant will pay the amount of the rent in full the defendants' testator will repay to him the amount of the property tax, and the question is whether this is against the Act. The intention of the Act is that the property tax shall be a landlord's and not a tenant's tax; this is partly provided for by sect. 73, but sect. 103 goes further. The Act means that for convenience of collection the occupier shall pay the tax in the first instance, but he may deduct the amount when he pays his rent to the landlord, and if he neglects to exercise this right of deduction he has no remedy in the absence of an express agreement on the part of the landlord to repay the amount. In such a case the tenant makes the payment in his own wrong. Now what is the agreement which is sought to be set aside here? It comes to this: that if the landlord receives the whole amount of the rent he will afterwards pay back to the tenant the amount of the property tax; but still by the agreement it is a landlord's and not a tenant's tax. The contention on behalf of the defendants would go as far as this, that if the tenant pays the full amount of the rent, and the landlord the very next day repays him the amount of the property tax, this would be an illegal transaction; but, in my opinion, such a transaction as that would not be a violation of the provisions of the Act. I think it would be keeping too close to the words, and not paying sufficient attention to the substance of the Act, if we were to say that this agreement makes the tax a tenant's and not a landlord's tax. It is said on behalf of the defendants that the Act makes the agreement void, for the tenant has the right to deduct the amount of the tax when he pays his rent, but, if he does not then exercise that right, he cannot claim afterwards. But I think there is nothing in the Act to say that the agreement is void. Here the tenant has at the request of the landlord paid the rent in full without insisting upon his right of deduction, and the landlord has promised to repay to the tenant the amount of the tax. The general intention of the Act is that this shall be a landlord's and not a tenant's tax, and this is carried out by giving effect to the agreement in question. The power of deduction is for the benefit of the tenant, and there is nothing to prevent his enforcing an express promise by the landlord to repay him the amount of the tax in consideration of his having waived his right to deduct it from the rent. I think this agreement is not void within the words of sect. 103, nor against the intention of the Act. I agree, therefore, that the judgment ought to be affirmed.

THESIGER, L.J.—I am of the same opinion. The statute has two main objects: first, to collect the property tax from the tenant; and secondly, as a matter of policy, that the landlord shall be the person to pay it. By sect. 63 the collection from the tenant is provided for; by sect. 73 no agreement shall be binding, contrary to the intent and meaning of the Act; by sect. 103 it is provided that contracts for payment of rent, without deduction shall be void; to carry out the objects of the Act, a remedy is given to the tenant, that is the power of deduction. Sect. 103 provides that, if the landlord refuses to allow any deduction authorised by the Act, he shall be liable to a

CHAN. DIV.] *Ex parte* SWANSEA, &C., FRIENDLY SOC. v. WEST OF ENGLAND, &C., BANK. [CHAN. DIV.]

penalty. Then what is a refusal within the meaning of this provision? The latter part of the section must be correlative with the former part. If the tenant gave a cheque for the whole amount of the rent, and said to the landlord, "You must repay me the amount of the property tax," it is impossible to say that this would be a transaction which would subject the landlord to a penalty. If this is so, we come to understand the latter part of the section to mean that no contract is to be allowed by which the tenant is to be ultimately liable for the tax, but a contract made for the sake of convenience, by which the deduction is to be made in some other way than by a deduction of the amount of the property tax at the time when the tenant pays his rent to the landlord, is perfectly good.

Judgment affirmed.

Solicitor for plaintiff, *Marsh*, for *Bescoby*, East Retford.

Solicitors for defendants, *Collyer-Bristow* and *Co.*, for *Hett*, *Freer*, *Hett*, and *Hett*, Brigg.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Saturday, April 26, 1879.

(Before *FRY*, J.)

Ex parte THE SWANSEA ROYAL AND SOUTH WALES UNION FRIENDLY SOCIETY; *Re* THE WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK. (a)

Incapacity of a corporate body to be an officer of a friendly society—Friendly Societies Act 1875 (38 & 39 Vict. c. 60), s. 15, sub-sect. 7; s. 20, sub-sect. 1.

Semble, that a corporate body cannot legally be appointed an officer of a friendly society.

The committee of management of a friendly society which had power, in certain events, to elect officers of the society, on the happening of one of such events, passed a resolution that a bank which had been registered as an unlimited company under the Companies Acts of 1862 and 1867 should be appointed treasurers of the society. The manager of the bank accepted the office on behalf of the bank, and certain moneys belonging to the society were paid to the bank as treasurers. An order having been made to wind-up the bank:

Held, that the society had no preferential right under sect. 15, sub-sect. 7, of the Friendly Societies Act 1875, as against other creditors of the bank, to be paid the moneys received by the bank as treasurers.

Quere, as to the effect of an omission, by an officer of a friendly society, to give security when required by the rules of the society and the 20th section of the Friendly Societies Act 1875.

THE SWANSEA ROYAL AND SOUTH WALES UNION Friendly Society was established in 1867, and was afterwards registered under the Friendly Societies Act 1875 (38 & 39 Vict. c. 60). The rules of the society were duly registered under the Act. By the 7th rule the business and affairs of the society were to be conducted by a committee of management, consisting of five members, which had

power to remove an officer for gross neglect, improper conduct, or incompetency; and, in case of such removal, the committee of management were to elect a successor, who should continue in office until the next annual general meeting of the members of the society, when his appointment was to be confirmed, or another person was to be appointed in his place.

The 8th rule was as follows:

A treasurer shall be appointed at any general or special meeting of the members of the society, by a majority of the members present and voting, and shall continue in office during the pleasure of the members. He shall be responsible for all sums of money from time to time paid into his hands by any persons on account of the society, and for the investment or application of the same under the authority of the trustees in such a manner as they and the committee of management of the society shall direct. He shall render his cash account monthly and as often as the society or trustees or committee of management shall direct, and supply them with duplicates thereof, and shall, if required, attend every general meeting of the members, and all meetings of the committee of management. He shall, before taking upon himself the execution of his office, give security pursuant to the 38 & 39 Vict. c. 60, s. 20. (a)

In the early part of 1877 the then treasurer of the friendly society became insolvent, and in consequence of the difficulty encountered in recovering from his estate the moneys in his hands belonging to the friendly society, it was resolved that in future a bank should be appointed treasurer, and at a meeting of the committee of management, held on the 18th June 1877, a resolution was passed that the West of England and South Wales District Bank should be the treasurer of the friendly society. Shortly afterwards three members of the committee of management called on the manager of the Swansea branch of the bank (which was registered as a company with unlimited liability under the Companies Acts of 1862 and 1867), and he then, on behalf of the bank, accepted the office of treasurer. An account in the name of the friendly society was then opened at the bank, and the prospectuses of the friendly society were reprinted. On the first page of the prospectus, as reprinted, appeared the names of the trustees, committee of management, &c., and the following words, "Treasurer: West of England Bank;" "Bankers: West of England and South Wales District Bank." The manager of the bank continued to act as treasurer of the friendly society from the time when he accepted the office on behalf of the bank until an order to wind-up the bank was made by *Malins*, V.C.; and, at the date of the winding-up order, the balance standing to the credit of the friendly society in their account with the bank amounted to the sum of 496*l.* 11*s.* 9*d.* After the winding-up order had been made the solicitors of the friendly society applied to the official liquidators for payment of the 496*l.* 11*s.* 9*d.*,

(a) "Every officer, if the rules of the society require, shall, before taking upon himself the execution of his office, become bound with one sufficient surety at the least in a bond according to one of the forms set forth in the third schedule to this Act, or give the security of a guarantee society, in such sum as the society directs, conditioned for his rendering a just and true account of all moneys received and paid by him on account of the society at such times as its rules appoint, or as the society, or the trustees, or committee of management thereof require him to do so, and for the payment by him of all sums due from him to the society:" (38 & 39 Vict. c. 60, s. 20, sub-sect. 1).

(a) Reported by *FRANK EVANS*, Esq., Barrister-at-Law.

as being a preference debt, within sect. 15, sub-sect. 7, of the Friendly Societies Act 1875. (a)

The liquidators having refused payment on the ground that the bank was not a treasurer within the meaning of the Act, the trustees of the friendly society took out a summons before Fry, J., to whom the winding-up of the proceedings had been transferred, for an order that the official liquidators might be directed to pay to the applicants as such trustees the sum of 496*l.* 1*l.* 9*d.*, money in the possession of the bank, by virtue of their office as treasurer. The summons was adjourned into court.

F. Bristow, Q.C. and H. B. Buckley for the friendly society.—The effect of sub-sect. 7 of sect. 15 is, that when there is a properly constituted officer, and that officer has in his hands any money belonging to the society, that officer must, on the demand of the trustees, pay back that money in preference to all other demands upon him. By the 8th rule the treasurer is to give the security pursuant to the 20th section of the Friendly Societies Act 1875. By that section the security is only to be given "as required" by the society, and in this case the society had not demanded the security. By the resolution of the 18th June 1877 the bank became treasurer of the society. [Fry, J.—The appointment must be made at a "general or special meeting of the members of the society," not by the committee.] They were appointed *ad interim* till the next general meeting, which was held on the 21st May 1878. [Fry, J.—Then the appointment terminated on the 21st May 1878.] No; they remained until the appointment was confirmed or someone else appointed, and, no one else being appointed at the next meeting, there was a tacit confirmation of the appointment. [Fry, J.—The alternative is that the appointment of treasurer is confirmed or someone else is appointed. By virtue of the general meeting he goes out of office.] The bank as treasurers were indirectly confirmed in their appointment because everyone would receive notice of what had taken place before the meeting, and no opposition was afterwards made. [Fry, J.—There is a difficulty as to the words "bankruptcy or insolvency" in the 15th section.] The bank was clearly in a state of bankruptcy or insolvency—they had ceased to pay their debts. It has been said that twenty shillings in the pound will ultimately be paid, but it could not be paid when demanded. Then the section applies if any exe-

cution, attachment, or other process be issued, or action raised. Winding-up is a prejudicial proceeding by which the assets of the company are made liable for its debts. The winding-up order may be said also to be a "process" within the meaning of the section. Winding-up is something additional to what is expressly mentioned in the section, and it is difficult to name anything else additional which would come within the section. The society would have had a right against the bank if no winding-up order had been made, and such order gives no new rights. [Fry, J.—How can a large body like this act as a treasurer?] The appointment was a *de facto* appointment, and the money came into the hands of the bank as treasurers, and not as bankers only. [Fry, J.—Had the bank any power to accept the office?] The manager of the bank had power to accept on behalf of the bank. They cited

Ex parte Harris, 1 De Gex, 162;

Ex parte Orford, 1 De G. M. & G. 483.

Glassey, Q.C. and Romer, for the liquidators, were not called upon.

Fry, J.—I am of opinion that the claimants in this case have not substantiated their claim. They claim that a sum of 496*l.* 1*l.* 9*d.* standing to the credit of their account at one of the branches of the bank should be paid to them in priority to any other creditors, by virtue of a provision, which is contained in the Friendly Societies Act, and which follows similar provisions which have been contained in similar Acts for a long series of years. The bank, it appears from the statement of counsel, is a company incorporated under the Companies Acts 1862 and 1867, and is therefore a corporation. It appears that, before the 18th June 1877, a treasurer had been appointed by this society, and that defalcations had been made by him, and that, at a meeting, held on that day, of the committee, the bank were appointed treasurer of the society. Now the rule of the society which regulates that appointment is the 7th, and it is there provided that in the event of any vacancy occurring by the resignation or death of any officer, the committee of management shall elect a successor, who shall continue in office until the next annual general meeting of the members of the society, when his appointment shall be confirmed, or another person shall be elected in his place. On the 21st May 1878 a general annual meeting of the society was held, and it does not appear that at that meeting the appointment of the bank as treasurer was confirmed, or that any other person was elected in its place. Upon that a question might arise whether the court is to imply that the bank was to continue in the office. I should have a difficulty judicially in coming to the conclusion that that is a necessary inference. Then the 8th section of the rules provides that, a treasurer is to be appointed, and is to continue in office during the pleasure of the members. He is to be responsible for money from time to time paid into his hands on account of the society, and for the investment or application of the same. Then he is to render cash accounts monthly and supply duplicates, and if required, attend every general meeting of the members, and all meetings of the committee of management. And he shall, before taking upon himself the execution of his office, give security pursuant to ss. 38 & 39 Vict., c. 60, s. 20. It appears that that security

(a) "Upon the death or bankruptcy or insolvency of any officer of a society, having in his possession by virtue of his office any money or property belonging to the society, or if any execution, attachment, or other process be issued, or action or diligence raised against such officer or against his property, his heirs, executors, or administrators, or trustee in bankruptcy or insolvency, or the sheriff or other person executing such process, or the party using such action or diligence respectively, shall, upon demand in writing of the trustees of the society, or any two of them, or any person authorised by the society, or by the committee of management of the same, to make such demand, pay such money, and deliver over such property to the trustees of the society in preference to any other debts or claims against the estate of such officer."

"Bankruptcy or insolvency in the present section includes liquidation of a debtor's affairs by arrangement in England, *cessio honorum* of a debtor in Scotland, and a petition for arrangement with creditors in Ireland, and a trustee in bankruptcy or insolvency includes an assignee in Ireland and a judicial factor in Scotland." (38 & 39 Vict. c. 60, s. 15, sub-sect. 7.)

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has never been given, and it may be, upon the authority of the case of *Ex parte Ross* (6 Ves. jun. 803a), before Lord Eldon, considered doubtful whether a person who has been appointed to the office of treasurer, and has not given the security which the Act requires, is a treasurer against whom the society can claim a preferential right. Then, further than that, the question arises whether a corporation can fill the office of treasurer according to the rules of the society. It is evident that a treasurer is bound to perform certain public duties. He is to attend the meeting of the members, and all the meetings of the committee of management. It is said that that can be done by the manager or clerk of the bank, but it appears to me that the scope and object of these rules with regard to the officer is the appointment of a natural person, who is to be an officer of the society within the ordinary meaning of that expression, and that great difficulties would be involved in the performance of the duties of that office by a corporation instead of by a natural person. When I turn to the clause of the existing Act regulating friendly societies, which gives the preferential right upon which the applicants are now insisting, I find similar words, indicating to my mind a similar intention, namely, the officer against whom, or whose estate, the preferential claim is to subsist is to be a natural person, and not a body corporate. The whole scope of that clause appears to me to refer to a private individual, who takes upon himself an office, and it gives certain rights in the event of his death, bankruptcy, insolvency, or execution of an attachment or other process to be issued, or action or diligence raised against his property or himself, and it is very remarkable that if it were in the mind of the Legislature that an incorporated company could be an officer, and that the priority should be given in the event of a winding-up, that this Act, which was passed long subsequent to any of the winding-up Acts, is entirely silent with regard to the liquidation of a company, or the winding-up and the distribution of the assets of the company. It appears to me that I am bound to read this clause somewhat strictly, and for the reason which has been pointed out by Lord Eldon, to which I have already referred, and by Knight-Bruce, L.J., when Chief Judge of the Court of Bankruptcy, in the case of *Ex parte Harris*, that the right given is one against the common right of Her Majesty's subjects, and therefore those who claim that right must bring themselves within the express provisions of the statute. Now, the only words which can be relied upon here are the words "other process" against "the property" of the debtor who is said to be liquidating. That appears to me to be a very doubtful proposition, but I conclude against it, because it appears to me that the Legislature has considered that the officer against whom the statute has given that benefit is a private person, and not a body corporate. If I were to extend the words of the section to a body corporate in liquidation, I think I should be going beyond the words, and the fair intent and meaning of the Act, the intent of the Act being addressed, I repeat, to the case of a natural person and not a body corporate. For these reasons, to which I must add the fact that it appears very doubtful whether the manager had any authority on the part of the bank to accept the office of treasurer

on the part of the bank, so as to bind the bank, although the bank might become bankers of the society, I must reject the claim made before me, with costs.

Solicitors for the society, *Tamplin, Taylor, and Joseph*, agents for *Strick and Bellingham*, Swansea.

Solicitors for the liquidators, *Clarke, Woodcock, and Ryland*, agents for *Fussell, Pritchard, Swann, and Henderson*, Bristol.

QUEEN'S BENCH DIVISION.

Wednesday, April 2, 1879.

(Before COCKBURN, L.C.J. and MELLOR, J.)

REG. on the prosecution of A. CRILF (app.) v. SIR RICHARD WALLACE (resp.). (a)

Highway—Diversion—View by justices—Validity of certificate—5 & 6 Will. 4, c. 50, ss. 85, 91.

Where justices certify that a new road will be more commodious than the one for which it is proposed to be substituted, it must unequivocally appear on the face of the certificate that they have arrived at that conclusion from their own personal inspection, and not from statements which they might have received from other parties.

An application was made to the court of quarter sessions for power to divert and turn a certain highway in the parishes of O. and S., and to substitute a new highway in lieu thereof.

The certificate of two justices required by the 5 & 6 Will. 4, c. 50, did not state that the old road would become unnecessary upon the completion of the new road, but that the new road would be more commodious to the public, "because the old pathway passes at the O. end through a low part of the park, which upon inquiries we find in spring and winter is necessarily wet and uncomfortable for walking; and along the S. portion is very irregular, not only in its direction, but also by the numerous holes and uneven ground over which it passes."

The sessions were of opinion that the certificate was insufficient, and altered the appeal.

Held (upon appeal), that the order of sessions was right, as it did not appear by the certificate of the justices that the statement that the new road would be more commodious was based on their own personal inspections.

Held also, by Cockburn, C.J., that as this was merely an application to divert a highway, it was not necessary to state in the certificate that the old road would become unnecessary.

THIS was an appeal, which came on for hearing at the general quarter sessions at Ipswich, in and for the county of Suffolk, on the 5th July 1878, against an order or certificate of two justices to divert and turn a certain pathway, being a highway in the parishes of Orford and Sudbourne, Suffolk, under the 5 & 6 Will. 4, c. 50.

The sessions allowed the appeal, upon the ground that the justices' certificate was incomplete in not stating that the old pathway or highway is or will become unnecessary. It was now sought to set aside the order of sessions, and the following case had been stated for the opinion of the court:

1. The notices on both sides were admitted, and form part of the case.

(a) Reported by A. H. POTTER, Esq., Barrister-at-Law.

[Q.B. Div.] REG. on the prosecution of A. CRILF (app.) v. SIR RICHARD WALLACE (resp.). [Q.B. Div.]

2. The justices' certificate was as follows :

To Her Majesty's justices of the peace at their general quarter sessions, to be holden at the County Hall, in and for the county of Suffolk, on the 5th July 1878.

We, Arthur John Bethel Thellusson and Ernest St. George Cobbold, Esqs., two of Her Majesty's justices of the peace, in and for the said county, do hereby certify that on the 20th March last requisitions were made to us, as two of Her Majesty's justices of the peace in and for the said county, by Henry Brindley, the surveyor of the highways of the parish of Orford, in the county aforesaid, to view a certain pathway or highway situate in the parishes of Orford and Sudbourne aforesaid, leading from Orford aforesaid to Sudbourne and Chillesford in the said county commencing at or near to the east gate of the Sudbourne Hall Park and terminating on the east side of a certain wood, called Watling Wood, the whole of the said lands being in the occupation of Sir Richard Wallace, of Sudbourne Hall, in the said parish of Sudbourne, Baronet, M.P., and also the lands and grounds through which a new pathway or highway was intended to be made, commencing also at or near to the east gate of the said park, and proceeding thence in a westerly direction through lands in the said parishes of Orford and Sudbourne (the whole of the said lands being in the occupation of the said Sir Richard Wallace), and terminating at or near the east side of the said wood, called Watling Wood, so as to make such new pathway or highway more commodious to the public than the present pathway or highway. And we do further certify that on the 1st April last we jointly made the view required by the said surveyors, and that upon such joint view it appeared unto us that such proposed new pathway or highway would be more commodious to the public than the present pathway or highway. And the said Sir Richard Wallace, being the owner of the lands and grounds through which such new pathway or highway hereinbefore particularly described is proposed to be made, having consented thereto by writing under his hand, bearing date the 4th April last, and hereunto annexed, we directed the said Henry Brindley and John Martin as such surveyors as aforesaid to affix copies of the several notices, &c. . . . And we do further certify that a plan hath this day been delivered to us, particularly describing the said highway so proposed to be diverted and turned as aforesaid. And the said lands and grounds through which a new highway is proposed to be made as aforesaid by metes, bounds, and admeasurements thereof, verified on the oath of Benjamin Moulton, of Woodbridge aforesaid, a competent surveyor. And we do further certify that the proposed new pathway or highway leading from Orford aforesaid, to Sudbourne and Chillesford in the same county, and particularly described in the said notice as aforesaid, will be more commodious to the public than the present highway, because the old path passes at the Orford end through a low part of the park, which upon inquiries we find in spring and winter is necessarily wet and uncomfortable for walking, and along the Sudbourne portion is very irregular, not only in its direction, but also is made inconvenient by the numerous holes and uneven ground over which it passes, whereas the new path, by taking a slight curve from the Orford end, avoids the wet ground, and thence continues along the Sudbourne portion in a perfectly straight direction, and is smooth and regular and a made path, the present one being in fact simply a track, the exact direction of which is uncertain, while the new path there is clearly apparent both by night and day, the slight addition in length of but sixteen yards being fully and more than compensated for by the even and regular manner in which the new path has been made. Given under our hand this 18th May 1878.

(Signed) ARTHUR J. B. THELLUSSON.
ERNEST S. G. COBBOLD.

4. It was objected on the part of the appellant that the justices' certificate was incomplete and insufficient because it did not state that the old pathway or highway is or will become unnecessary, and, if so, why it was or would become unnecessary.

5. The sessions decided that the justices' certificate was incomplete and insufficient in not

stating that the old pathway or highway is or will become unnecessary. A copy of the order of sessions, certified by the clerk of the peace, is set out in the appendix hereunto annexed.

6. It being thus the opinion of the quarter sessions that the justices' certificate was incomplete and insufficient, the sessions considered it unnecessary to hear the evidence on the question of fact, and the appeal was allowed, subject to a case for the opinion of the Queen's Bench Division of the High Court of Justice.

7. The appellant also contends that the said certificate is insufficient on the ground that the statement therein, that the new path will be more commodious, is based partly upon inquiries made by the justices, and it does not unequivocally appear that they acted on their own view as required by the 85th section of the Act 5 & 6 Will. 4, c. 50.

8. The appellant further contends that the certificate and plan herein do not "particularly describe the old and new highways by metes, bounds, and admeasurements thereof," as required by the 85th section of the said Act.

9. The questions for the opinion of the court are whether the certificate is complete and sufficient, and also whether the plan accompanying the said certificate is in accordance with the Act of 5 & 6 Will. 4 c. 50.

10. If the court shall be of opinion that the certificate is complete and is sufficient, and that the plan is in accordance with the Act, then the judgment of the quarter sessions is to be reversed, and the matter to go back to the sessions for the purpose of having the questions of fact determined and of proceeding thereon according to law.

By 5 & 6 Will. 4 c. 50, s. 85 it is enacted that

When it shall appear upon such view of such two justices, made at the request of the surveyor as aforesaid (sect. 84), that any public highway may be diverted and turned either entirely or subject as aforesaid, so as to make the same nearer or more commodious to the public; and the owner of the land or grounds through which new highway so proposed to be made shall consent thereto by writing under his hand; or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form or to the effect of schedule 4, in legible characters, at the place and by the side of each end of the said highway from where the same is proposed to be turned, diverted, or stopped up . . . the notices to be published. . . . and the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices, and a plan having been delivered to them at the same time particularly describing the old and proposed new highway by metes, bounds, and admeasurements thereof, which plan shall be verified by some competent surveyor, the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public; and if nearer the said certificate shall state the number of yards or feet it is nearer, or if more commodious the reason why it is so, and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary.

Sects. 88 and 89 provide for an appeal to sessions. By sect. 91 :

If no such appeal be made, or being made shall be dismissed as aforesaid, then the justices at the said quarter sessions shall make an order to divert and turn and to stop up such highway either entirely, or subject as aforesaid, or to divert, turn, and stop up such old highway, and to purchase the ground and soil for such new highway, or to stop up such unnecessary highway, either entirely or subject as aforesaid,

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by such ways and means, and subject to such exceptions and conditions in all respects as in this Act is mentioned in regard to highways to be widened . . . but no old highway (except in the case of stopping up such useless highway as herein is mentioned) shall be stopped up until such new highway shall be completed and put into good condition and repair, and so certified by two justices of the peace upon view thereof.

Poyser (Gully, Q.C. with him) for the appellant.—The certificate before the court contains no statement that the old road which it is proposed to stop up either is or will become unnecessary. It is true that the justices are only asked to give authority "to divert and turn," but in reality authority to stop up the old road is sought for, though the conditions precedent to such stopping up are evaded. The 85th section of the Act contemplates two things: the stopping up of an old way as unnecessary, and the diverting a way by substituting a new way for it. It is submitted that though there may be a stopping up without a diversion, there cannot be a diversion without a stopping up, and if that is so all the conditions with respect to stopping up must be complied with in the latter case, and that has not been done here. *Reg. v. Phillips* (L. Rep. 1 Q. B. 648; 35 L. J. 217, M. C.) supports this argument. If all allusion to the old road was surplusage, the time spent in discussing that case was time wasted. As suggested in the case cited, it is not the road that is diverted, but the traffic over the road, and that can only be done by stopping up the old road either by a barrier or some order of justices. That there could not be a diversion without a stopping up is clearly contemplated by the Act. The order of justices is provided for by sect. 91, which says, "the justices at the same quarter sessions shall make an order to divert and turn and to stop up such highway either entirely or subject as aforesaid, or to divert, turn, and stop up such old highway, and to purchase ground for such new highway, or to stop up such unnecessary highway," so there can be no order for diverting without at the same time an order to stop up. (See form of order, sched. 19 of Act.) The new highway might be shorter or more commodious, and yet there might be some reason which would still make the old road necessary. There might, for instance, be a well to which it was the sole means of approach, and the certificate should show that this is not so. The authorities upon the second point are conclusive. Here the certificate states that the justices base their opinion that the new road will be more commodious upon inquiries that they have made, or at all events partly upon inquiries made by them. In *Reg. v. The Marquis of Downshire* (4 A. & E. 698) Lord Denman says: "We think that it does not by any fair or reasonable inference (and such only ought we to apply) follow that the motive operating upon the justices was the view only. They might, consistently with a fair and reasonable construction of the order, have been influenced by other proof. If so, the justices never obtained jurisdiction over the subject, and their order cannot be supported." *Reg. v. Stephen Jones* (12 A. & E. 684) is also in point, and the principle was recognised in *Reg. v. Milverton* (5 A. & E. 841). On both grounds therefore this certificate is bad, and the order of quarter sessions should be affirmed.

Bulwer, Q.C. (C. E. Malden with him).—The application here is merely to divert a highway and

not to stop up. The distinction is clearly recognised in the sections of the Act, and a different mode of procedure is provided for in each of those cases. All we ask for here is to be allowed to go by steps. Later on it may be an application may be made to stop up the old road, but that is not so at present. The distinction between diverting or turning and stopping up was recognised in *Agmundesham v. Cornwallis* (Anderson's Rep. 234). It is not necessary to inquire into the precise meaning of the words diverting and turning, but they mean something distinct from stopping up, and all conditions for diverting and turning have been complied with here. As to the second point, the Act has been fully carried out. The magistrates have viewed, and upon such view in the earlier part of the certificate they say the new way will be more commodious. The statement in the later part of the certificate is mere surplusage and may be rejected. Besides even there it is stated that the old road was uneven, which was information gained from the view. *Reg. v. Milverton* (*ubi sup.*) supports my argument. *Reg. v. The Marquis of Downshire* and *Reg. v. Stephen Jones* (*ubi sup.*) are distinguishable, as there was no sufficient statement of a view in any part of the certificate.

Gully, Q.C. in reply.

COCKBURN, C.J.—I regret to say that I have come to the conclusion that the order cannot be maintained, that is to say the order of the justices, and that the order by the court of quarter sessions in setting the order aside, and in refusing to proceed upon it is right. Two objections have been taken by the party resisting the order in question. The first is that it was necessary that the justices in their certificate stating that this proposed diversion should have for its effect the making of a road more commodious for the public, should have contained in addition a statement that the old road would be unnecessary, and should be stopped up, and I have been rather struck by that argument; but I think, looking at the sections in the Act of Parliament more closely, that there is no foundation for it, and for the simple reason that as soon as the proceedings have terminated for the substitution of a new road for an old one, the diversion to which the certificate of the magistrates had reference had been established, and hence the old road ceased to be a highway at all. It was divested of its character of a highway, the public were no longer entitled to use it as such, and it reverted unincumbered by any public easement or obligation to the original owner. The other objection however is a far more formidable one, and that is that it does not appear upon the certificate that the proposed substitution of a new road would be more commodious to the public as the result of the view of the magistrates themselves affecting their own judgment. I think this is necessary under the Act of Parliament. The Act of Parliament requires that the justices should view, and not only that they should view, but that they should certify under their hands the fact of their having viewed, and that the proposed new highway was shorter and more commodious than the former one. If more commodious, which was the ground upon the certificate as given here, they had to set out the reason why it was so. The reasons, I think, must be reasons resulting from the view

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on their own personal inspection, and not from statements which they might have received from parties possibly interested in the result. The justices in this case appear to have founded their decision not upon their own view, but upon inquiries. I do not mean to say that they must not consult, but it must appear that the view upon which they founded their decision was their own, and such a view was totally wanting in the certificate. I cannot help regretting the decision, but the order of quarter sessions must be affirmed.

MELLOR, J.—I think I have come to the conclusion on the same grounds. The term diversion must mean a change of direction in the highway, and that the portion of the highway abandoned is no longer highway. What remains is merely the property of the person who owned the land. That, however, is not a point for decision at present.

Order of quarter sessions affirmed.

Solicitors for the appellant, *Rhodes and Son*, for *Steward and Rouse*, Ipswich.

Solicitor for the respondent, *Wood*.

Wednesday, May 7, 1879.

(Before COCKBURN, C.J. and LOPES, J.)

LEEDS UNION (apps.) v. TADCASTER UNION (resps.) (a)
Settlement by residence—Child living apart from parent—39 & 40 Vict. c. 61, s. 34.

A pauper child, born in 1870, a bastard, was placed by her mother, when about a fortnight old, in the charge of a person, who resided with the child for eight years in the appellants' union. Afterwards the child and the person having charge of her removed to the respondents' union, and there, in about seven months, became chargeable to the poor rates. The mother's settlement and residence were not known.

Held, that the pauper's settlement by residence under 39 & 40 Vict. c. 61, s. 34, was in the appellants' union; and that the order of removal thereto was rightly made.

At a general quarter sessions of the peace for the said riding, holden at Wakefield, in the said riding, on the 14th Oct. 1878, before Thomas Brooke, Esq., and others, justices of the peace, an appeal in which the guardians of Leeds Union were appellants, and the guardians of Tadcaster Union were respondents, came on to be tried against an order of removal made by two justices of the said riding on the 2nd Sept. 1878 adjudging the place of the legal settlement of Beatrice Emily Wright, aged eight years, the illegitimate child of Caroline Wright, to be in the parish or township of Seacroft, in the said riding and in the said Leeds Union. At the hearing of the appeal the said court of quarter sessions confirmed the said order of the justices, subject to the following case:

1. The pauper, Beatrice Emily Wright, is the illegitimate child of Caroline Wright, and was born in the parish or township of Roundhay, in the West Riding in May 1870.

2. When the pauper was about a fortnight old she was placed by her mother in the care of John Oakes and his wife.

3. John Oakes and his wife resided at Seacroft from Dec. 1871 to Feb. 1878, and during all this time the pauper lived with them without receiving any relief, except that in Sept. 1875 the pauper was sent by John Oakes for one week (during the temporary illness of his own daughter) to the house of his son, who lived at Crossgates, in the West Riding.

4. At the time the pauper was so sent to Crossgates, both John Oakes and his wife intended to bring her back to their house at Seacroft within a period of a week or thereabouts.

5. In Feb. 1878 John Oakes and his wife with the pauper left Seacroft and went to reside in Crossgates within the respondents Union, and in Sept. 1878 the pauper became chargeable to the respondents Union.

6. No evidence was given of the settlement by birth or otherwise of Caroline Wright, the mother of the pauper, though evidence was given that the respondents had made unsuccessful enquiry about it.

7. During all the time aforesaid the parishes or townships of Seacroft and Roundhay were comprised within the appellants' union.

8. Copies of the order of justices and grounds of removal and grounds of appeal accompany and form part of this case.

9. Upon the above facts the court of quarter sessions confirmed the above order.

The question for the court of Queen's Bench Division was whether they were right in doing so.

If the answer of the court were in the affirmative, the order of sessions was to stand, otherwise it would be reversed.

Lofthouse for the respondents.—This settlement comes within the words of 39 & 40 Vict. c. 61, s. 34, by which it is enacted that "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." [Stopped by the Court.]

Poland and Lumley for the appellants.—To reside, according to the meaning of this section, must involve some personal act by the individual who thereby obtains a settlement. A child of this age is incapable of selecting a residence as a voluntary proceeding; if it were otherwise and the settlement in this case were good, the result must be frequently to separate children from their parents. Moreover, this was not a residence at Seacroft which would constitute irremovability under 9 & 10 Vict. c. 66; it is rather the case of the child who was sent year after year to a charitable institution, but yet constructively resided with his mother in another parish, and was held to be irremovable when he became chargeable in the mother's parish:

Reg. v. Abingdon, L. Rep. 5 Q. B. 406.

This statute of irremovability is subject to the proviso in 11 & 12 Vict. c. 111, s. 1, "Provided always that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act (i.e. 9 & 10

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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Vict. c. 66), and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act." There was nothing here to make the mother irremovable from Seacroft, and therefore the pauper can neither be irremovable from there, nor have a settlement there :

Reg. v. Pott Shrigley, 12 Q. B. 143.

COCKBURN, C.J.—We think our judgment must be to confirm the order of removal and that of the quarter sessions. It has been ingeniously argued that the case is bound by the proviso in 11 & 12 Vict. c. 111, to 9 & 10 Vict. c. 66, s. 1, which, it is said, limits the irremovability of a child to the place where the parent is irremovable. But the proviso has nothing to do with the present case: its object was to prevent the dispersing of different members of a family. Here there is no consideration of that kind, and we have only to decide upon the applicability of sect. 34 of the Act of 1876 to the circumstances. The pauper has actually resided for three years in Seacroft, but it is contended that, because the mother lived in another parish, the child constructively re-resided with her and where she resided. It is true that where a child is under the authority and control of its parent, it may, even placed at a school in a different parish, be said to constructively reside with the parent. Here, however, the child had been entirely given up by its mother; it was not a suspension, but a virtual abandonment of the maternal right. Circumstanced as she was, she asked Oakes and his wife to take the child off her hands, and the child resided with them in another parish without any intention on the part of the mother to resume her rights. Mr. Poland has contended that under sect. 34, there must be an intention on the part of the person residing to choose a residence, but nothing of the kind is expressed in the Act. The expression is simply "shall have resided." The child must have resided somewhere, and the words and spirit of the section are satisfied by actual residence on its part. The section may sometimes produce inconvenience, but on the whole, its operation, by preventing people from being torn from a neighbourhood in which they have long been living, is likely to be beneficial. I think this is a case certainly within its application.

LOPES, J.—I am of the same opinion.

Judgment for respondents.

Solicitors for appellants, *C. G. G. Rushworth*, for *Clarke and Son*, Leeds.

Solicitors for respondents, *Torr and Co.*

Friday, March 28, 1879.

(Before MELLOR and LUSH, JJ.)

STACEY (app.) v. LINTELL (resp.). (a)

Bastardy—Married woman living with her husband—Justices' jurisdiction—35 & 36 Vict. c. 65, s. 3.

A single woman, after being delivered of a bastard child, got married, and, whilst living with her husband, applied for an affiliation summons against the putative father.

Held, upon a case stated by justices, that the 3rd section of the Bastardy Laws Amendment Act

1872 does not apply to such a case, and that the justices rightly refused to make an order.

THIS was a case stated by justices, under 20 & 21 Vict. c. 43, for the opinion of the court.

At a petty sessions for Chipping Wycombe an information was preferred under 35 & 36 Vict. c. 15, s. 3, by Sarah Stacey, formerly Sarah Cogdell, against Charles Lintell, charging him with being the father of her bastard child. Upon the hearing the justices dismissed the information, and stated the following case:—

1. Upon the hearing of the said information and application it was proved that the appellant at the time of the birth of the child mentioned in the said information, namely, in Jan. 1876, was a single woman, and she deposed on oath that the respondent was the father of the said child, and that his wife, within twelve months next after the birth of the said child, paid her money, which the appellant considered was intended for its maintenance. In cross-examination it was admitted by the appellant, and proved to the satisfaction of the justices, that since the birth of the said child, but previous to the filing of the said information—namely, on the 6th Feb. 1878—the appellant had intermarried with and become the wife of Edward Stacey, and was at the date of the said hearing the wife of the said Edward Stacey, and living with him as his wife.

2. It was therefore contended by Mr. Daniel Clark, the solicitor for the respondent, that the appellant was not a single woman within the meaning of sect. 3 of 35 & 36 Vict. c. 65, and that an order to affiliate the said child could not, under the circumstances before stated, be made on her application. The following cases were referred to, namely, *Res v. Luffe* (8 East 193); *Reg. v. Collingwood* (12 Q. B. 681); *Ex parte Grimes* (2 E. & B 547). The solicitor for the respondent contended that those cases were distinguished, because there the woman was not living with her husband at the time the order was made; and, further, that the cases were decided on the ground that if an order could not be made the child would be unprovided for, and he pointed out that such would not be the case with regard to the child of the appellant, as by sect. 57 of 4 & 5 Will. 4, c. 76, the husband of the appellant would be liable to maintain it.

3. The said justices, in the absence of any decision as to the words "single woman" applying to a married woman living with her husband at the time of the application and hearing, dismissed the said information, as before mentioned, without going into further evidence as to the respondent being the father of the said child, or having paid monthly, as alleged in the said information, on the ground that the appellant was not entitled to prefer the said information, or to obtain an order thereon, because she was a married woman and living with her husband at the time the said information was preferred and came on for hearing.

4. The question of law arising on the above statement for the opinion of the court was, whether an order to affiliate the child named in the said information could be made on the application of the appellant, assuming that the paternity of the child could be proved by the mother and the necessary corroborative testimony could be given, and the payment by or on behalf of the alleged

(a) Reported by M. W. McCLELLAN, Esq., Barrister-at-Law.

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father of money for the child's maintenance within twelve months of its birth and before the marriage of the appellant could be proved to the justices' satisfaction.

Graham for the appellant.—The words of this 3rd section—which are that “any single woman who may be with child, or who may be delivered of a bastard child, after the passing of this Act may either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance,” apply for an affiliation order—can be satisfied by reading the words “single woman” as applying only to the time of the child's birth. This interpretation is supported by the fact that the previous statute, 7 & 8 Vict. c. 101, contained a proviso in sect. 5 that no order for the maintenance or support of a bastard child should have any force or validity after the mother's marriage. That proviso has now no existence, the previous statute being repealed by the present one; therefore an order will now continue to have effect, notwithstanding the marriage. This being so, there is no reason why the order should not be made after the marriage. Under the earlier Bastardy Acts, before 7 & 8 Vict. c. 101, marriage was held to be no objection to an order (*Rees v. Luffe*, 8 East, 193); so also under that Act in the case of a woman living apart from her husband (*Reg. v. Collingwood*, 12 Q. B. 681; and *Reg. v. Pillington*, 2 E. & B. 546). The case of *Lang v. Spicer* (1 M. & W. 129) was decided under an early statute, and was based only on the ability of the husband to maintain the child.

Crooms for the respondent.—The repeal of 7 & 8 Vict. c. 101, merely restores the previous law under which *Lang v. Spicer* was decided; it is therefore a distinct authority against any affiliation order in this case. There is a marked distinction between the other cases cited and the present, in that the married women were in both the cases, under the 7 & 8 Vict. c. 101, living apart from their husbands, and were therefore held to be single women.

Graham in reply.

MELLOR, J.—I am of opinion that the decision of the justices was right, and that the appellant did not come within the definition of a single woman. It appears to me that the reasoning in the case of *Lang v. Spicer*—although this case is not actually governed by the decision there—shows us that we ought not to hold that a woman who is married at the time of her application for an order is within the contemplation of the 3rd section of 35 & 36 Vict. c. 65. By her marriage her husband becomes liable to maintain her bastard child; and, if she were at liberty also to apply and obtain an order against the putative father, there would be a double liability in reference to the maintenance of the same child. The reason of the thing is thus against the argument of Mr. Graham founded upon the Acts; but I think also that we are within the strict meaning of the words in the section. I think that the intention is that the woman throughout should be a single woman, or at least that she should be so in the sense of those cases where a woman separated from her husband has been held to be a single woman for the purpose of obtaining an

order of affiliation. Those cases, however, only show that for the purposes of the Poor Law Acts a married woman might come within the provision throwing the cost of the maintenance of the bastard of a single woman upon the putative father.

LUSH, J.—I am of the same opinion. The policy of the law is to assist the mother in maintaining the child, and to insure that she shall not throw the cost of it upon the parish; and so the word single woman has received an interpretation which enables us to say that it does not necessarily mean “unmarried,” but may include a woman separated from her husband, who, during such separation, has had a bastard child, and who by such separation has been reduced as it were to the position of a single woman. But the woman here was living with her husband at the time of her application, and by sect. 57 of the Poor Law Act (4 & 5 Will. 4, c. 76) “every man who shall marry a woman having a child at the time of such marriage shall be liable to maintain such child as part of his family.” Therefore, as soon as the woman married, the child had a father, a person bound to maintain it. Now, it has been observed that in the Act 7 & 8 Vict. c. 101, there was a proviso that no order for the maintenance of a bastard child should be of any force after the marriage of the mother, and that that proviso is purposely omitted in the later Act, whence it is contended that the Legislature intended that her subsequent marriage should not invalidate the order. I, however, do not so read the Act. I think the effect is this, that the order does not now become *ipso facto* void upon the marriage of the woman; but, if the order has been made while she was single, it may be continued after her marriage, under the order of the justices, until the child is thirteen—that is, whether she marries or not, the order may be kept alive and in force up to that time. That is not this case. The question then is, When she applied was she in the position of a single woman? I think not; she was not therefore capable of applying, for to be within the Act she must be either single or separated from her husband.

Judgment for respondent.

Solicitors for appellant, *King and M'Millin*, for *James Batting*, Great Marlow.

Solicitor for respondent, *D. Clarke*, High Wycombe.

Monday, March 31, 1879.

(Before COCKBURN, C.J. and MELLOR, J.)

REG. V. GREENLAW TURNPIKE TRUSTEES. (a)

Turnpike tollhouse—Purposes of the road—Used as a dwelling-house—Encroachment—3 Geo. 4, c. 126, ss. 89, 118—4 Geo. 4, c. 95, s. 57.

A tollhouse had been used for the residence of a man employed to keep the road in repair ever since the tolls had ceased to be collected there, twelve years ago. The adjoining landowner applied for a mandamus to compel the road trustees to pull down the house, under 4 Geo. 4, c. 95, s. 57, in order that he might purchase the site, under 3 Geo. 4, c. 126, s. 89.

Held, that the house, being situated within forbidden distance from the centre of the road for a dwelling—

(a) Reported by M. W. M'KELLAR, Esq., Barrister-at-Law.

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house (under 3 Geo. 4, c. 126, s. 118), it was, under the circumstances, no longer required for the purposes of the road; and that the applicant was entitled to this remedy.

THIS was a rule for a *mandamus* obtained on behalf of the proprietor of land adjoining, by which the trustees of the Greenlaw Turnpike Trust were commanded to pull down a tollhouse which, it was alleged, was no longer required for the purposes of the road, and to sell or remove the materials.

The tollhouse was erected in 1851, and was used for about sixteen years afterwards for collecting tolls. In 1867 it was resolved to remove the bar, and since that time the house has been used only as a residence for a workman, employed by the trustees, to keep the road in order. The tollhouse stood by the side of the road within less than 30 ft. from the middle of the road, which is forbidden, with respect to a dwelling-house, by sect. 118 of 3 Geo. 4, c. 126.

By 4 Geo. 4, c. 95, s. 57 it was enacted

That where any tollhouse or tollhouses standing on or adjoining any turnpike road, and which shall have been erected by or vested in the trustees or commissioners of such road, shall become useless and be no longer required for the purposes of such road, it shall not be lawful for the trustees or commissioners of such road to sell or dispose of such tollhouse or tollhouses, but in every such case the trustees or commissioners of the road, on which such tollhouse or tollhouses no longer required, shall stand, shall cause such tollhouse or tollhouses, with the outhouses attached or belonging thereto, to be pulled down, and the materials thereof to be sold or removed, and the site of such tollhouse or tollhouses so pulled down, together with the gardens and appurtenances thereunto belonging may then be sold by the said trustees or commissioners, in the same manner as and under the regulations in the said recited Act and this Act contained, with respect to any land or ground not wanted for the purposes of the road.

The provision in the recited Act referred to is contained in sect. 89 of 3 Geo. 4, c. 126

That where the trustees or commissioners of any turnpike road shall have purchased, or shall be possessed of any piece or pieces of ground not wanted for the purposes of such road, it shall and may be lawful for such trustees or commissioners to sell and dispose of the same: provided always that the said trustees or commissioners, before they shall sell and dispose of any such piece or pieces of ground not wanted for the purposes of such turnpike road as aforesaid to any other person or persons of whom the same shall have been purchased, or to the person or persons whose lands shall adjoin thereto.

Candy showed cause for the trustees.—This is an appeal to the discretion of the court by a landowner for the purpose of becoming possessed of a piece of land adjoining his own. The duty of the trustees is to pull down these tollhouses only when they become useless and are no longer required for the purposes of the road. Because this tollhouse has not been used for collecting during the last twelve years, it does not follow that it may be no longer required for that purpose again. Moreover, it is a sufficient exemption from the application of the section, if the tollhouse is required for the purposes of the road. Here the house is used for the residence of the person who keeps the road in repair, which may well be included in the purposes of the road. Under the Lands Clauses Act, "superfluous land" has been held to be inapplicable to land used for other purposes of a railway than that of bearing the rails.

Bidley supported the rule.—The adjoining owner has a right of pre-emption, and this is the only

means by which he can enforce his right. When used as a dwelling, the tollhouse became an obstruction within the 118th section of 3 Geo. 4, c. 126, and its continued existence is forbidden by that section, and cannot therefore be a purpose of the road. As to its future use, the definition of the word "required" with respect to superfluous land was given by Bramwell, L.J. in *Hooper v. Browne* (L. Rep. 3 Q. B. Div. 258, 274). Land is required by a railway company where they have actually used it for laying down the rails over which the trains carrying their traffic pass and re-pass, or for erecting works necessary in conducting their business. I think also that land is required where, although it is not at the moment used by the company, it will be wanted within a definite ascertained time." It is not suggested here that the house will again be required for collecting tolls.

COCKBURN, C.J.—This rule must, I think, be made absolute. The first question is, whether the tollhouse has become useless, and is no longer required for the purposes of the road? and the decision of this question turns on what is the proper construction of the words "required for the purposes of the road?" It is quite clear that this has ceased to be useful as a tollhouse, and I do not think that the turnpike trustees have shown anything to lead us to believe that they seriously contemplate setting up a toll again at this place. As an inference of fact from their statement I do not believe there is any intention to use this again as a tollhouse. I start therefore with the assumption that this is useless as a tollhouse. Then it is said that it is still required for road purposes, because it is occupied by one of the men employed in the road. We must therefore consider whether such occupation can come within the meaning of sect. 57. In order to determine that, we were very properly referred to sect. 118 of the 3 Geo. 4, c. 126, forbidding encroachments by means of dwelling-houses or other buildings being made on or at the sides of any turnpike road so as to reduce the breadth, which seems to me to make all the difference in the case. It is clear that if the trustees had erected this, not as a tollhouse but as a dwelling-house, they would have obstructed the road, and gone in direct contravention of this section. If they had done so, then the neighbouring landowner, who it must be presumed uses the road, would have a right to call upon them to pull the house down, or to proceed by information as prescribed. Turning again to sect. 57, and reading the purposes there as meaning lawful purposes, we see that the use of the house otherwise than as a tollhouse is not within it. The only other question is, whether the neighbouring proprietor is entitled to call upon the turnpike trustees by *mandamus* to proceed under the Act and pull down the tollhouse, and sell or remove the materials. I think that he is. He has the right to have the road unobstructed, and we may, as I before said, assume that, being a neighbouring owner, he uses the road. That being so, he has, in my opinion, a right to call on the trustees to proceed so soon as it is established that the tollhouse has become useless.

MELLOR, J.—I am of the same opinion. For some little time I hesitated as to whether this might not still be said to be required for the purposes of the road, but I am satisfied now that it has

become useless within the meaning of the section. The object of that section is to deal with toll-houses, and their removal when useless for toll purposes. Furthermore, it is clear, in view of the other sections about the erection of houses, that the trustees would have no right to erect any such house except for a tollhouse, and it is only as such that it can be continued. Otherwise it is a nuisance and obstruction on the road; and sect. 57 is express that the land shall not be sold with the obstruction on it. The rule for a *mandamus* must therefore be made absolute.

Rule absolute.

Solicitors for prosecution, *Shum, Crossman, and Co.*, for *Fenwick and Manisty*, Newcastle-on-Tyne.
Solicitor for defence, *Adam Burn*.

Saturday, March 1, 1879.

(Before FIELD and MANISTY, JJ.)

THE GUARDIANS OF THE POOR OF THE HEREFORD UNION (apps.) v. THE GUARDIANS OF THE POOR OF THE WARWICK UNION (resps.). (a)

Poor Law—Settlement—Child under sixteen—Poor Law Amendment Act 1870 (39 & 40 Vict. c. 61), s. 35.

A pauper was born in the H. Union in 1840, but had never acquired a settlement in her own right. Her father was born in the L. Union, but had acquired no settlement except his birth settlement.

Held, that, under these circumstances, the pauper was not settled in the H. Union, but must be deemed to have derived her father's birth settlement.

THIS was an appeal against an order of two justices for Warwick, adjudicating the settlement of Emma Jones, a lunatic, to be in the Hereford Union.

The appeal was tried at the quarter sessions of Warwickshire holden at Warwick on the 3rd July 1878, when the said order of adjudication was confirmed, subject to the opinion of the Queen's Bench Division upon the following

CASE.

It was proved or admitted that the said pauper lunatic, Emma Jones, was born in the parish of St. John, Hereford, in the month of April, in the year 1840, and was the lawful daughter of James and Ann Jones.

James Jones, the father, was born at Leominster in or about the year 1798, and acquired a settlement there by birth, but never acquired any settlement elsewhere.

The said lunatic, Emma Jones, was never married, and had never done anything to acquire a settlement in her own right.

The said Emma Jones was adjudged a lunatic by an order of one of her Majesty's justices of the peace for the county of Warwick, dated May 12, 1878, and was received as a patient in the county lunatic asylum at Hatton.

An order was made by two justices of the peace for the county of Warwick, adjudging the parish of St. John, Hereford, in the Hereford Poor Law Union, to be the place of the last legal settlement of the said Emma Jones, and ordering the guardians of the poor of the said Hereford Union to contribute to her support in the said Hatton asylum.

(a) Reported by A. H. POTTER, Esq., Barrister-at-Law.

This order was confirmed by the justices in quarter sessions, they being of opinion that the derivative settlement of Emma Jones from her father ceased on her attaining the age of sixteen years before the passing of 39 & 40 Vict. c. 61, s. 35.

The question for the opinion of the court is, whether such order was rightly confirmed.

By 39 & 40 Vict. c. 61, sect. 35:

No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child shall acquire another settlement.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

Lumley Smith for the respondents.—The only settlement that it is alleged the father had was a birth settlement. He may have been entitled to a derivative settlement, and that being so, no inquiry can be made into such derivative settlement. The child must therefore take her own birth settlement under the 3rd clause of sect. 35 of 39 & 40 Vict. c. 61:

Woodstock Union v. St. Pancras, 39 L. Rep. N. S. 256; L. Rep. 4 Q. B. Div. 1.

Colmore, contra, cited

Guardians of Westbury-on-Severn v. Overseers of Barrow-in-Furness, 38 L. T. Rep. N. S. 315; L. Rep. 3 Ex. Div. 88.

FIELD, J.—I am of opinion that the case comes within the decision of the Exchequer Division in *The Guardians of Westbury-on-Severn v. The Overseers of Barrow-in-Furness*, and we are bound to follow that decision. The question we have to determine arises in this way. The pauper in question was born in the Hereford Union in 1840, and never acquired any other settlement, and at the time the Poor Law Amendment Act passed in 1876, she was long past the age of sixteen. There might have been some difficulty in arriving at the settlement of the pauper under these circumstances, had it not been that in the case to which I have before referred, the Exchequer Division has come to the conclusion that sect. 35 of that Act and the proviso therein are retrospective. It follows, therefore, that the pauper in question was a child under sixteen within the meaning of this Act, and up to that age took her father's settlement, which she was to retain until she acquired some other settlement—but she never did acquire another settlement, and therefore she still takes her father's settlement. Mr. Lumley Smith contends that this case comes under the third branch of the 35th section. He says it would be unsafe to assume that the father was actually settled at the place of his birth until the grandfather's settlement has been inquired into, and when once it becomes necessary to inquire into the grandfather's settlement the court should hold it in his hand, and he relied upon *The Guardians of Woodstock Union v. The Churchwardens of St. Pancras* (*ubi sup.*); but, if that contention is right, you

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would exclude from the benefit of this section all birth settlements, if it is necessary to go back and inquire into the settlement of all ancestors. This section was clearly intended to exclude birth settlements, so that children under sixteen might be as far as possible settled with their parents. I am of opinion, therefore, that the decision of quarter sessions was wrong and must be quashed.

MANISTY, J.—I am of the same opinion. This case is clearly within the decision of *The Guardians of Westbury-on-Severn v. The Overseers of Barrow-in-Furness*.

Order of sessions quashed.

Solicitors for the appellants, Cooke and Jonas, for Llanwarme, Hereford.

Solicitor for respondents, H. Tyrrell, for Passman, Leamington.

COMMON PLEAS DIVISION.

Dec. 7, 1878, and Jan. 11, 1879.

(Before DENMAN, J.)

NIGOTTI v. COLVILLE. (a)

False imprisonment—Time, mode of computation—Calendar month—Expiration of term of imprisonment.

The plaintiff, who had been sentenced by a police magistrate on the 31st Oct. to two different terms of imprisonment on two convictions, the first for "one calendar month," the second "for fourteen days, to commence at the expiration of the imprisonment previously adjudged," sued the defendant, the governor of Coldbath Fields Prison, for false imprisonment. The plaintiff was received into the defendant's custody on the 31st Oct., and finally released on the 14th Dec. at 9 a.m.

Held, that the facts disclosed no cause of action, the term of imprisonment not strictly expiring until midnight on the 14th Dec.

"One calendar month," in a sentence of imprisonment, means a period expiring on that day in the succeeding month which corresponds numerically with the day on which the sentence is pronounced.

FURTHER CONSIDERATION.

The plaintiff, who sued the governor of Coldbath Fields Prison for false imprisonment, had been sentenced on the 31st Oct. to two successive terms of imprisonment, one calendar month and fourteen days respectively.

The defendant received the plaintiff into his custody on the afternoon of the same day, and finally discharged him at 9 a.m. on the 14th Dec.

The jury having provisionally assessed the damages at 20s., the case was adjourned for further argument.

Kydd and Barnard, for the plaintiff, argued that the first period of one calendar month's imprisonment must be regarded as having commenced at midnight on the 30th Oct., the plaintiff having been in custody during part of the 31st, and a part of a day being in law equivalent to a whole day for such a purpose. This being so, the month would expire at midnight on 29th Nov., that completing thirty entire days. If the term were reckoned to midnight on 30th Nov., the plaintiff would have been detained in prison during the whole of November (which would be

one 'calendar month'), and, in addition, one day in October, under a sentence for one month. Fourteen days from midnight on 29th Nov. would expire at midnight on 13th Dec., so that there was an illegal detention.

A. L. Smith, for the defendant, contended that the first sentence of one calendar month did not expire until midnight on the 30th Nov. at the earliest.

Our. adv. vult.

DENMAN, J. subsequently delivered the following written judgment.—This was an action for false imprisonment by detaining the plaintiff in custody for a longer period than, as he contended, he was liable to be detained. The facts were not in dispute. I took the opinion of the jury as to the damages, which were assessed at 20s. After hearing counsel, I took time to consider whether judgment ought to be for the plaintiff or for the defendant. The plaintiff had been convicted by a metropolitan police magistrate of two different assaults, and sentenced to imprisonment upon each conviction. The convictions took place at 11 a.m. on the 31st Oct., and the commitments were drawn up in accordance with the sentences passed. For the first assault the plaintiff was sentenced to be imprisoned "for one calendar month;" and, for the second assault, "for fourteen days, to commence at the expiration of the imprisonment previously adjudged." He was taken into the custody of the defendant, being the governor of Coldbath Fields Prison, during the afternoon of the 31st Oct., and finally released at 9 a.m. on the 14th Dec., having claimed to be released on the previous day. It was contended for the plaintiff that the calendar month (the term of the first sentence) commenced at midnight on the 30th Oct. So far I am of opinion that the plaintiff's contention was well founded. I can find no express authority on the point, but, arguing from analogous cases, I think I ought so to hold. It has been held in many cases that, as a general rule, except where it is necessary in order to settle which of two actions on the same day is to prevail, the law takes no notice of parts of a day, and that the first day to be counted is the day, any part of which is occupied in the particular business which is to endure for a certain number of days in order to fulfil any requirement of the law. This principle is recognised in the often-cited case of *Combe v. Pitt* (3 Burr. 1434); in *Field v. Jones* (9 East. 154); in *Glassington v. Rawlings* (3 East. 407), where it was held that, under the statute which enacted that a trader lying in prison two months after an arrest for debt should be adjudged a bankrupt, the day of arrest was to be included in the computation of the two months; and also in *Wright v. Mills* (4 H. & N. 488) and other cases; and this is stated to be the rule applicable "to all judicial acts" in the judgment of the Exchequer Chamber in *Edwards v. The Queen* (9 Exch. 628). There are no doubt several cases in which, where the date is to run from an act done, it has been held that the day on which the act is done is to be excluded from the computation. See *Lester v. Garland* (15 Ves. jun. 254). There are also cases in which, where a payment is to be made or something to be done "within so many days or months," or "at the expiration of so many days or months," the day of the event within or at the expiration of so many days from which the payment is to be made, or the act done,

(a) Reported by J. A. Fooks, Esq., Barrister-at-Law.

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is not included in the reckoning. The case of a bill of exchange is a familiar instance. But I can find no authority for saying that the general rule ought not to apply to the case of a sentence of imprisonment. Nor can I see any ground for doubting that it applies to the case, where the sentence is for a calendar month, or a given number of calendar months, just as much as to a sentence for so many days. Holding, then, that the first sentence in the present case must be computed from midnight on the 30th Oct., when did the calendar month expire? The plaintiff contends that it expired at midnight on the 29th Nov. at the latest; and he does so on the ground that, if not, the plaintiff under a sentence of one calendar month's imprisonment would have to undergo something more than a calendar month's imprisonment, inasmuch as he would be imprisoned for the whole of one day in October (i.e., from midnight on the 30th to midnight on the 31st Oct.), *plus* twenty-nine days and something more (say, even a whole calendar month more) in November, making in the whole more than thirty days; whereas November, which is a calendar month, only consists of thirty days. Therefore, it is argued, it follows of necessity that he will have suffered more than a calendar month's imprisonment, and in this particular case he will have actually been imprisoned during the whole calendar month of November, plus one day in October. It appears to me that this argument, however plausible, is not sound. The question appears to me to depend entirely upon what was the meaning of "one calendar month" at the time the sentence was passed; and I am of opinion that at that time, viz., on 31st Oct., those words meant a month ending on the day in the succeeding month corresponding to the day of the sentence, according to the ordinary understanding of the words "this day calendar month." The whole difficulty of the case here arises from the fact of October having thirty-one days, and November only thirty; but I think that a few considerations will show how that difficulty ought to be solved. Suppose instead of the 31st Oct. this sentence had been passed on the 26th. Then, applying the rule mentioned above as to the commencement of the term, the prisoner would be entitled to count the whole of the 26th as a day of imprisonment, i.e., the sentence would have begun to run from midnight on the 25th. I apprehend that no one would contend that it would have expired before midnight on the 25th Nov. Why? because that would be the expiration of the "calendar month." Yet in that case, as in this, the calendar month spent in prison would have been one of thirty-one days and not of thirty days. This seems to show that the meaning of "one calendar month" cannot be construed with reference only to the duration of the latter of the two months over which it may extend. If it did, then a sentence of one calendar month passed on the 29th Jan. would expire not on the 28th Feb., but at midnight on the 25th, because, February being a calendar month of twenty-eight days, the prisoner would have in that sense spent a calendar month in prison. In the case of bills of exchange, in which the word month is held to mean "calendar month," it is laid down by all the text writers that bills of one month drawn on the 28th, 29th, 30th, or 31st Jan. will fall due (excluding the days of grace) all on the same day,

viz., 28th Feb., or in Leap Year on the 29th. See Byles on Bills, 12th edit., p. 206; Chitty on Bills, 11th edit., by J. A. Russell, p. 264 (and the older books there cited in the note); Story on Bills, 1st edit. s. 335, note 1. Yet those drawn on the 28th and 29th would, according to the mode of reckoning here contended for by the plaintiff, have been running one or two days more than the whole of February, and therefore more than a calendar month. It is no doubt true that the law applicable to bills of exchange depends upon the usage of merchants, and is not necessarily applicable to other cases; but where the question is, what is the true meaning of so familiar an expression as "one calendar month," it is useful to consider how such an expression is regarded in any case in which it is constantly used in familiar legal instruments. On the whole I am of opinion that a sentence of imprisonment for one calendar month passed on any given day of any given month, is held to begin to run from the first moment of that day, and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month not having so many days as the preceding month, then, by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its last day; but as long as there is a day in the calendar numerically corresponding with the day from which the sentence begins to run, so that it is unnecessary to trench upon a succeeding month, I see no ground for anticipating the expiration of the sentence. This being so, it follows that the plaintiff was not strictly entitled to his discharge until midnight on the 14th Dec., being one calendar month and fourteen days from the time from which his first sentence began to run, and fourteen days from its expiration. I am of opinion, for these reasons, that the plaintiff, who was discharged at nine o'clock in the morning of the 14th Dec., was not detained illegally, and I accordingly give judgment for the defendant with costs.

Judgment for the defendant.

Solicitors for the plaintiff, *Gold and Son.*

Solicitors for the defendant, *Nicholson and Herbert.*

Friday, May 23, 1879.

(Before Lord COLERIDGE, C.J., and LINDLEY, J.)

WYNNE v. FORESTER. (a)

Mines—Agent—Certified manager—Conviction—Mines Regulation Act 1872 (35 & 36 Vict. c. 76), sect. 51.

By sect. 51 of the Mines Regulation Act 1872 (35 & 36 Vict. c. 76), it is enacted (sub-sect. (1) that an adequate amount of ventilation for certain defined purposes shall be constantly produced in every mine; and by sub-sect. (31), that, in the event of any contravention of or non-compliance with any of the preceding rules being proved in the case of any mine to which this Act applies, the owner, agent, and manager shall each be guilty of an offence against the Act, unless he proves certain exculpatory facts.

Held, that the conviction and fine of the certified manager of a mine for a breach of the regulation

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

contained in sub-sect. (1) did not prevent the respondent, who was the agent of the mine, from being also convicted in respect of the same breach.

The following case (omitting formal parts) was stated by the stipendiary magistrate for Stock-upon-Trent for the opinion of the court.

CASE.

4. The statute under which the appellant instituted proceedings is the Coal Mines Regulation Act 1872 (35 & 36 Vict. c. 76), s. 51, which enacts that

The following general rules shall be observed so far as is reasonably practicable in every mine to which this Act applies:

(1.) An adequate amount of ventilation shall be constantly produced in every mine, to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables, and workings of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein.

(31.) Every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this Act; and in the event of any contravention or of a non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, being proved, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing, and to the best of his power enforcing, the said rules or regulations for the working of the mine, to prevent such contravention or non-compliance.

5. Every person who is guilty of an offence against the Act is by sect. 60 made liable to a penalty not exceeding (if he is an owner, agent, or manager) 20*l*.

6. The said mine is a mine to which the said Act applies.

7. The respondent is the agent of the said mine.

8. One George Hollins was at the date of the said proceedings duly appointed manager of the said mine, and he holds a certificate under the said Coal Mines Regulation Act 1872.

9. On the 12th Oct. 1878, Mr. S. B. Gilroy, the assistant-inspector of mines for the district, visited the said colliery and found that the ventilation of the said mine was defective and inadequate, the defect having been caused by a fall in the roof of the said mine, and he thereupon gave directions to the said Martin Forester (the respondent), who accompanied the said assistant-inspector in the absence of the manager, to have the same remedied.

10. On the 1st Nov. the said S. B. Gilroy, as such assistant-inspector, examined the said mine again, and still found the ventilation defective and inadequate for the safe working of the mine, and that nothing had been done for the purpose of removing the said fall or improving the ventilation, and thereupon the said appellant instituted proceedings both against the said Martin Forester (the respondent) and the said George Hollins the certificated manager for such offence.

11. It was proved by the evidence that the said George Hollins was a duly certified manager of the said mine, and that the said mine was worked under his directions. It was also proved that the said respondent was the agent of the said mine, and that occasionally in the temporary absence of the said George Hollins, which was about two days per week, he gave certain directions for the management of the said mine.

12. I thereupon convicted the said George Hollins as the certified manager of the said mine,

who in my judgment was responsible for the said offence, and fined him the sum of 15*l*. and costs for the said offence, which the said George Hollins duly paid, and I dismissed the summons as against the said respondent.

13. It was contended, on the part of the appellant, that upon the above facts being proved, I was bound under the provisions of sect. 51 of the said Act to convict the respondent as the agent of the said mine, as well as George Hollins, the certificated manager; but I held that, as the said George Hollins had already been fined for the offence, I had no right to convict the respondent as such agent as aforesaid for the same offence. I was of opinion that, though the assistant-inspector on his first visit gave directions to the respondent to remedy the defect, the promise given by him was simply a promise that he would mention the matter to the manager, the person made responsible by the statute, for by sect. 26 it is expressly declared that every mine to which the Act applies should be under the control and daily supervision of a manager, and that no mine should be worked for more than fourteen days without there being such a manager. The intention of this enactment is, in my opinion, that there shall be some person attached to such mine thoroughly conversant with mining operations, and who shall be deemed responsible for the proper and safe working of the mine; and that, if that be not so, but that the owner or agent who may know little or nothing of the subject is to share the responsibility with the manager, there would be a divided authority which might lead to very serious results, because the two parties may differ in opinion as to any remedies or alteration to be adopted; and if so, whose influence is to prevail if both are responsible? By adhering to what I believe to be the clear intention of the statute, that is, of making the manager alone responsible, the difficulty and danger is overcome. Some stress was put upon the fact that the manager was generally absent two days a week. Be it even so; that did not relieve him from his responsibility as manager, or throw it upon the respondent. It would be the duty of the manager in his unavoidable absence to leave some equally efficient person in charge. On these grounds I dismissed the summons against the respondent.

If the court shall be of opinion that my view of the law is right, the summons will stand dismissed; but if they should be of a contrary opinion, the case is to be remitted to me with their opinion, in order that I may hear the case upon the evidence.

Gorst, Q.C. (M. Mackenzie with him) for the Crown.—The stipendiary magistrate seems to have thought that a *mens rea* must be shown; but this is one of those cases such as are not uncommon in recent legislation, in which certain persons are presumed by the law to be guilty of a certain offence, upon certain facts appearing, unless they prove the contrary. The section of the Act in question (sect. 15) applies to all the three persons mentioned in it, and they are all three liable.

The respondent did not appear.

Lord COLERIDGE, C.J.—I am of opinion that the appellant is entitled to succeed. There is no doubt great force in the observations of the stipendiary magistrate, which would have been very well addressed to Parliament against the passing

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of this Act, or this clause in it. But I do not know whether I may not say that I believe such observations and similar arguments were addressed to Parliament in vain, and yet the Act was passed with this clause in it. I have no doubt that by this section it was intended to compel the persons at the head of these great mining establishments to give their personal attention to these matters, and to render them personally responsible if these rules were neglected. The section expressly exempts them from liability if they can show that they have done their best to carry these regulations into effect, by doing all that a man can reasonably be expected to do to discharge themselves from this liability. The Act seems to me to be a wise and salutary one, and the language of the sections referred to is quite clear. Our judgment must be for the appellant.

JINDLEY, J.—I am of the same opinion. The language of sects. 51 and 52 at first sight might suggest that there might be found in the Act some sections pointing to a separate sphere of duties which it would be incumbent on the several persons mentioned to discharge; but there are in fact no such sections; and this clause plainly enacts that in the event of a breach of these regulations by anybody, the three persons mentioned shall be held to be guilty of an offence, unless they show that they have done their best to avoid the event. It appears to me therefore that, notwithstanding the *prima facie* good sense of the observations of the stipendiary magistrate, the language of the Act is too strong to be got over, and that the scheme of the Act is somewhat different from what he has supposed.

Judgment for the appellant.

Solicitor for the appellant, *Solicitor to the Treasury.*

Friday, March 14, 1879.

(Before BRAMWELL, L.J. and LOPES, J.)

DAVIS (app.) v. BROWNE (resp.). (a)

APPEAL FROM INFERIOR COURT.

Locomotive—Highway—To be in charge of three persons—One in charge of horse and cart also—28 & 29 Vict. c. 83, s. 3—41 & 42 Vict. c. 77, s. 29.

A steam locomotive, while in motion on a highway, is to be in charge of three persons, one of whom, by 41 & 42 Vict. c. 77, s. 29, shall precede the locomotive on foot, and "shall in case of need assist horses and carriages drawn by horses passing the same."

Held, that the fact that the man preceding the engine was leading a horse and cart of his own was not sufficient to support a conviction for a breach of the above provision.

SPECIAL CASE stated, under 20 & 21 Vict. c. 43, by the justices for the parts of Kesteven, in Lincolnshire.

At a petty sessions held at Bourne, in and for the said parts, on the 10th Oct. 1878, the said justices heard and determined a complaint by the respondent preferred against the appellant, that the appellant on the 25th Sept. 1878, at the parish of Careby, in the said parts, then being the driver of a certain locomotive engine on a highway there situate, unlawfully had not any person preceding such engine by at least twenty yards on foot, contrary to the statute.

It was proved before the said justices by the evidence of a police constable, as follows:

That on the 25th Sept. 1878 a locomotive engine was seen by him travelling in the day time upon a public highway, in the parish of Careby aforesaid, and that the appellant was the driver of such engine, and that another man was with and assisting him upon the engine.

That at about sixty yards preceding such engine was a third man, on foot, leading a pony, which was drawing an empty light cart, and upon such cart was a red and white pocket handkerchief, by way of a flag, attached to a pole fastened to the said cart.

That the appellant, on being asked by the policeman if the said last-mentioned man was his signalman, replied in the affirmative, and thereupon the policeman said that such man had no right to be in charge of a horse and cart. The appellant then added that they had come some distance to fetch the engine, and had brought the cart to ride in, and that if any accident occurred they would pay for it. The policeman said that there should be a flag and a person on foot not leading a horse and cart.

It was not proved in evidence before the said justices, or suggested, that any case arose in which horses and carriages drawn by horses passing the said engine needed assistance.

At the close of the case for the complainant the defendant's solicitor submitted that no offence had been proved against the appellant, and contended that the appellant had only been shown to be the driver, and not the owner of the locomotive, and that, in the absence of proof of his being the owner, he was not liable to be convicted under the 3rd section of 28 & 29 Vict. c. 83. It was further contended that there was (as the fact was) a person preceding the locomotive on foot by at least twenty yards, for the purpose of warning the riders and drivers of horses, and that if occasion for assistance such as that contemplated by the last-mentioned section had arisen, such person would, and that the justices were bound to assume that he would, have rendered the necessary assistance, and if he had done so no offence under the Act would have been committed. That, had a case of need occurred, and proper assistance not have been given by such man, then and then only, under the circumstances, would an offence have been committed. That the fact of a man leading a horse did not cause him the less to be a person complying with the said 29th section of the Act 41 & 42 Vict. c. 77.

It appeared to the justices that a person necessarily engaged in attending to his own horse and cart was certainly unable to comply with the said 29th section of 41 & 42 Vict. c. 77, since he could not render the assistance mentioned in this section of the Act without himself committing a breach of the law, by leaving his own horse and cart on the highway beyond his control; and the said justices were of opinion that it could not be said that three persons were employed "to drive or conduct the locomotive" whilst one of them was engaged in leading a horse attached to a cart. They therefore convicted the appellant of the offence with which he was charged, and sentenced him to pay a fine of 5s. and 11s. 6d. costs.

The question of law is, whether or not, upon the evidence above stated, the said justices were justified in so convicting and fining the appellant.

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

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STANANOUGHT (app.). v. HAZELDINE (resp.).

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28 & 29 Vict. c. 83, s. 3, is as follows:

Every locomotive propelled by steam or any other than animal power on any turnpike road or public highway shall be worked according to the following rules and regulations, viz.:

First, at least three persons shall be employed to drive or conduct such locomotive, and if more than two waggons or carriages be attached thereto an additional person shall be employed, who shall take charge of such waggons or carriages.

Secondly, one of such persons, while any locomotive is in motion, shall precede such locomotive on foot by not less than sixty yards, and shall carry a red flag constantly displayed, and shall warn the riders and drivers of horses of the approach of such locomotives, and shall signal the driver thereof when it shall be necessary to stop, and shall assist horses, and carriages drawn by horses, passing the same. . . . In the event of a non-compliance with any of the provisions of this section, the owner of the locomotive shall, on summary conviction thereof before two justices, be liable to a penalty not exceeding 10l.; but it shall be lawful for such owner, on proving that he has incurred such penalty by reason of the negligence or wilful default of any person in charge or in attendance on such locomotive, to recover summarily from such person the whole or any part of the penalty he may have incurred as owner.

Sect. 7 is as follows:

The name and residence of the owner of every locomotive shall be affixed thereto in a conspicuous manner. If it is not so affixed the owner shall, on summary conviction, be liable to a penalty not exceeding 2l.

41 & 42 Vict. c. 77, s. 29, is as follows:

The paragraph numbered "secondly" of sect. 3 of the Locomotive Act 1865 (28 & 29 Vict. c. 83) is hereby repealed so far as relates to England, and in lieu thereof the following paragraph is hereby substituted, namely, "Secondly, one of such persons, while the locomotive is in motion, shall precede by at least twenty yards the locomotive on foot, and shall in case of need assist horses, and carriages drawn by horses, passing the same."

Graham for the appellant.—The conviction is wrong on two grounds. First, the only person who can be convicted under the Act is the owner of the locomotive, and the appellant has been convicted as the driver. There was no evidence before the magistrates that he was the owner. Secondly, there is no reason why the man on foot in front of the locomotive should not be quite as well able to give the assistance required by the Act when he has a pony with him as he would be without it. It does not appear that the pony was not properly under his control, even when not held by him, so that in case of need he could have safely left the pony on the road, or have taken it back to the locomotive and fastened it to the engine, or left it in charge of the appellant and the other man there while he went and assisted any other horse or carriage in passing the locomotive. The case of *Morris v. Jeffries* (L. Rep. 1 Q. B. 261) is an instance of horses, while grazing on the side of a turnpike road four or five yards from the person in charge of them, being deemed to be under the control of such person, and therefore not liable to be impounded under 4 Geo. 4, c. 95, s. 75, as being horses found "wandering, straying, or lying about" the road, within the meaning of that enactment. That the man in front was leading a horse and cart does not prevent him, therefore, from being a person preceding the locomotive on foot, as required by the statute.

No one appeared for the respondent.

BRAMWELL, L.J.—I think this conviction cannot be sustained. The statute says that one person

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shall precede the locomotive on foot, and shall in case of need assist horses and carriages passing. The magistrates thought that the man in front here was in such a position that he could not assist passing horses lawfully. I think that cannot be. It seems to me impossible to say that he could not assist passing horses. It is said that he could not, because he could not without leaving his own horse and cart unattended. But I do not think that follows. Indeed, it is obvious that he need not leave his own horse and cart unattended; as Mr. Graham suggests, he might ask a passer-by to mind them, or lead them back to the engine driver, or tie the horse to the fence, or in many other ways keep it under control. The conviction therefore must be quashed on the merits.

LOPES, J.—I am of the same opinion.

Judgment for the appellant, with costs.

Solicitors for the appellant, *Whyte, Collison, and Pritchard*, agents for *J. E. Atter*, Stamford.

Friday, March 14, 1879.

(Before BRAMWELL, L.J. and LOPES, J.)

STANANOUGHT (app.) v. HAZELDINE (resp.). (a)

APPEAL FROM INFERIOR COURT.

Municipal election—Ballot Act—Offence under—Criminal information—Bad for duplicity—Officer at polling station—Secrecy of voting—Leaving about the means of information—Not "communicating to any person any information"—35 & 36 Vict. c. 33, s. 4.

The 4th section of the Ballot Act 1872 provides that "every officer, clerk, and agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorised by law, before the poll is closed, to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station," &c.

Held, that, in order to prove a breach of this provision, it was not sufficient to show that an officer in attendance at a polling station had given to some persons the opportunity of obtaining information as to the names of electors who had applied for ballot papers by leaving the burgess roll on which he had marked off such names among them, unless it was also shown that they, or some of them, had availed themselves of that opportunity.

SPECIAL CASE stated by the police magistrate of the borough of Liverpool, under 20 & 21 Vict. c. 43.

On the 6th Nov. 1878 the appellant laid an information before the said magistrate against the respondent, of which the following is a copy:

Borough of Liverpool to wit.

Be it remembered, that on the 6th day of Nov., in the year of our Lord 1878, at Liverpool, in the borough aforesaid, in the county of Lancaster, Joseph Stananought, at Liverpool aforesaid, cometh before me, the undersigned, one of Her Majesty's justices of the peace in and for the said borough of Liverpool, and informeth me, the said justice, that Francis Hazeldine, on the 1st day of Nov. inst., at the borough of Liverpool aforesaid, being a personating agent duly appointed and in attendance at a certain polling station in connection with the municipal

(a) Reported by A. H. BUTTLESTON, Esq., Barrister-at-Law.

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election for a town councillor for St. Anne-street Ward, in the said borough, did not then and there maintain and aid in maintaining the secrecy of the voting in such station, but did then and there communicate, without it being for some purpose authorised by law, before the poll was closed, to a certain person or persons, certain information as to the names and numbers on the register of voters of certain electors who had and had not applied for ballot papers or voted at that station, contrary to the form of the statute in such case made and provided.

On the 19th Nov. 1878 the said information came on to be heard before the said magistrate, when both parties appeared before him.

The complaint arose under the Ballot Act 1872 (35 & 36 Vict. c. 33), the 4th section of which enacts as follows :

Every officer, clerk, and agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorised by law, before the poll is closed, to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station, or as to the official mark ; and no such officer, clerk, or agent, and no person whosever shall interfere with, or attempt to interfere, with a voter when marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote or has voted, or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote or has voted, or as to the number on the back of the ballot paper given to any voter at such station. Every officer, clerk, and agent in attendance at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting, and shall not attempt to ascertain at such counting the number on the back of any ballot paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given in any particular ballot paper. No person shall directly or indirectly induce any voter to display his ballot paper after he shall have marked the same so as to make known to any person the name of the candidate for or against whom he has so marked his vote. Every person who acts in contravention of the provisions of this section shall be liable, on summary conviction before two justices of the peace, to imprisonment for any term not exceeding six months, with or without hard labour.

On the hearing of the information it was proved that on the 1st Nov. 1878 there was an election for a councillor for the St. Anne-street Ward, in the said borough, the vacancy being caused by Mr. Ronald M'Dougall's term of office having, pursuant to the Municipal Corporation Act 1835, expired by effluxion of time on that day.

The candidates at such election were the said Ronald M'Dougall and Thomas Hayes Sheen.

Pursuant to the 85th section of the 6 & 7 Vict. c. 18, personating agents were appointed by each candidate, and amongst these the respondent was appointed personating agent for Mr. Thomas Hayes Sheen, and notice of his appointment was duly given to the returning officer.

The respondent made the declaration of secrecy required by rule 54 in the first schedule to the Ballot Act 1872, except that sect. 4 of this Act was not read over to him by the justice who took his declaration, which the note to the form of such declaration in the second schedule to the Act states must be done.

The appellant was duly appointed and declared to act as presiding officer at the polling station in which the respondent acted as personating agent.

The appellant deposed that he acted as presiding officer on the occasion, that he saw the respon-

dent with a part of the burgess roll in his hand, and that he (the respondent) put a tick opposite the name of every voter when he obtained a ballot paper. Between two and three o'clock in the afternoon he noticed that the respondent had left the booth without his (the appellant's) permission. He also noticed that the respondent's part of the burgess roll was not upon the table where he had placed it on one or two occasions on which he had left his seat in the polling station. The respondent returned in about a quarter of an hour after the appellant had missed him. On being asked by Mr. Stananough where his part of the burgess roll was, he replied that he was not going to work for nothing, and as his committee had not supplied him with any refreshment he had given up his part of the burgess roll to them. The appellant told him he had done very wrong, and had committed an offence under the Ballot Act. The appellant also told him he could not remain in the booth, and he left. The respondent had been in attendance at the polling station from nine o'clock in the morning until the time he left the station as aforesaid, and had not been supplied with any refreshment during that time. The fact that the respondent left the part of the burgess roll in the committee room of the candidate by whom he was employed was admitted by his solicitor. The matters mentioned in this paragraph took place before the close of the poll.

On the part of the respondent it was contended, first, that the information contained two offences, and was therefore bad under the 10th section of the 11 & 12 Vict. c. 43, which provides that every information shall be for one offence only, and not for two or more offences. This objection the magistrate overruled, on the ground that there was really only one offence charged, namely, that of communicating before the poll was closed to some person information as to the names or numbers on the register of voters of certain electors who had or had not applied for ballot papers. The respondent's solicitor then contended that the appellant had no authority or power to lay the information, contending that his powers were limited to matters arising within the polling station, and that the information should have been laid by the alderman of the ward. The magistrate overruled this objection, as the Ballot Act does not contain any directions as to the persons by whom the information for the offences under it should be laid.

The respondent's solicitor then contended as follows : "The question is whether any offence has been committed under the 4th section. The object of this section is to prevent other persons becoming acquainted with the proceedings in a polling station. Now, what does this man do? According to the evidence all he does is this : he takes a book (it has not been produced to us) out of a polling station, and leaves it at a committee room. That is not communicating to persons information. To communicate information he must impart it to some person capable of understanding it. If he had whispered into the ear of a deaf man something that had taken place, that would not have been a communication. There must be a communication from one man's mind to another man's mind, so that the man may comprehend what has been done. There was no communication made by the defendant to any other person, as required by the Act of Parlia-

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ment, to constitute an offence." The respondent's solicitor denied that the book referred to had been looked into, or any information obtained therefrom by any person, but called no witness upon this or any other point.

The respondent's solicitor also contended that, as the magistrate did not read over the 4th section of the Ballot Act to the respondent at the time that he made the declaration of secrecy, the appointment of the respondent was informal, and he could not be convicted. The magistrate was of opinion that, upon the facts proved before him, the respondent had violated the 4th section of the Ballot Act, but he considered this last objection fatal, and he dismissed the information.

The following questions of law are submitted to the court:

1. Whether the information was bad for containing two offences?

2. Whether the information should have been laid by the alderman of the ward instead of by the appellant?

3. Whether it was necessary to prove that the respondent communicated information as to the persons who had or had not applied for ballot papers to some individual person or persons? And

4. Whether it was necessary, in order that a conviction should take place under the Act, that the declaration of secrecy should be read over to the personating agent by the magistrate?

R. T. Wright for the appellant.—As to the first point, there is only one offence in the information, viz., that of communicating information contrary to the Ballot Act. The 10th section of the 11 & 12 Vict. c. 43 (*Jervis's Act*), does not apply where more than one act is charged, but constituting in substance only one offence:

Reg. v. Scott, 8 L. T. Rep. N. S. 662;

Onley v. Gee, 4 L. T. Rep. N. S. 338.

As to the second point, this is an offence against public policy, and the information may be laid by anyone:

Cole v. Coulton, 2 L. T. Rep. N. S. 216.

As to the third point, the respondent having placed the means of information within the reach of other persons, and having given no evidence to show that they did not avail themselves of it, it was open to the magistrate to find, as he has, that the respondent did communicate information contrary to the Act. If there was any evidence to support that finding, it must stand. As to the fourth point [he was stopped by the Court].

Fullarton, for the respondent, was not called on to argue.

BRANWELL, L.J.—It is unnecessary for us to hear any argument on the fourth question in the case, as we think that our answer to the third question must be in favour of the respondent. As at present advised, I am inclined to think that a double offence is stated in the information, but, as I am not clear on this point, I state it with some reserve. It seems to me that the 4th section of the Ballot Act 1872 refers to the actual voting. If it does, then maintaining the secrecy of the voting is different from not communicating any information as to the names or numbers of those who have applied for ballot papers, or voted, and therefore I am not sure that the information in this case does not allege a double offence. But it is not necessary to determine this, for, granted

that it does not do so, there is the third question, viz., whether the respondent had communicated information to anyone contrary to the provisions of the 4th section, and I do not think he had done so. It is not enough, in my opinion, to give the means of knowing, for I do not think there is any communication until it has reached the mind of the person communicated with. It would, I think, have been sufficient for a conviction to have shown that after the book had been taken into the committee room several of the persons there had looked into it, without specifying who in particular had done so. But, in default of the proof to the contrary, it might well be presumed that the members of the committee acted as right-minded men would have done, namely, shut up the book, and refused to look at it. Therefore, there was no evidence to show that the respondent had communicated the information contained in the book to anyone, and, in my opinion, it was not a case on which the magistrate ought to have convicted. Then ought we to send the case back to the magistrate to re-state it? I think not, for I think it was not intended to ask us whether it was necessary to identify any particular individual to whom the communication had been made, but that what the magistrate meant was to raise the question whether it must be shown that the intelligence had reached the mind of the person communicated with; and therefore, if the case were sent back, there would not be any substantial alteration made in it, and consequently it would be useless to send it back. In order to communicate information within the meaning of the Act there must, I think, be a common knowledge in the mind of the person communicating and of the person to whom it is communicated.

LOPES, J.—I entirely agree.

Appeal dismissed.

Solicitors for the appellant, *F. Venn and Son*, for the Town Clerk, Liverpool.

Solicitors for the respondent, *W. W. Wynne*, for *J. P. Harris*, Liverpool.

CROWN CASES RESERVED.

Saturday, June 21, 1879.

(Before Lord COLERIDGE, C.J., KELLY, C.B., DENMAN and FIELD, JJ., POLLOCK and HUDDLESTON, BB., MANISTY, LINDLEY, HAWKINS, and LOPES, JJ.)

REG. v. OWEN HUGHES. (a)

Perjury—Petty sessions—Jurisdiction of justices—Illegal arrest—Want of information in writing or on oath.

H., a police constable, obtained an illegal warrant against *S.* for assaulting him and obstructing him in the discharge of his duty. *H.* arrested *S.* thereon, and took him before the magistrates in petty sessions, who convicted and sentenced *S.* to six months' imprisonment with hard labour.

No objection was taken by *S.* to the proceedings, and he called a witness to show he was not guilty.

H. was afterwards indicted for perjury committed by him at the hearing of the case at petty sessions, and convicted by the jury, subject to the opinion

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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of this court as to the jurisdiction of the justices in petty sessions, because there was no written information nor oath to support the warrant. Held (Kelly, C.B. dissentiente), that the justices had jurisdiction to hear and determine the case against S., notwithstanding he was brought before them on an illegal warrant, and there was no written information.

CASE reserved for the opinion of this court by Bramwell, L.J.

Owen Hughes was convicted before me at the last Anglesea Assizes (July 1878) of perjury.

He swore falsely and corruptly on the hearing of a charge against John Stanley at petty sessions for an assault on him, Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty.

But it was objected that the defendant Owen Hughes should be acquitted on the ground that the proceedings were informal and without jurisdiction in the magistrates who heard the case.

Hughes went to the office of the clerk to the justices, saw there a clerk of the clerk, and told him he wanted a warrant against John Stanley for assaulting him and obstructing him in the discharge of his duty. The clerk gave him a form of a warrant to that effect, which Hughes took to a magistrate, who signed it.

There was no written information nor oath by Hughes or any other person to found or justify the issuing of the warrant.

Stanley, however, was arrested on the warrant by Hughes, and brought before the magistrates. The case was gone into of assault and obstruction. No objection was taken by Stanley, who defended himself, and called a witness to show he was not guilty.

I overruled the objection, and, as I have said, the defendant Hughes was convicted.

I have now to ask the Court for the Consideration of Crown Cases Reserved whether, because there was no written information nor oath, I ought to have directed an acquittal. If I ought, the conviction should be quashed, otherwise not.

The defendant was discharged on bail, to appear at the next Assizes for Anglesea.

G. BRAMWELL.

Bramwell, L.J. stated further to the court that there was no evidence at the trial before him that the warrant was produced before the magistrates; that no one then thought it necessary to inquire into such a matter; and that the case at the trial was conducted on the footing, that the case before the magistrates was conducted in the same way as it would have been if the warrant had been issued on a written information duly sworn to.

The case was argued twice, first on Nov. 23, 30, and Dec. 6, 1878, before Kelly, C.B., Mellor, Denman, and Field, JJ., and Pollock, B., and the Court, after taking time to consider its judgment, directed the case to be re-argued before a full court, and it was re-argued accordingly before the above-named ten judges on March 8 and 15, 1879.

O. Bowen for the prisoner.—The conviction cannot be sustained. It was essential that there should have been a written information to sustain the warrant for the arrest of Stanley. Without an information there is no charge, and without a charge there is no issue between the prisoner and the Crown. The necessity for the information

appears from Paley on Convictions, 64 (5th edit.). The information or charge was the basis of the whole proceeding, and without that being laid upon oath, there was no legal trial or hearing before the magistrates in petty sessions, any more than there could be a criminal trial before a judge at the assizes without an indictment; all the proceedings were *coram non judice*. The only statute under which the sentence on Stanley could have been imposed is the 34 & 35 Vict. c. 112 (Prevention of Crime Act), s. 12, which enables justices to inflict a term of imprisonment not exceeding six months with hard labour for assaults on constables in the execution of their duty. Assuming the justices to have proceeded under that statute, sect. 17 enacts "that any offence against that Act may be prosecuted before a court of summary jurisdiction, in England in manner directed by the 11 & 12 Vict. c. 43, and any Act amending the same." Sect. 1 of the 11 & 12 Vict. c. 43 enacts that in all cases where an information shall be laid or complaint made the justices may issue a summons requiring the person summoned to appear to answer to the said information or complaint provided also that no objection shall be taken or allowed to any information, complaint, or summons for any defect therein in substance or form, or for any variance between such information, complaint, or summons, and the evidence produced at the hearing of such information or complaint. Then sect. 2 enables justices, if they think fit, upon oath or affirmation substantiating the matter of such information or complaint, to issue their warrant to arrest the party charged or complained against if he does not appear to the summons. Sects. 4, 7, 8, 9 also show that it was intended by the Act that the information should be in writing. Sect. 10 enacts that every information for any offence punishable upon summary conviction, unless some particular Act of Parliament shall otherwise require, may be made or laid without any oath or affirmation being made of the truth thereof, except where the justices shall issue their warrant in the first instance (as here was the case), and in every such case the matter of such information shall be substantiated upon oath before any such warrant shall be issued. The language in sect. 10 is imperative and not directory merely. To give them jurisdiction the justices in petty sessions should have followed the course prescribed in 11 & 12 Vict. c. 43, and, not having done so, the proceedings were *coram non judice*, and perjury could not be committed by a person giving evidence under such circumstances. In *Caudle v. Seymour* (1 Q. B. 889) it was held that a justice's warrant was bad which did not show any information on oath on which the warrant was issued; and, further, that a deposition on oath taken by the justice's clerk, the justice not being present, nor at any time seeing, examining, or hearing the deponent, was irregular, and no justification for the proceedings founded upon it. If it be said that this is procedure, and does not affect the jurisdiction of the magistrate, that may be met by the observation of Coleridge, J. in *Caudle v. Seymour*: "It is true that a magistrate here has jurisdiction over the offence in the abstract, but to give him jurisdiction in any particular case it must be shown that there was a proper charge upon oath in that case. A man has no right because he is a magistrate to order another to be taken for an offence over which he

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has jurisdiction without a charge regularly made." So in the present case it is conceded that the justices had jurisdiction in the abstract over the offence, but it is contended that they had no jurisdiction in the charge against Stanley for want of a written information on oath. The cases of *Reg. v. Pearce* (9 Cox C. C. 258; 22 L. J. 75, M. C.) and *Reg. v. Millard* (6 Cox C. C. 150; 22 L. J. 108, M. C.) were then referred to. In *Reg. v. Carr* (10 Cox C. C. 564) it was held that it should be proved distinctly, on the trial of an indictment for perjury, what the charge was on the hearing of which the false evidence was given. In that case Kelly, C.B. said: "This is an indictment for perjury, on the trial of which offence it is necessary to prove, first, that perjury was committed—that is, that the party charged has deposed on oath to something that is untrue; and, secondly, that that evidence is material to the issue before the tribunal where the inquiry takes place. In this case the perjury arises on the hearing of a charge against Lambe before certain magistrates, and the jurisdiction on their parts to entertain it is the point in question. We must see whether the case distinctly shows that the charge was made to and in the presence and hearing of the accused in order to ascertain whether what was sworn was material to the issue. The charge must be collected from the statement in the case, and looking at that, it appears that Lambe was in some way or other made personally to appear before the magistrates, when certain evidence on some charge or other was given. We find, first, that a summons seems to have been made out, but whether that was ever served, or left the magistrates' office, or was delivered to the police officer, or, if so, whether he ever showed it to the accused, does not appear. It is further stated that Lambe appeared before the magistrates, and evidence was heard which there is reason to believe was in relation to a charge of selling beer without a licence; but whatever may have been the charge, we look in vain for any charge distinctly stated, whether written or oral, on which the defendant gave evidence, and in relation to which such evidence is said to have amounted to perjury. Perjury is assigned in the indictment by alleging that the prisoner swore falsely on the hearing of the charge. To sustain that, the charge should distinctly be proved, and I nowhere find any statement—I do not mean on which we may not speculate as to the charge—but any such statement as distinctly shows the charge against Lambe. Two documents are set out, neither of which appears to have been shown or made known to Lambe. How do we know that the charge was not keeping open his house for the sale of beer at unlawful hours? I do not say that we are to infer that, but how can we say that Lambe may not have been before the magistrates without any summons or information, or any real charge having been made known to him? Under these circumstances, and without reference to the authorities cited, I think the conviction should be quashed." The case of *Reg. v. Scotton* (59 B. 493; 13 L. J. 58, M. C.) also supports the defendant's conclusion, though that was not an indictment for perjury. The case of *Turner v. The Postmaster-General* (5 B. & S. 756; 34 L. J. 10, M. C.), which will be cited on the other side, depended on a particular statute. It has been said that a person by appearing waives an irregularity in the process by which he is sum-

moned before the court, but it is contended that there can be no waiver in a criminal case of any matter which goes to the root of the jurisdiction of the justices. The information in writing was essential to the jurisdiction of the justices, and the want of that could not be waived. What charge was there when Stanley was brought before the magistrates? [DENMAN, J.—May not the magistrates have said to the constable when Stanley was brought before them, "What do you charge this man with?" and may not the constable have replied, "I charge him with assaulting me in the execution of my duty."] That would not do, if a written information, as is contended, is necessary. There was no proof that the defendant was sworn in any judicial proceeding. If Stanley was brought before the bench for an offence under the 24 & 25 Vict. c. 100, he could not be convicted under the 34 & 35 Vict. c. 112:

Martin v. Pridgeon, 1 E. & E. 778; 28 L. J. 179, M. C.

The information is not mere process, but procedure, and goes to the root of jurisdiction. "The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion of the inquiry," per Lord Denman, C.J. in *Reg. v. Bolton* (1 Q. B. 74). In *Reg. v. Brickhall* (33 L. J. 156, M. C.) a person was summoned under the 5 & 6 Will. 4, c. 76, s. 81, for assaulting a constable in the execution of his duty, but convicted under the 24 & 25 Vict. c. 100, s. 42, of a common assault, and Crompton, J. held that the conviction was made without jurisdiction. In the present case the false oath was not taken on the charge of which the prisoner was convicted. Sect. 4 of 11 & 12 Vict. c. 43, was evidently framed on the assumption that the information was to be in writing, and there could not be a waiver of the oath required to substantiate the information where a warrant is issued by magistrates in the first instance under sect. 10. The case of *Blake v. Beech* (L. Rep. 1 Ex. Div. 320) is a decision in the defendant's favour. Most of the decisions where it has been said that the want of a summons or information was waived are civil cases.

Poland for the prosecution.—The conviction was right. The justices who heard the case had jurisdiction, and the false swearing of the defendant at such hearing amounted to perjury. The question is whether the hearing was *coram non judice*. The warrant was improperly issued, and Stanley was illegally arrested and brought before the justices, but he was before them, and his case was to be dealt with by them in some way. No question arises now as to the illegality of the arrest, or of the conviction of Stanley; the only question is whether all that took place at the hearing was *coram non judice*. [KELLY, O.B.—What do you say the charge before the justices was, and in what form was it made?] It is sufficient to say that a charge was made orally, and that upon the hearing of that charge the defendant swore falsely and corruptly. Whatever was the form of the charge against Stanley before the justices, he had an opportunity of defending himself against it. A man may be charged in the first instance with a particular offence, and on the hearing it may appear that the man has committed a second offence. In such cases the justices exercise their discretion, it may be to commit summarily or send the case for trial, or to dismiss the first

charge and convict for the second offence. Surely the magistrates have jurisdiction over the entire matter in such cases. In the present case the constable at the time of the commission of the assault might have arrested Stanley and taken him before the justices, and the charge then would have been oral. The warrant in this case was not the charge—it was merely the authority of the justices to arrest Stanley, and when Stanley was before the magistrates the charge was then made. [MELLOR, J.—Was Stanley in custody for the offence or any other offence legally?] Are the justices to enter upon a preliminary inquiry whether a person before them charged with a breach of the peace is legally brought before them? [KELLY, C.B.—Then what prevents a man not legally in custody from walking away? MELLOR, J.—The Judges of the Superior Courts have power over all kinds of offences, yet the courts never exercise the jurisdiction without inquiring into the legality of the proceedings. What more power has a justice of the peace?] The jurisdiction of a justice of the peace arises on a breach of the peace, and it arises when a person is brought before him charged with a breach of the peace, and that person has the opportunity of defending himself against the charge. There is no law that requires the charge to be made in writing. A man when brought before a justice on a charge is to be dealt with according to law, if the charge is one over which the justice has jurisdiction: The Vagrant Act (5 Geo. 4, c. 33, s. 6) authorises any person to apprehend a vagrant, and forthwith take him before a justice of the peace, to be dealt with according to the provisions of the Act. That is an instance where there is no preliminary formal charge, and the justice must necessarily inquire whether the person apprehended was found offending as a vagrant, and false swearing upon the inquiry would amount to perjury. In *Reg. v. Millard* (Dears. O. C. 166; 6 Cox O. C. 155) Wightman, J. ruled, on an objection on the trial of an indictment for perjury, "that the magistrates had jurisdiction to hear a charge under the Malicious Trespass Act (7 & 8 Geo. 4, c. 30, s. 24), although the information was not on oath, and that the omission to lay the information on oath was an error in procedure only," and Jervis, C.J. said that Wightman, J. was right in saying that the information on oath was a matter of procedure only. Jervis, C.J. also said: "If a party charged appear before a magistrate, his jurisdiction is founded to hear and determine the case, but if he does not appear the proceedings must be under the 30th section of the 7 & 8 Geo. 4, c. 30, and there must be an information on oath in order to justify an *ex parte* proceeding." In *Turner v. The Postmaster-General* (5 B. & S. 756; 34 L. J. 10, M. C.) the passage from p. 54 of Paley on Convictions was relied on, yet it was held that the want of an information and a summons was cured by the appearance of the appellants before the justices, and that they had waived the objection that they were not legally in custody on the charge, and therefore that the justices had jurisdiction to commit. A man may waive anything in the nature of procedure.

Blake v. Besch, L. Rep. 1 Ex. Div. 320; 45 L. J. 111, M. C.;

Reg. v. Berry, Bell C. C. 46; 8 Cox C. C. 151;

Reg. v. Hurrell, 3 Foa. & Fin. 171,

were then cited.

Bowen in reply.—It is conceded that there may

be a waiver of process, but not of procedure. Process is merely to bring a man before a justice, but where the procedure is dictated by statute, as in this case, by sect. 17 of 34 & 35 Vict. c. 112, the mode prescribed is a condition precedent to the jurisdiction which must arise at the commencement of the hearing. See note to *Cripps v. Durden* (1 Sm. Lead. Cas. 735). In *Res v. Fearshire* (1 Leach C. C. 202) Lord Mansfield said that it was the indispensable duty of the magistrate to take all charges in writing of whatsoever nature, kind, or complexity they might be. In this case an information was required in writing, and the absence of it rendered the inquiry at petty sessions one *coram non judice*.

Our. adv. vult.

June 21.—LOPES, J.—The facts of this case and the Acts of Parliament and authorities which bear upon it have been fully gone into by the judgments of the other members of the court which I have read. I agree in substance with the judgments which will be delivered, but do not desire to commit myself to any opinions which have been expressed collateral to the question before us. I think the warrant in this case was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices. I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, or was brought by force, or under an illegal warrant, is immaterial. Being before the justices, however brought there, the justices, if they had jurisdiction in respect of time and place over the offence, were competent to entertain the charge, and being so competent a false oath wilfully taken in respect of something material would be perjury.

HAWKINS, J.—I am of opinion that the conviction was right, and ought to be affirmed. In arriving at this opinion, I have assumed as a fact, from the case as stated, that Stanley was arrested and brought before the justices upon an illegal warrant as ever was issued—a warrant signed by a magistrate not only without any written information or oath to justify it, but without any information at all. It follows that the magistrate who issued the warrant, and the defendant who with knowledge of the illegality executed it, were liable to an action for false imprisonment. If authority were wanting for this, I need but refer to *Candle v. Seymour* (1 Q. B. 889), and *Morgan v. Hughes* (2 T. R. 231), per Ashhurst, J. Wrongful, however, as were the proceedings by which Stanley was brought into the presence of the magistrates, to answer a charge which up to that moment had never been legally preferred against him, yet before those magistrates, and in his presence, a charge was made over which, if duly made, they had jurisdiction. Upon that charge it was that the hearing proceeded, and in support of that charge it was that the defendant was sworn, and in giving his evidence swore corruptly and falsely. The case expressly finds that the alleged perjury was committed "on the hearing of a charge against John Stanley at petty sessions for an assault on him, Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty." Comparing this finding with the language of the 24 & 25 Vict. c. 100, s. 38, which enacts that "whosoever shall assault, resist, or wilfully obstruct any police officer in the due execution

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of his duty shall be guilty of a misdemeanour," I come without hesitation to the conclusion that the charge was that of the indictable offence created by that statute; and I do not think a doubt could have been suggested as to this, had we not been informed, in the course of the argument, that the justices in the result dealt summarily with the case, and convicted Stanley under sect. 12 of 34 & 35 Vict. c. 112 of an assault upon Hughes, being a constable, in the execution of his duty, and sentenced him to six months' imprisonment with hard labour. The case does not find in what form the charge was made, whether in writing or otherwise. In my opinion, writing was unnecessary; but even were it so, I would, in the absence of evidence to the contrary, assume it to have been properly made, as did Crompton, J. in *Turner v. The Postmaster-General* (34 L. J. 12, M. C.). Now, a charge having been made before them of an indictable offence, committed within their jurisdiction by a person then bodily present, it seems to me the justices were bound to take cognizance of it. The 17th section of 11 & 12 Vict. c. 42, expressly recognises the legality of depositions of witnesses taken in cases in which persons charged with indictable offences are "brought" before justices "with or without warrant." Had the justices proceeded upon the defendant's deposition to commit Stanley for trial, instead of convicting him summarily, it is difficult to see what possible objection could have been made to the legality of their proceedings. They did not, however, think fit to adopt that course. They took, it is true, the evidence on oath of the defendant upon the charge for the indictable misdemeanour created by 24 & 25 Vict. c. 100, but, having done so, they proceeded to convict summarily under a different statute (34 & 35 Vict. c. 112) without, as I collect, any new information or charge of the latter offence; in short, they convicted him of an offence with which he had never been legally charged. In this I am of opinion they were wrong; and upon this ground I am strongly inclined to think the conviction may be quashed. *Martin v. Pridgeon* (1 Ell. & Ell. 778; 23 L. J. 179, M. C.) and *Reg. v. Brickhall* (33 L. J. 156, M. C.), more particularly referred to hereafter, are strong authorities in favour of this view. It does not, however, seem to me to be necessary to decide that point, for in the case before us we have only to determine whether the justices, at the moment when they swore the defendant in support of the charge which was made, had jurisdiction to hear that charge. Whether they afterwards pronounced a legal or an illegal judgment is immaterial to the present inquiry. Assuming, however, contrary to the view I have taken, that the charge upon which the defendant was sworn was an offence punishable upon summary conviction under 34 & 35 Vict. c. 112, and that verbal information of that offence was made before the magistrate who without written information or oath illegally issued the warrant under which Stanley was brought before the petty sessions, I should still be of opinion that the justices, in hearing that charge, and taking evidence in support of it, were acting within their jurisdiction. There is a marked distinction between the jurisdiction to take cognizance of an offence and the jurisdiction to issue a particular process to compel the accused to answer it. The former may exist; the latter may

be wanting. To found jurisdiction to take cognizance of an offence, notwithstanding the dictum of Lord Mansfield in *Res v. Fearshire* (1 Leach C. C. 202), it has been constantly held that a written information is not necessary, per Grose, J. in *Res v. Thompson* (2 T. R. 23), per Parke, B. in *Reg. v. Millard* (6 Cox C. C. 150; 22 L. J. 108, M. C.), per Erle, C.J. in *Reg. v. Shaw* (10 Cox C. C. 66; 34 L. J. 173, M. C.), and per Crompton, J. in *Turner v. The Postmaster-General*. See also old forms of conviction, in which the information is set out thus: "A. B. giveth me to understand and be informed," &c. The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place, unless under special statutory enactment. If a mere summons is required, no writing or oath is necessary—a bare verbal information is sufficient. If a warrant is required, then, and for that purpose only, an oath substantiating the information is requisite, not only by the provisions in Jervis's Act, so often referred to, but by the common law, of which it was always a doctrine that a warrant which deprives a man of liberty ought not to issue without oath of the truth of the information: (see *Res v. Heber*, Barnardiston, 101.) To justify a warrant, I am also of opinion that a written information is necessary. In the case of indictable offences it is expressly made so by sect. 8 of 11 & 12 Vict. c. 42. The illegality of the warrant and of the arrest did not, however, affect the jurisdiction of the justices to hear the charge, whether that hearing proceeded upon a valid verbal information, followed by an illegal process, or upon an information for the first time laid in the presence of Stanley, upon which he was then and there instantly charged. The dictum of Holt, C.J. (1 Lord Raymond 509) is an express authority recognising the legality of a conviction upon an information *instantly*. Stanley might, it is true, had he known of the illegality of his arrest, have demanded his release from it, and prayed for an adjournment to a future day, to enable him to prepare his defence. This, I think, it would have been the duty of the magistrates to grant: (see per Crompton, J. in *Turner v. The Postmaster-General* (34 L. J. 13, M. C.), and per Blackburn, J. in *Reg. v. Shaw* (1b. 173, 4). A refusal to do this, however, would not have destroyed their jurisdiction, though it might possibly have afforded good ground for setting aside the conviction on the ground that they had not allowed the accused sufficient opportunity to answer the charge. Another course might have been pursued, viz., to commence to hear, and if necessary adjourn the further hearing to a future day, a power expressly given by 11 & 12 Vict. c. 43, s. 16. It so happens, however, in the case before us that neither the magistrates nor Stanley were aware of the illegality of the warrant; and so the hearing proceeded without objection, and as if all things were in order. To use the language of the case, "the case was gone into of assault and obstruction," Stanley "defended himself and called a

witness to show he was not guilty," and in the result was convicted as I have above mentioned. Possibly that conviction may be open to the objection that the justices had no jurisdiction to convict of the offence created by statute 34 & 35 Vict. c. 112, when the only charge made against him was of the misdemeanour created by 24 & 25 Vict. c. 100, on the authority of *Reg. v. Brickhall*, or upon the ground that under the circumstances Stanley had not such opportunity of answering and time to answer as he was in common justice entitled to: (see *Blake v. Beech*, 1 Ex. Div. 320.) The case of *Reg. v. Gillyard* (12 Q. B. 527) is a strong authority to show that the Queen's Bench have jurisdiction to quash a conviction upon other grounds than want of jurisdiction in the magistrates, e.g., on the ground of fraud, conspiracy, and perjury in obtaining it. If the contention on the part of the defendant be correct, then Stanley, even though he had suffered the whole imprisonment to which he was sentenced would be liable to be tried again, and could not plead *autrefois convict*; and if he had been acquitted would have been in no condition to plead *autrefois acquit*—two very startling consequences. A flood of authorities might be cited in support of the proposition that no process at all is necessary when the accused being bodily before the justices the charge is made in his presence, and he appears and answers to it. In 2 Hawk. P. C. 281 it is said "it seemeth plain from the nature of the thing that there can be no need of process where the defendant is present in court, but only where he is absent." In *Rees v. Stone* (1 East, 649) Lord Kenyon said: "Justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be stated to be present at the time of the proceeding, and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient." *Reg. v. Shaw* (34 L. J. 169, M. C.; L. & C. 579; 10 Cox C. C. 66) is to the same effect, and appears to me to be decisive of the present case. The defendant in that case was convicted of perjury, committed upon the hearing of a charge punishable on summary conviction against one Kilshaw, a beershop keeper, under 18 & 19 Vict. c. 118. The proceedings, not being prescribed by that Act, were regulated, as are proceedings for the offence of which Stanley was convicted, by Jervis's Act (11 & 12 Vict. c. 43). At the trial no proof was given of any written information warranting a summons; indeed, the evidence showed that the summons was filled up by the magistrate's clerk, handed to a superintendent of police, who took it to a magistrate, who read and signed it without making any inquiry, or requiring any statement of fact—very like the circumstances of the present case. It was proved, however, that Kilshaw appeared before the justices, that the charge was then made against him, that he answered it, and that the defendant committed perjury in evidence which he gave on his behalf. It was objected that the justices had no jurisdiction to hear the charge against Kilshaw, because there was no information to justify the issuing of a summons. Erle, C.J. said: "In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without

any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such step." See also per Blackburn, J.: "I think when a man appears before justices, and a charge is then made against him, if he has not been summoned, he has a good ground for asking for an adjournment; if he waives that, and answers the charge, a conviction would be perfectly good against him, and the witnesses, if they swore falsely, would be liable to indictment for perjury." To the same effect are *Reg. v. Millard* (*ubi sup.*); *Reg. v. Borry* (8 Cox C. C. 151; 28 L. J. 86, M. C.); *Reg. v. Simmons* (*Ib.* 183; 8 Cox C. C. 190); *Reg. v. Smith* (1 L. Rep. C. C. R. 110; 11 Cox C. C. 10); *Reg. v. Fletcher* (*Ib.* 320; 12 Cox C. C. 77); *Turner v. Postmaster-General* (5 B. & S. 756; s. c. 34 L. J. 10, M. C.) in which latter case the defendants were in custody upon a charge of felony, which could not be sustained, but before the magistrates were charged with and convicted of a different offence, for which they could not be legally arrested without warrant or information on oath. The court upheld the conviction. I do not look upon *Blake v. Beech* (1 Ex. Div. 320) as deciding that the magistrates in the case then before them had no jurisdiction, but only that the conviction ought to be quashed for irregularity under the peculiar circumstances of that case. *Reg. v. Pearce* (3 B. & S. 531; s. c. 32 L. J. 75, M. C.) only decides that perjury cannot be committed by a witness who is sworn in a non-existing cause, which is undeniable. That case would have been a strong authority for the defendant if no charge had been made against Stanley before the defendant was sworn. *Reg. v. Scotton* (5 Q. B. 493; s. c. 13 L. J. 58, M. C.; and 1 New Seas. Cas. 27) was the strongest authority cited in favour of the defendant. That case, however, turned upon the peculiar language of the 6 & 7 Will. 4, c. 65, s. 9, "provided that before any proceedings shall be had or taken upon such information the charge shall be deposed to on oath," &c. It does not become necessary therefore to consider how far that case has been affected by more recent decisions. In the course of the argument there was some discussion as to whether the warrant was produced before the justices. In my opinion, whether it was or not is immaterial; had it been so, it would have proved nothing, for it could not in any sense be treated as the information. It was the act and process of the magistrate alone, not the information of the informer, and the recital of an information in it would be no evidence that there was such an information in fact: (see *Stevens v. Clark*, 1 Car. & M. 509, Cresswell, J.) I have carefully considered the provisions of Jervis's Act (11 & 12 Vict. cc. 42 and 43), but I find in them nothing at all militating against the view I have expressed. The sections of those statutes to which our attention was called which regulate the formalities to be observed when a charge is made against an absent person whose presence it is desired to procure do not seem to me to have any bearing upon a case like the present where the charge is made in the presence of the accused, who is then and there called upon to answer it, as he lawfully may be, according to the dictum of Holt, C.J., to which I have referred. In such a case it is, in my opinion, altogether immaterial, so far as the jurisdiction of the justices to hear that charge is concerned, whether the accused was before them voluntarily

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or otherwise, or on legal or illegal process. I have already pointed out that Stanley may have good grounds for asking that his conviction may be quashed, irrespective of the invalid objection raised by the defendant. But this conviction, in my opinion, ought to be affirmed.

POLLOCK, B. and LINDLEY, J. concurred in the judgment delivered by Hawkins, J.

MANISTY, J.—I am of opinion that this conviction should be affirmed. The case finds that Hughes swore falsely and corruptly in the hearing of a charge against Stanley at petty sessions for an assault on him (Hughes) and for obstructing him, being a police-constable, in the execution of his duty; and the question is whether the justices had jurisdiction to hear that charge, Stanley having been brought before them by means of a warrant signed by a magistrate, but which warrant had been issued without any information in writing or on oath. By virtue of the provisions in several statutes, which it is unnecessary for me to repeat, justices of the peace assembled in petty sessions have jurisdiction to hear a charge of an assault upon a constable in the execution of his duty, but it is only by the Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112) that they can summarily convict and punish for that offence. The charge made against Stanley might have been lawfully made and heard without any previous summons or warrant. Hughes might have apprehended Stanley in the act of committing the alleged assault; a magistrate seeing the alleged assault committed might have then and there ordered Stanley into custody; or Stanley, knowing or believing that he would be apprehended if he did not appear, might have appeared voluntarily before the justices to answer the charge, in any of which cases I cannot doubt but that the justices not only might, but must have heard the case and disposed of it somehow. It would be very strange, to say the least of it, if the law be that, notwithstanding the justices would have had jurisdiction to hear the charge if there had not been a warrant, they had no such jurisdiction in consequence of there being a warrant unsupported by sworn information. Nothing short of a clear statutory enactment would justify such a conclusion. That there is no such statutory enactment, I think, is clear. But it is said there are decisions which govern the case. The decision most relied upon on behalf of the prisoner Hughes is *Reg. v. Scotton* (5 Q. B. 493), but it will be seen by examining that case that the very ground upon which it was decided is wanting in the present case. The indictment was for perjury on the hearing before justices of an information laid under 1 & 2 Will. 4, c. 32, sects. 40 & 41, and the court held that the justices had no jurisdiction to hear it, because by sect. 9 of 6 & 7 Will. 4, c. 65, it was expressly made a condition precedent to any further step beyond the information that the matter of the information should be deposed to by oath of the informer or some other credible witness, and no such deposition had been made. Whether that case was rightly decided may, I think, admit of considerable doubt, having regard to the qualified language of the proviso at the end of sect. 9; but, assuming the right construction to have been put upon it, there is no such enactment in the present case, or anything like it. I think it unnecessary to review all the cases which were cited in the course of the

argument, partly because I do not think that any of them are conclusive either way, but mainly because I found my judgment upon this, that the provisions contained in the 17th section of the 34 & 35 Vict. c. 112 (which incorporates the 11 & 12 Vict. c. 43), relative to process or proceedings for the purpose of bringing accused persons before justices, are, in my opinion, directory only, and do not in any way affect the jurisdiction of justices to hear charges made against persons who are before them, and who are accused of offences over which the justices have jurisdiction. The proviso at the end of sect. 1 of 11 & 12 Vict. c. 43, strongly supports this view. We are not told by the learned judge who has stated this case how the justices dealt with Stanley; but we are informed by counsel at the Bar that they convicted him summarily, and sentenced him to imprisonment. In my opinion it is immaterial for the present purpose how the justices disposed of the charge, the only question before us being whether the justices had jurisdiction to hear it, and to receive evidence upon oath in support of it. I think they had, and that the question put to us should be answered in the affirmative.

FIELD, J.—I also am of opinion that this conviction should be affirmed. I have nothing to add to the judgments already delivered, but only desire to say, as I differed from my brothers Cleasby and Grove in *Blake v. Beech*, that I have carefully reconsidered my judgment in that case, and am unable to alter the view I then entertained.

HUDDLESTON, B.—The question in this case is, whether a conviction for perjury committed by the prisoner Hughes before justices should be quashed, because there was no information on oath for the warrant upon which Stanley, the party charged, was brought before the justices. The charge against Stanley before the justices was for obstructing Hughes, a police constable, in the discharge of his duty. It is not stated in the case under what statute the charge was made against Stanley; it might, therefore, have been under 34 & 35 Vict. c. 112, s. 12, by which he might be convicted summarily; or it might have been under 24 & 25 Vict. c. 100, s. 38, by which he might have been sent for trial to the assizes or sessions. If the charge be for an offence under the former Act, it may by sect. 17 be prosecuted in manner directed by Jervis's Act, 11 & 12 Vic. c. 43. Sect. 1 of that Act provides that, "where an information shall be laid that any person has committed any offence for which he is liable by law on summary conviction, the justice may issue his summons." This is the process by which the person to be charged is called on to appear. By sect. 2, "if being served the party does not appear a warrant may issue, or a warrant may issue in the first instance if the justice shall think fit," but in both these cases the matter of the information must be substantiated to the satisfaction of the justice by oath or affirmation; and if the summons is not obeyed the justice may proceed *ex parte* on proof of due service. By sect. 10 it is declared (that is declaratory of the common law) and enacted that the complaint in case of an order, and the information in case of a summary conviction, shall be made or laid without any oath or affirmation except where warrants are issued in the first instance to apprehend, and then the matter of the in-

formation must be substantiated by the oath or affirmation of the informant. Sect. 13 deals with the appearance or default of the party charged, and provides that the case may be heard in his absence on due proof of the service of the summons, or a warrant for his apprehension issued and committal; and for the dismissal of complaint or information if the complainant or informant does not appear by himself, counsel, or attorney; for the adjournment of the hearing, and concludes thus, "but if both parties appear, either personally or by their respective counsel or attorneys, before the justice or justices who are to hear and determine such complaint or information, then the said justice or justices shall proceed to hear and determine the same." The object of all these provisions is to bring the party accused before the justices, to enforce his presence, and to enable them to deal with him in his absence; but when he is before them, the justices are required, and shall proceed to hear and determine. The information on oath is not necessary to give the justices jurisdiction to try, though it is necessary to give them jurisdiction to issue a warrant to apprehend. The jurisdiction to try arises on the appearance of the party charged. Sect. 14 shows what is to take place at the hearing, "where such defendant shall be present at such hearing the substance of the information shall be stated to him." The word "stated" is important as pointing out that no summons, information, or other document, is to be read or shewn to him. An information is nothing more than what the word imports; namely, the statement by which the magistrate is informed of the offence for which the summons or warrant is required, and it need not be in writing unless the statute requires it. The magistrate to whom it is made is not necessarily, and very often never is, one of the magistrates by whom the case is subsequently heard. In practice an information is never produced before the justices. If in writing, it remains with the magistrate granting the summons or warrant, as the warrant remains in the custody of the constable. The clerk to the justices, or the police officer present, states the substance of the information, that is, the nature of the charge; sometimes where there is a charge sheet, as in the metropolitan districts, reading from it — otherwise not. The charge sheet is merely the statement drawn up by the inspector at the station of the charge preferred before him. He states, in fact, the substance of the charge or information, and the prisoner is called on to plead. He may admit the truth and plead guilty, or he may not admit the truth and desire to be tried for it, or he may apply to adjourn or object to the jurisdiction. But if he make no objection (and here it is found that Stanley made no objection) the case must proceed. Principle and authority seem to show that objections and defects in the form of procuring the appearance of a party charged will be gone by appearance. The principle is that a party charged should have an opportunity of knowing the charge against him, and be fully heard before being condemned. If he have the opportunity, the method by which he is brought before the justice cannot take away the jurisdiction to hear and determine when he is before them. The arrest of Stanley was no doubt illegal, there had been no information or oath to justify the warrant,

and it might be that if the objection had been taken the magistrates might have entertained it, but they could then and there have issued their summons for Stanley's apprehension at once, on a verbal information which would be good (*Res v. Fuller*, 1 Ld. Raym. 610), and have proceeded to hear and determine, though if the defendant objected they ought to adjourn, so that he might know the charge and be prepared to meet it. *Res v. Stone* (1 East, 649), was a conviction under the game laws, and the objection that there had been no summons was abandoned on argument, and Lord Kenyon at p. 649, and Mr. Justice Le Blanc at p. 654, point out that "justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be present at the time of the proceeding, and heard the charge of all the witnesses, and not have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient." This was a case in which the objection was made to the conviction that it did not appear on the face of it that the defendant was duly summoned, but the principle is the same. In *R. v. Shaw* (L. & C. 579, 10 Cox C. C. 66), where there was no information of any kind, Erle, C. J. points out that where the parties are before a magistrate who has jurisdiction in respect of time and place (as the magistrates had here), no summons or information is necessary to complete his jurisdiction, unless the obligation is imposed by the statute which constitutes the offence, and certainly that is not imposed by the 11 & 12 Vict. c. 43. Blackburn, J., in that case, says no information was required. It is material to know what the charge is (and here the case finds Stanley was charged with obstructing the police constable in the discharge of his duty). Sometimes a summons or other writing may be required, but no antecedent information is necessary. In the absence of one, the party to be tried may, if he please, ask for an adjournment, but if he does not do so the adjudication is good; and Montague Smith, J., says, no information or summons is necessary where the party appears voluntarily, (and I do not think it makes any difference if he be there compulsory.) It is to be observed that this decision was in 1865, long after Jervis's Act came into operation. Indeed Jervis's Act (11 & 12 Vict. c. 43) is referred to by the prisoner's counsel. Mr. Bowen's argument in this case for the necessity of an information is entirely based on Jervis's Act (11 & 12 Vict. c. 43.) This case is, therefore, a distinct authority that the absence of such an information is not fatal to the jurisdiction of the justices. In *Turner v. Postmaster-General* (5 B. & S. 756) it was held that though there was no information on oath (the 2nd section of 24 & 25 Vict. c. 97, the statute on which the defendant was convicted, requiring one) that after appearance and no objection made, no objection to the jurisdiction of the justices to convict could be taken, that any defect in bringing the party before the justices was cured by appearance and the merits of the case being gone into, and that the justices had jurisdiction. *Blake v. Beach* (1 Ex. Div. 320) is to the same effect. I wish to say that I subscribe to every word in my brother Field's judgment in that case. The judgments of Olesby, B. and Grove J. are based on the ground that the objection to the want of an information was distinctly taken before the magistrates. *R. v. Berry* (*ubi sup.*),

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B. v. Fletcher (*ubi sup.*), *Rea v. Fuller* (13 Lord Raym. Rep. 320) support the same principle, though they were sought to be distinguished in argument by suggesting that the inquiry on which the perjury arose was of a *quasi* civil nature. The decision in *B. v. Scotton* (5 Q. B. 493) was on the ground that by the words of the statute 6 & 7 Will. 4, c. 65, s. 9 it was a condition precedent to any further steps that the matter of the information should be deposed to on the oath of the informer, or some other credible witness. I think, therefore, that Stanley being before the justices and no adjournment asked for, and being charged with an offence punishable by summary conviction, though there had been no information on oath for the warrant, that false swearing in a material point would be perjury. The passages quoted in the argument from Paley on Convictions and Smith's Leading Cases have reference to the statement of the information in the old form of conviction, where, of course, it became necessary to show in that part of the conviction all the ingredients to give jurisdiction. The form of conviction in Jervis's Act omits the information, but if the offence with which Stanley was charged was one under 24 & 25 Vict. c. 100, s. 38, for which he might be committed for trial at the assizes or quarter sessions, I entertain no doubt that there need not have been an information on oath or warrant to give the justices jurisdiction to hear and commit or discharge. The practice of justices with regard to indictable offences is regulated by Jervis's Act. Chap. 42, sect. 8 provides that where a warrant is to be issued there must be an information in writing on oath, but not where a summons only is issued. There is no section pointing out what is to be done at the hearing, as in Jervis's Act 11 & 12 Vict. c. 43. But sect. 17, which applies to the examination of witnesses provides, "that where any person shall appear, or be brought before any justice, charged with any indictable offence, whether such person appear voluntarily upon summons or have been apprehended with or without warrant, or be in custody for the same, or any other offence, depositions shall be taken and the oath administered before the witness is examined." The justice here, therefore, has expressly jurisdiction to administer the oath to the witness when the party charged is before him, whether he appear or be brought there, and whether there be or be not a warrant; and, therefore, having jurisdiction to administer an oath, false swearing on a material point would be perjury. But apart from either statute, I do not think it can be doubted that a police constable would be justified in taking into custody without summons or warrant any person who was assaulting and obstructing him in the execution of his duty, and subsequently charging him with that offence. Upon such a charge being made (although it was entirely false) the magistrate before whom it is made must inquire into its truth, and to do so must have jurisdiction to administer an oath. False swearing in that inquiry on a material point would be perjury. In any view, therefore, I am of opinion that the conviction must be affirmed.

DENMAN, J.—I conceive the true meaning and effect of the case submitted to us by the learned Lord Justice to be as follows: John Stanley was improperly arrested by the defendant, Owen Hughes, a constable, who had obtained a form of warrant from the clerk to the clerk of the justices which was filled up by the clerk or by Hughes in

the usual form, as for a charge of assaulting and obstructing Hughes in the execution of his duty. This warrant was improperly signed by the magistrate without requiring any information either in writing or upon oath. The magistrates at petty sessions finding Stanley before them, and having been verbally informed, either by Hughes, or their own clerk, that Hughes charged Stanley with assaulting him and obstructing him in the execution of his duty, and without inquiring how Stanley had been brought there, administered an oath to Hughes, and took evidence in the course of which Hughes committed perjury, if perjury, in law, would be committed in such a case; the only point raised for our consideration being that the absence of a written information or of an information upon oath was fatal to a conviction for perjury. No question was raised at the petty sessions as to the existence of an information or as to the existence or legality of the warrant or arrest. These objections were first suggested upon the trial of Hughes for perjury. Stanley made no objection to the charge being heard, and called a witness in his own behalf. He was in fact, as was admitted upon the argument though not stated in the case, convicted and sentenced to six months' imprisonment with hard labour, a sentence which could only have been passed upon summary conviction under the powers of the 34 & 35 Vict. c. 112, s. 12. The case has been twice most ably and elaborately argued, and for some time I doubted whether the conviction could be sustained, but upon full consideration I am satisfied that it ought to stand. The main argument for the defendant was based upon the ground that the offence of which he was convicted was one under statute 34 & 35 Vict. c. 112, s. 12, and that by virtue of sect. 17 of that Act, coupled with the provisions of the 11 & 12 Vict. c. 43, thereby incorporated, the whole proceeding was void, and without jurisdiction for want of an information upon oath. I am of opinion, however, that we ought not to have regard to the conviction in considering whether perjury was committed, but to look to the moment at which the false evidence was given, and consider whether, at that moment, the magistrates had jurisdiction to hear that evidence judicially. And I think that they had jurisdiction to hear that evidence judicially, if, at the trial at which it was given, it was evidence which in any possible event they might have acted upon judicially in a matter within their jurisdiction whether the result of their acting upon it might have been to convict, or to acquit, or to adjourn, or to send for trial, or to take bail, or to do any other judicial act within their competency. At the moment at which the false evidence in question was given, it appears to me that there was nothing to compel the magistrates to inquire into the mode in which Stanley had been brought before them. If, as I suppose (and here I am putting the case as favourably as it can be put for the defendant) nothing more happened than that the magistrate inquired "What is the charge against that man?" and Hughes said in answer, "I charge him with assaulting me, and obstructing me in the execution of my duty." I apprehend that the magistrates would at once have had jurisdiction to put Hughes upon his oath, and inquire into several matters, upon any one of which the perjury might have been committed wholly without reference to what they might in the result feel

themselves bound to do or not to do. For example, they might have inquired into the name and number of Hughes, and whether he were really a member of the police, and actually on duty at the time of the alleged assault; whether Stanley was really the person who had assaulted him or not, how he was dressed, whether he were alone, or with others, &c., and indeed even if the jurisdiction of the magistrates to convict depended upon whether he had arrested Stanley in the act, or brought him up upon a legal warrant afterwards obtained, this very question might have been a legitimate subject of inquiry. Considering that this was a case in which Hughes complained of an assault upon himself, it need not have occurred to the magistrates in the first instance that any warrant at all would have been necessary, for there is nothing in any of the statutes to repeal the common law which would have enabled Hughes if the charge were a true one, to bring Stanley at once before the magistrates, without any warrant at all. The charge actually made as stated in the case, according to my understanding of it, is much more nearly in accordance with the provisions of 24 & 25 Vict. c. 100 s. 38, than with those of 34 & 35 Vict. c. 112, s. 12. It included a breach of the peace; and I can see no reason why the magistrates, at all events, in the absence of any objection on the ground of the illegality of the arrest, or the want of an information, should not have administered an oath, and inquired into the charge; at all events, until any doubt arose as to their jurisdiction to deal with it finally by conviction. It was contended, that even under 11 & 12 Vict. c. 42, relating to indictable offences, the right of the magistrates to inquire would not be well founded in the absence of an information in writing or upon oath; but I am of opinion that there is nothing in that Act to destroy the jurisdiction of the magistrates to inquire into a charge of an indictable offence, where the person charged is actually in custody before them. The first section of that Act shows that the provisions relating to warrants and informations are not intended to apply in such a case, but are merely provisions for the purpose of bringing people not already in custody before the justices; but it is not necessary to consider further the question whether the conviction was good or bad, and I express no opinion upon it. Their jurisdiction to convict appears to me to be a totally different question from the question whether they had jurisdiction to take evidence in such a case. I cannot hold that the magistrates who tried and convicted Stanley (even if the conviction be one that cannot be supported) had no jurisdiction to administer an oath to Hughes, or that any evidence he gave relevant to a verbal charge of assault and obstruction was *coram non judice*. The case of *Reg. v. Scott* (5 Q. B. 493) which at first seemed to me to be in favour of the defendant's contention, is, I think, clearly distinguishable on the ground that there the court thought that the only possible foundation of the magistrates' jurisdiction was an information, whereas in the present case there was nothing to prevent the magistrates proceeding to inquire into a charge which in at least one other lawful manner might have been brought before them without any information at all, and either adjudicated upon by them or sent for trial. In the view I take of this case it is necessary to discuss more fully the con-

tention of the defendant's learned counsel as to the applicability of Jervis's Acts to the case upon the supposition that because the conviction was one under 34 & 35 Vict. c. 112, no evidence given upon the hearing could be the subject of an indictment for perjury in the absence of an information on oath or in writing. In my view all that was necessary to give the magistrates jurisdiction to hear evidence was that there should be before them a person charged with an offence within their general jurisdiction under such circumstances as to call upon them to take evidence before they could decide whether they should exercise or abstain from exercising some legal power which they possessed. For the reasons above given, I think such was the case here, and that the evidence falsely and corruptly given upon oath, and which must be taken to have been held by the learned Lord Justice to have been relevant and material to the subject matter of inquiry before the justices cannot be said to have been *coram non judice*. The indictment on being referred to, appears to have contained an allegation that the perjury was committed upon the hearing of a "complaint or information," and this is no doubt language which would at first sight lead me to expect that proof would have been given of a charge made otherwise than in the way in which it appears to me that the case states the charge in this case to have been made. But I do not think that the words "complaint or information" are inconsistent with a verbal charge made under the circumstances suggested above. The statute 14 & 15 Vict. c. 100, s. 20, which is applicable to the case provides that "In every indictment for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or equity, and without setting forth the commission or authority of the court or person before whom such offence was committed." All that is necessary since that statute is that the indictment should show that there was a proceeding pending before the court, over which the court had jurisdiction, and I think this does sufficiently appear in the present case, and that it is not necessary to tie down the meaning of the words to any particular form of information or complaint. For these reasons I am of opinion that the conviction ought to be affirmed.

LORD COLERIDGE, C.J.—I am desired to say that the Lord Chief Baron dissents from the judgment of the majority of the court. I had myself prepared a judgment, but after having had the advantage of reading the judgment of my brother Hawkins, I should only be expressing, were I to read it, in less forcible language the conclusions at which he has arrived. Without binding myself to every single expression, I concur in the results, and the train of reasoning in his judgment. And this being the view of the majority of the judges who heard the case, the conviction will be affirmed.

Conviction affirmed.

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MULKERN AND ANOTHER v. LORD.

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HOUSE OF LORDS.

Feb. 18, 20, and April 7, 1879.

(Before the LORD CHANCELLOR (Cairns) Lords HATHERLEY, O'HAGAN, and GORDON.)

MULKERN AND ANOTHER v. LORD. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Building society—Mortgage—Action by member to redeem—Reference to arbitration—Friendly Societies Act.**The Friendly Societies Act* (10 Geo. 4, c. 56) provides, by sect. 27, that disputes between the society and any member shall be referred to arbitration.*The Benefit Building Societies Act* (6 & 7 Will. 4, c. 32) provides, by sect. 4, that the provisions of the 10 Geo. 4, c. 56, shall extend to benefit building societies "so far as the same may be applicable."*The respondent was a member of a building society formed under the 6 & 7 Will. 4, c. 32, and not registered under the 37 & 38 Vict. c. 42 (the Building Societies Act 1874). As such member he had mortgaged property to the society to a large amount. In a suit brought by him for a redemption of the property and an account, the defendants asked that the matter might be referred to arbitration, in accordance with the rules of the society, under the 10 Geo. 4, c. 56, s. 27.**Held (affirming the judgment of the court below), that the provisions of this section were not applicable to a dispute where the relation of mortgagor and mortgagee existed.**This was an appeal from a judgment of the Court of Appeal (James, Baggallay, and Thesiger, L.JJ.) reversing a decision of Jessel, M.R.**The case is reported in 38 L. T. Rep. N. S. 265, and 47 L. J. 228, Ch. The action was brought by the respondent against the trustees of the Birkbeck Permanent Benefit Building Society, of which he was a member, for the redemption of property which he had mortgaged to them to secure a loan of 16,000*l.* and interest. The defendants contended that by the rules of the society the matter should be referred to arbitration, and the Master of the Rolls made an order to that effect. The facts appear more fully in the judgment of the Lord Chancellor, and in the report in the Court below.**The Solicitor-General (Sir. H. Giffard, Q.C.), Waller, Q.C., and W. S. Owen appeared for the appellants, and contended that the effect of the statutes and of the rules of the society was to oust the jurisdiction of the court, and make arbitration compulsory. The whole intention was to prevent costly litigation between these societies and their members:**Ex parte Payne*, 5 D. & L. 679;*Cutbill v. Kingdom*, 1 Ex. 494; 10 L.T. Rep. O. S. 114.*Morrison v. Glover* (14 L. T. Rep. O. S. 183, 204; 4 Exch. 430) resembles the present case, but there the decision was based on the special rules of the society; so also in *Fleming v. Self* (24 L. T. Rep. O. S. 101; 1 Kay, 518; 3 De G. M. & G. 997). Here the very dispute contemplated by the rules has arisen. This society exists for the purpose of making advances to its members on mortgage in proportion to the amount of their*shares. Unless the respondent had been a member of the society he could not have been in the position of a mortgagor at all, therefore the rule applies:**Wright v. The Monarch Investment Building Society*, 5 Ch. Div. 726;*Reg. v. Trafford*, 4 E. & B. 122; 24 L. J. Mag. Cas. 20.*Willesford v. Watson* (L. Rep. 8 Oh. 473), decided by Lord Selborne, L.C., was a reference to arbitration under the Common Law Procedure Act, which is a totally different thing. [Lord CAIRNS, L.C. referred to *Dimsdale v. Robertson*, 2 J. & Lat. 58.] They also cited*Crisp v. Bunbury*, 8 Bing. 394;*Reeves v. White*, 17 Q. B. 995; 21 L. J. Q. B. 169;*Seagrave v. Pope*, 1 De G. M. & G. 783; 19 L. T. Rep. O. S. 173;*Thompson v. The Planet Benefit Building Society*, L. Rep. 15 Eq. 333; 28 L. T. Rep. N. S. 549.*Davey, Q.C. and Bush* appeared for the respondent, and maintained that the case was covered by*Morrison v. Glover* (*ubi sup.*); see also*Doe v. Glover*, 15 Q. B. 102;*Farmer v. Giles*, 5 H. & N. 753.*The cases of friendly societies, which have been cited, stand upon a different footing. Lovejoy v. Mulkern* (37 L. T. Rep. N. S. 77) was an action against the trustees of this society; it went off upon a different point, and this question was never suggested. *Wright v. The Monarch Investment Building Society* (*ubi sup.*), was under the Act of 1874, where the arbitration clause is different. To bring a dispute within this clause it must be one which arises with the party as a member, which this question does not:*Prentices v. London*, L. Rep. 10 C. P. 679; 33 L. T.

Rep. N. S. 251;

Crisp v. Bunbury (*ubi sup.*)*Reeves v. White* (*ubi sup.*)*Wright v. Dealey*, 4 H. & C. 209.*It is settled by a long course of authority that the jurisdiction of the court cannot be ousted in a case like this:**Scott v. Avery*, 5 H. of L. Cas. 848.*Further, the arbitrators in this case were not properly appointed under the rules and Act.**The Solicitor-General* was heard in reply.*At the conclusion of the arguments their Lordships took time to consider their judgment.**April 7.—Their Lordships gave judgment as follows:—**The LORD CHANCELLOR (Cairns).—My Lords, the appellants in this case are the trustees of the Birkbeck Building Society, the respondent is a member of the society who has mortgaged property to it to secure a loan of 16,000*l.* He now seeks to redeem that mortgage, and to have an account against the appellants of the moneys received by them on sales of part of the mortgaged estate, and of sums which, but for their default, they might have received while in possession of the estate, they having been mortgagees in possession. A decree for account and redemption would, under the circumstances, be a matter of course, if the respondent is not in some way precluded from asking for it. The appellants contend that he is so precluded, and that his only remedy is arbitration. There is not, I think, any doubt that by the rules of this society, standing alone, the respondent would not be prevented*

from maintaining a suit for redemption. Rule 91, it is true, states the terms upon which a member is to be entitled to redeem his property before the expiration of the full term for which it was mortgaged, and the 109th and two following rules provide that if any dispute arises between the society and any member, reference shall be made to arbitration. But it is clear that a mere contract of this kind between the parties, unless made obligatory by some Act of Parliament, would not of itself have the effect of ousting the ordinary jurisdiction of the courts. The appellants, however, insist that arbitration has been made obligatory by Act of Parliament, and the Act to which they refer for this purpose is the 10 Geo. 4, c. 56. That is the statute consolidating the law as to friendly societies, societies established for the mutual relief and maintenance of the members in sickness, old age, and infirmity, but not in any way contemplating transactions by way of mortgage between the society and its members, much less mortgage transactions of the magnitude of the one now in question. Various provisions were made by that statute for the economical and expeditious management of the petty transactions of such societies, and among the rest, sect. 27 enacted that provision should be made in the rules of each society, specifying whether a reference of every matter in dispute between the society and a member should be made to a justice of the peace or to arbitrators. If to arbitrators, the award, assumed to be an award for the payment of money, was to be enforced by warrant of two justices, and if the reference was to be made to two justices in the first instance, they were themselves to enforce their order, which was to be final. It is unnecessary to decide the question but I will assume, in favour of the appellants, that, in the case of societies regulated by this statute, the clause to which I have referred would prevent a member suing the society or its trustees, and would oblige him to submit any dispute which he had as a member with the trustees to such an arbitration as is mentioned in the Act. But how does this statute affect the society of the appellants, which is not a friendly society but a building society, established under the 6 & 7 Will. 4 c. 32? The argument of the appellants is this: They say that the 6 & 7 Will. 4, c. 32, s. 4, enacts that all the provisions of the Friendly Societies Act (10 Geo. 4, c. 56), so far as the same, or any part thereof, may be applicable to the purpose of any benefit building society, shall extend to the Benefit Building Society and the rules thereof, in the same manner as if the provisions had been expressly re-enacted. Now I will assume that the mortgage transaction between the respondent and the appellants was one warranted by the constitution of the appellants' society. It is a mortgage of an ordinary kind, conveying the legal estate, and constituting the relation of mortgagor and mortgagee; that is a relationship the consequences of which are well known to the law. That relationship creates on the part of the mortgagee a right, in certain events to enter into possession of the mortgaged property, subject to a liability to account for receipts, and for wilful default; a further right to exercise a power of sale, if a power of sale is given; and a right to obtain that which a court alone can give, a decree of foreclosure in the event of nonpayment of the mortgage debt. It creates in the mortgagor a right to obtain from the mortgagee an account, on

the footing I have mentioned; and a right to obtain what a court alone can give, a decree for the redemption and reconveyance of the property; a decree which, in default of redemption, dismisses the suit, and thus operates as a decree of foreclosure. This being the relative position, and these the rights of the mortgagor and mortgagee, it appears to me to be impossible that these rights, and especially the rights of foreclosure and redemption, could be enforced or adjusted as is provided by the 10 Geo. 4, c. 56, s. 27; and I therefore arrive at the conclusion that the provisions of that Act are not applicable to those purposes of a benefit building society which involve the adjustment of rights created by mortgage. It is unnecessary, in the view which I take of the case, to refer to many of the authorities which were cited during the argument, but I may say that the view taken by Lord Cranworth in *Fleming v. Self* (3 De G. M. & G. 997) appears to me in substance to coincide with that which I have endeavoured to express. I think the decision of the Court of Appeal in this case is right, and that the appeal should be dismissed with costs.

LORD HATHERLEY.—My Lords, I am of the same opinion, and I shall not detain your Lordships by going through the various authorities that were cited. Some authorities were cited which appeared at the first blush opposed to each other, and to be decided by judges of considerable authority both one way and the other, indeed, I think I am not mistaken in saying that with regard to one authority the same learned judge, according to the view presented by the argument of counsel, took different views at different periods. But the reality was this: the application to building societies at all of the powers of arbitration arose in this way; building societies had many objects in common with friendly societies, and many objects in common with savings banks, and consequently this was another instance in which the application of the rule of arbitration superseding the ordinary courts of justice was introduced. When one came to look into the Friendly Societies Act one saw that not only was there a choice given between arbitration on the one hand and magistrates on the other, but there was a set form of conviction in each case laid down, and two things had to be determined, whether A. should pay to the trustees a certain definite sum of money, that being the matter in dispute which was to be settled by the speedy mode of arbitration; and whether A. continued to be a member of the society, or was not a member, showing again the nature of the dispute, namely, whether a member had or had not so misconducted himself as to be deserving of expulsion for having broken the rules of the society. When you come to look into the authorities which were cited they amount to this, that where the case went beyond the internal arrangements of the society, and introduced something which might be within their functions in the ordinary course of their business, but yet still outside the whole scheme and scope of the society itself, then a person who had a much larger interest than any of those contemplated among the ordinary members could not be deprived of recourse to the ordinary tribunals of the land; and more especially he could not be so deprived in regard to mortgages, where, as in this case, possession was taken, where there was a question as to an account against the mortgagees

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for wilful default, and where there was an account also for outlay and expenditure in the mortgaged premises by the mortgagees, and where a number of other questions had arisen, which cannot properly be sifted unless you go to the proper court which has all the means, and the powers of sifting and dealing with them. I think, therefore, when you see what the real nature of the case is, there cannot be a doubt that this tribunal fell short of the requirements of the case, and that the party who sought to have a decree for account and redemption was entitled to it.

LORD O'HAGAN.—My Lords, the substantial question in this case appears to me to have been settled by a series of decisions of very high authority, and, unless your Lordships are prepared to overrule them, I think that the respondent is entitled to succeed. For my part, I see no reason to doubt the correctness of the principles on which they have been founded. On the undisputed facts before us it is plain that the respondent is entitled to maintain his action, unless the appellants can establish that he has been expressly forbidden by law to bring it. The onus is on them. He is a mortgagor, and has received large advances on his mortgage. The appellants are mortgagees. The respondent has failed to make the payments which he ought to have made according to his contract, and the appellants have exercised a power of sale given to them in the usual way, and have sold a portion of the mortgaged premises in discharge of the debt due to their society. A large sum admittedly remains unpaid, and only a part of the premises has been disposed of. In these circumstances the respondent brings his action, and files his claim demanding an account of the money still due by him, an account of the money which the appellants have received, or might have received without wilful default, and an injunction to restrain them from disposing of the premises still remaining unsold. This is a very ordinary claim, and would be considered as a matter of course but for the contention of the appellants that the respondent is a member of their society, and as such is obliged by its rules to submit any disputes between the society and himself to arbitration, pursuant to the 10 Geo. 4, c. 56, s. 27. As I have said, the burden of this contention is on the appellants, and the respondent has a right to sustain his action, unless that right is taken from him by clear and express legislation. The privilege of appeal to a court of justice remains with him, unless its jurisdiction is statutorily superseded. The appellants rely (*inter alia*) on rule 109 of their society, which is in these words: "That in case of any dispute arising between the society and any member thereof, or the legal representatives of any member, reference shall be made to arbitration, pursuant to the 10 Geo. 4, c. 56, s. 27, unless such dispute can be amicably arranged by the board of directors and the member, or the legal representatives of such member, within fourteen days from the time such dispute shall be formally brought before the board." And they contend that this rule, which *per se* would be wholly insufficient to take from the respondent his right of action, is made effective for that purpose by the statute to which it refers. That Act was passed "to consolidate and amend the laws relating to friendly societies." It contained provisions for the cheap and easy settlement of disputes between their members in reference to matters within the

scope of their operations, and if we were dealing with such a dispute, as to such a matter, the rule in question, if properly framed according to the statute, would be of binding force. But the society which the appellants represent is a building society, and the provisions of the Friendly Societies Act are only made to affect it by 6 & 7 Will. 4, c. 32, which was passed "for the regulation of benefit building societies," and by its 4th section enacts that those provisions "so far as the same or any part thereof may be applicable to the purposes of any benefit building society," shall extend and apply to such society, in such and the same manner as if those provisions had therein been expressly re-enacted. The real question is whether the provisions are so applicable and I am clearly of opinion that they are not, and should not be so applied. It seems to me necessary merely to state the nature of the transactions to which the appellants ask your Lordships to compel the application of the legal machinery of the Friendly Societies Act, and the character and operation of that machinery, to demonstrate the utter inapplicability of the latter to the former. The building society which the appellants represent appears to have large monetary dealings. The advance to the respondent was originally 12,000*l.*, and 4000*l.* was afterwards added to it. The powers given to the mortgagees were used on the default of the mortgagor, and the taking of the accounts which he is entitled to demand may involve long and laborious calculations, the difficult application of legal principles, and the authoritative interference of a tribunal competent to adjust the complicated relations of the parties, and to carry into effect their relative rights. The claim of the respondent may raise nice questions, *e.g.*, as to wilful default, of which only lawyers can be qualified to dispose, and it invokes the exercise of powers by injunction or otherwise, which belong exclusively to a court of justice. This being the nature of the transaction, what is the machinery which the appellants seek to apply to it? That which manifestly was intended to deal with small affairs amongst humble people, and with simple controversies easily brought to a short and final issue. It aimed at securing mutual assistance to the working classes in circumstances of difficulty, and to settle their ordinary disputes, and enforce their limited demands, at the least expense and in the promptest way. It contemplated the daily dealing of the members one with another, and was in no way adapted to the arrangement of considerable claims, and the solution of doubtful questions. And accordingly the matters in dispute with which the statute intends to meddle are to be referred, according to circumstances, to an arbitrator, or a justice of the peace, the arbitrator to be chosen by the society, and the justice to act in cases submitted to him by its rules. But the exercise of the jurisdiction of either can only result in the levy of a sum of money to be raised by distress, and how small, even so, must be the amounts meant to be dealt with is shown by the trifling fee allowed to the arbitrator upon a reference, the few shillings of costs given on a proceeding before the justice, and the absolute finality of the award or the judgment which may be pronounced. There can be no appeal from either, and they are not to be removed into a court of law, or restrainable by a court of equity.

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Such provisions can plainly have been designed only to regulate disputes of a trifling and domestic kind; and it seems to me idle to suppose that an account of the sums due upon the respondents' mortgage, or of the sums received by the appellants, or lost by their wilful default, could possibly be taken by an arbitrator clothed with no special powers, or by an ordinary justice of the peace; whilst the redemption which the respondent seeks they must be absolutely without power to secure to him. I should have been of opinion, if we had no guidance from authority, that, for these reasons, the provisions of the Friendly Societies Act cannot be applicable, and ought not to be applied in the circumstances before us. But, as I have said, that view is maintained by many decisions. *Morrison v. Glover* (4 Ex. 430) sustains it, and is undistinguishable from the present case. *Outbill v. Kingdom* (1 Ex. 494), and *Reg. v. Trafford* (4 E. & B. 122), are to the same effect; and in *Fleming v. Self* (3 De G. M. & G. 997), to which the Lord Chancellor has referred, Lord Cranworth states succinctly the principle adopted in these and other cases: "The total absence of adequate machinery for enabling arbitrators to enforce any award they might make on the mortgage, in a case like the present, affords cogent evidence that the dispute is not within their competency." And surely the evidence is as cogent with reference to a justice of the peace, if any one should claim for such a functionary the power of interference. In the view I take of the matter it is unnecessary to discuss the question raised at the bar as to the validity of the appointment of the arbitrators. As to the Common Law Procedure Act, I agree with the Court of Appeal that, there being no statutable agreement to refer, no jurisdiction is created under that statute. I am satisfied, on principle and on authority, that the appellants have failed in their contention, and that the judgment should be affirmed with costs.

Lord GORDON concurred.

Decree appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, J. P. Poncions.

Solicitors for the respondent, Kays and Jones.

Tuesday, April 29, 1879.

(Before the LORD CHANCELLOR (Cairns), Lords SELBORNE and GORDON.)

TURNER v. CRUSH AND ANOTHER. (a)

APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Inclosure Act—Private right of way—Effect of allotment.

The General Inclosure Act (8 & 9 Vict. c. 118) enacts (sect. 68) that "all private or occupation ways over, through, and upon the lands to be inclosed which shall not be set out" by the valuer as provided by the section "shall be for ever stopped up and extinguished."

The appellant purchased lands, "together with all ways, &c.," from H. At the time of the purchase an inclosure of the waste of the manor in which the lands sold were situated, was in contemplation, and H. expressly reserved to himself the allotments to which he would be entitled under the award in respect of the lands so sold.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

He afterwards sold the allotments to the respondents. The occupiers of the lands sold to the appellant had for forty years, and down to the time of the award under the Inclosure Act, enjoyed a private right of way over the part of the waste comprised in the respondents' allotment, but the award did not set out any way over that allotment.

Held (affirming the judgment of the court below), that the effect of the award was to extinguish the right of way previously enjoyed by the occupiers of the appellant's land.

THIS was an appeal from a judgment of the Court of Appeal (Brett, Cotton, and Thesiger, L.JJ.), reported in 39 L. T. Rep. N. S. 192, and 3 Ex. Div. 803.

The action was brought by the respondents against the appellant in the County Court of Essex for damages for a trespass on the plaintiff's land. The defence set up was a right of way over the land in question.

The facts are fully set out in the reports in the court below, and shortly in the head-note above.

The County Court judge decided in favour of the plaintiffs, assessing the damage at 10*l*, and he stated a case for the opinion of the Exchequer Division, under sect. 14 of stat. 13 & 14 Vict. c. 61. Upon argument, Kelly, O.B. was in favour of reversing the judgment of the County Court judge, and Huddleston, B. in favour of affirming it. The judgment accordingly stood affirmed, and the defendant obtained leave to appeal to the Court of Appeal. Upon the case coming on, the question was raised whether the appeal would lie since the passing of the Appellate Jurisdiction Act 1876, sect. 20; but the court decided that it had power to hear the appeal (38 L. T. Rep. N. S. 595), which was heard on the merits, and affirmed.

This appeal was then brought to the House of Lords.

The question at issue between the parties was whether certain paths claimed by the appellant over certain land, formerly part of the waste of a manor, which had been included in an allotment made under the General Inclosure Act (8 & 9 Vict. c. 118) were extinguished by the award made under that Act, not having been set out by the valuer under the provisions of sect. 68.

Philbrick, Q.C. and H. Tindal Atkinson appeared for the appellant.

Grantham, Q.C. and Croome for the respondents.

At the conclusion of the arguments, their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns).—My Lords, it is necessary in this case to observe what exactly it was which happened in the year 1869, when Mr. Hardcastle sold these lands, which were purchased by the appellant. At that time Mr. Hardcastle was the owner of these lands, and of others in the same neighbourhood. He was not the lord of the manor, but in the neighbourhood of these lands were the wastes of the manor, and among others was the waste along the side of the road in the vicinity of his lands. In that state of things he put up the lands subsequently bought by the appellant for sale by auction, but he reserved to himself expressly the allotments which were to be made of the waste lands under the proceedings then going on for the purpose of inclosure. Notice

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was, therefore, taken of these proceedings on the face of the sale, and the purchaser was warned that allotments were expected, and that, therefore, if allotments came to be made in respect of the lands offered for sale, these allotments would not pass to the purchaser, but be retained by the vendor. Now, all that was authorised by the General Inclosure Act (8 & 9 Vict. c. 118). That Act enables persons who expect allotments to be made to them to sell their lands, reserving to themselves the right to the allotments when they come to be made. The purchaser, therefore, was warned that the allotment was in progress, and was put on his guard to be vigilant as to any rights in which he might be interested in respect of that allotment. In that state of things the appellant bought the lands to which I have referred, and subsequently, the allotment having gone on, and having been completed, an award of the pieces of land, the wastes of the manor, intervening between the road and the lands thus sold, was made to persons who claimed under Mr. Hardcastle, and are the present respondents. But before I refer to the allotment I must direct your Lordships' attention to the form of conveyance made to the present appellant. That conveyance passed the property sold to him with the general words, "together with all lands, buildings, yards, gardens, orchards, walls, fences, hedges, ditches, timber, and timber-like trees, woods, underwoods, ways, paths, passages, drains, watercourses, lights, easements, privileges, advantages, and appurtenances, to the said farm lands and hereditaments hereby conveyed, or any of them, belonging or in any wise appertaining, or held, used, or occupied therewith, or known, accepted, or reputed as part, parcel, or member thereof." The County Court judge finds in the special case that, at the time when the conveyance which contained these words was executed, there were track ways, or private roads over a piece of waste to which I have referred, intervening between the road and the lands sold to the appellant, which were used for the purposes of this land; and he finds that these trackways had been so used for upwards of forty years. I think it better therefore to take it that these were valid private rights of way at the time of the conveyance. Beyond all doubt, therefore, as it seems to me, the conveyance carried to the appellant the land which he purchased, and the ways appurtenant to that land, and among other ways those private ways over this waste piece of ground. But then it did that subject to whatever might be the legal consequences of the inclosure then in progress. If that inclosure went off, if it came to nothing, or if the piece of land to which I have referred was not inclosed, then of course the right of the appellant to his private ways would remain unaffected. But if it came to pass that these pieces of waste land were inclosed, as happened under the allotment, then it appears to me that both the appellant and Mr. Hardcastle, or any person claiming under them, must be bound by whatever is the legitimate consequence of the inclosure which was then proceeding under the provisions of the Act of Parliament. Now, what says the Act of Parliament on the subject? It says (sect. 68) that it is to be the duty of those who are making an inclosure to take up the question of private roads over the lands which they are inclosing, and the valuer is to "set out such

private or occupation roads and ways through the land to be inclosed as he shall think requisite for the use of the persons interested in such lands, or any of them." And if there be any question whether these roads extend to other lands, that seems to be removed by another enactment. Then it provides for the expenses of setting out those private ways; and it provides that "after such setting out as aforesaid all private or occupation roads or ways over, through, and upon the lands to be inclosed, which shall not be set out as aforesaid, shall be for ever stopped up and extinguished." These are the words of the Legislature, and are as clear and distinct as any words can be; and unless there was some special contract between Mr. Hardcastle and the appellant at the time that he purchased, which bound Mr. Hardcastle not to take advantage of the provisions in this Act of Parliament, or not to allow the title which this Act would give him to be set up as against the appellant, then it appears to me that the operation of the Act is absolutely unfettered so far as Mr. Hardcastle is concerned, and that the appellant has no right to complain of any consequences of that operation. It was for him, knowing that the inclosure was in progress, to set up any case he could before the valuer and commissioners as to the necessity of private roads across these pieces of waste in question. He took no such proceeding, and therefore must, as it seems to me, be held to have remained content with the other means of access he possessed to the land he bought. I can find nothing whatever in the transaction which took place which binds Mr. Hardcastle, or which can be said to bind the respondents taking under him, not to avail themselves of whatever are the legal consequences from the proceedings in the matter of the inclosure. That is the whole case. I must say that I think the judgment of the Court of Appeal is entirely right, and I therefore move your Lordships that the appeal be dismissed with costs.

LORD SELBORNE.—My Lords, I agree for the reasons given by Huddleston, B. in the Exchequer and by Thesiger, L.J. in the Court of Appeal. The words "all ways" are ordinary general words, and as soon as the deed of 1869 was executed these particular rights of way passed to the appellant as legally appurtenant to the land conveyed, and not otherwise, exactly in the same way as such rights of common over the part of the waste now in question, or over any other parts of the wastes to be inclosed, also passed to him thereby. Now, as to all these other rights over the surface of the wastes, it would be inconsistent with the nature and object of the proceedings under the Inclosure Act to suppose that the reservation between these parties of the allotments to be made under these proceedings to the vendor, could possibly have the effect intended by it if all these rights were to remain in the purchaser's favour, as if there had been no inclosure. If so, I cannot see any ground whatever for making a distinction as to rights of way which were equally liable to be extinguished by the process of allotment. The appellant obtained at the time of the conveyance, and by virtue thereof, everything which then belonged to the land, but he did so subject to the pending inclosure, and to the rights which Mr. Hardcastle might acquire in respect of any allotments, wheresoever situate, which might be made to him. If he desired to save the rights

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of way over this part of the waste which passed to him by the conveyance, as against any title which either Mr. Hardcastle or anyone else might acquire thereto by allotment, it was for him to take the necessary steps thereto for his own protection, as much as if he had been the original owner of the purchased land, and not a purchaser from Mr. Hardcastle. The appellant's argument treats the general words in the deed of conveyance as if they had been a contract or covenant by Mr. Hardcastle to grant new easements over any land which he might acquire by allotment under the Inclosure Act; but for such a construction there is, in my opinion, no ground.

Lord GORDON concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellant, *J. Scarlett.*

Solicitors for the respondents, *Duffield and Bruty.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

May 29 and 30, 1879.

(Before JAMES, BRETT, and COTTON, L.JJ.)

SWANSTON v. THE TWICKENHAM LOCAL BOARD OF HEALTH. (a)

Local Board of Health—Public Health Act 1848 (11 & 12 Vict. c. 63), ss. 45, 46, 144—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 16, 308—Sewer—"Man-hole"—Compensation or purchase.

A "man-hole" or side entrance into a sewer, for the purpose of cleansing it, is part of a "sewer" within the meaning of the 45th section of the Public Health Act 1848, and the 16th section of the Public Health Act 1875, and the local authorities may construct a "man-hole" on any land within their district without first purchasing the land required for the purpose, the landowner being entitled to compensation only.

Decision of Fry, J. reversed.

THIS was an appeal from a decision of Fry, J.

The hearing in the court below is reported in 40 L. T. Rep. N. S. 208, where the facts of the case are sufficiently stated.

The judge below having granted an injunction to restrain the defendants from making man-holes in the plaintiff's land until they had acquired a right in the land by purchase, the defendants appealed from his decision.

J. Pearson, Q.C. and Vaughan Hawkins, for the appellants.—A "man-hole" is part of a sewer within the meaning of sect. 45 of the Act of 1848, and sect. 16 of the Act of 1875, and by sect. 144 of the former Act, and sect. 308 of the latter Act compensation is all that the plaintiff can claim. They cited

Rodericks v. Ashton Local Board, 36 L. T. Rep. N. S. 170, 328; L. Rep. 5 Ch. Div. 328;

North London Railway Company v. Metropolitan Board of Works, Johns, 405;

White v. Hindley Local Board of Health, 32 L. T. Rep. N. S. 460; L. Rep. 10 Q. B. 219.

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

Higgins, Q.C. and E. J. Payne, for the respondent.—We say that a "man-hole" is not part of a sewer. A sewer is a horizontal structure through which the sewage flows, while a man-hole is a vertical structure through which men descend into the sewer. The defendants propose not to carry a sewer through our land, but to sink a shaft, and they have no power to do so without first buying the land. They cited

Sutton v. The Mayor and Aldermen of Norwich, 27 L. J. N. S. 739, Ch.;

Taylor v. The Corporation of Oldham, 35 L. T. Rep. N. S. 696; L. Rep. 4 Ch. Div. 395;

Wood v. Veal, 5 B. & Ald. 454.

Pearson, Q.C., in reply.

BRETT, L.J.—I am sorry to say that I cannot agree with the decision of Fry, J. in this case. It seems to me that what we have to determine is whether within the meaning of either statute this is part of a sewer. Now I think exactly the same question arises under both Acts of Parliament (the Public Health Acts 1848 & 1875). I cannot see, with regard to the question that we have to decide, that there is any difference between the two statutes. The two statutes seem to be identical except that in the second there is a power of compulsory purchase. With regard to the manholes, or whatever they are called, in the two roads, I cannot see myself that there is any difference between the cases of the two roads. If it were necessary to determine it, I should upon the plans and evidence say that the pavement or the part called W.W.W.W. in Station-road is a part of the street. I should say also, taking the plans and evidence into account, that the Avenue-road is a place laid out and intended for a street. No doubt the property in the land below the surface of the Station-road belongs to the owner of the land, who probably is the plaintiff, and certainly the land in Avenue-road belongs to the plaintiff. If it were necessary to determine whether within the meaning of this Act of Parliament these streets are private ground or not, I should have thought that no part of Station-road was private ground in that sense, and Avenue-road, although it is private property, and not yet dedicated to the public, is an intended street. However, it seems to me to be immaterial to consider that, because, supposing they are both private land, the notice is to be given, and if this structure is a part of a sewer, then it is immaterial whether the land is private land or not or whether it is a street or an intended street. The whole question, therefore, is whether this is a part of a sewer within the meaning of the statutes. Now, let us for a moment consider it. The way it strikes me is this: it is either within the 46th sect. of the Act, or it is within the 45th sect., or it is not within the statute at all. Now can it be that it is a *casus omissus*, and that it is not within the statute at all? It is the means of getting into that part of the sewer which requires cleaning. The statute insists that the persons who have to deal with these sewers shall keep them clean, and is it to be supposed that, although the statute insists that the sewers shall be kept clean, the statute has omitted something which is the means of getting to them in order to clean them? It would be a monstrous conclusion, as it seems to me, to suppose that this is not within the statute at all. Then, if it is within the statute, it is either within the 45th section, or it is within the

46th section. The 46th section empowers the local board to construct such reservoirs, sluices, engines, and other works as may be necessary, and provides that it may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary. How can it be said that a man-hole is a work which is necessary, or which causes all or any of the sewers to communicate with and be emptied into the place which is fit and necessary? That has nothing to do with it. It is not that kind of work at all. It is plain to my mind that it is not within the 46th section. Then it follows logically, as it seems to me, that it is within the 45th section. It is a shaft. It is not used for the purpose of passing sewage through it. That is quite clear; but it is built structurally as part of the sewer, for the sewer purposes, and for the purpose of making the sewer more effectively a sewer. It is said that it is only put at the junctions. That is not true. It is wanted more at junctions than at other places; but, if there were no junctions in the drains all through the system, it would be necessary to have these man-holes, in order to get at the drain for the purpose of cleansing the drain, or to see to the drain being cleansed. It was built for that purpose, and therefore it is structurally, as it seems to me, part of the drain, although no part of the sewage is made to go through it. If that is so, it is within the terms of the 45th section, and it is a part of the sewer. Now, what Fry, J. has held is this: that it is not a part of the sewer, that it is a work within the 46th section, and for all works within the 46th section there must be the purchase of land before the works are made. With regard to the second point, as to land which is required for the purpose of reservoirs, sluices, engines, and works such as are described in the 46th section, whether there must be purchase of land, or whether they are to be the subject-matters of compensation, I desire to give no opinion on the present occasion, because it does not seem to me to be necessary to do so. It may be that, for the things described in the 46th section, under the first Act there must have been a purchase or agreement, and it may be that under the second Act there must be compensation. However, it is not necessary to decide that because we hold that the present case is within the 45th section, and, with regard to matters within the 45th section, it is clear to my mind that the only right which the person has who is injured by anything done under the 45th section is a right to compensation. The plaintiff therefore is not entitled to the decree or order that has been made by Fry, J.—that is to say, to an injunction until the land, or his rights in the land through which this thing is made, be purchased and paid for, and therefore I think that the order was wrong, and must be reversed. The plaintiff is entitled only to compensation.

COTTON, L.J.—I am of the same opinion. It is no doubt true that the existence of a man-hole may cause greater inconvenience to a person whose property adjoins, or through whose property the sewer is made, than if the sewer had had at that place no man-hole. Of course the greater or less inconvenience is not an argument which can prevent us putting a reasonable construction upon the words used in the Act of Parliament, especially when we consider this, that there is in the Act of Parliament a provision for giving compensation to

anyone who is injured by putting in exercise and in force the powers of the Act. I do not think it can be contended for a moment that that does not apply to any inconvenience arising from the construction of a sewer, whether involving a man-hole or not, because it is done in exercise of the powers given by the Act, and for any loss or injury sustained in consequence of it, compensation is given by the 144th section. The question we have to consider is in substance whether or not this case comes within the 45th or the 46th section of the Act of 1848. There is a substantial difference between the sections. If it comes within the 46th section, I do not see that which gives power to the local board or authorities to do what is there referred to in any land whatever, but only general power to do certain things, and it may very well be that under the 46th section power is given to them to do certain things as to which they are to apply the funds at their disposal, but not, on the contrary, to enable them to go into another man's land, and do what is pointed out. They cannot under the section go into another man's land, but they must buy it. In the 45th section power is given to them to do the things pointed out in any land under a street or any other land. The substantial question is whether the present case comes within the 45th or the 46th section. It is not necessary, to my mind, to decide what the effect of the 46th section is, and although I do not dissent from Fry, J. as to that, I think the present case is not within the 46th, and that it is within the 45th section. I think these openings are clearly part of the sewer—a sewer properly made, and that it is right and proper as a matter of construction of the sewer, and not for the purpose of constructing some work auxiliary to the use of the sewer, that there should be these openings in the sewer. That being so, and these openings being strictly a part of the sewer, they are within the 45th section, and come within the term "sewer," to which we must give a reasonable construction. Of course that obviates the necessity of their buying the land, but leaves the local board, or whoever the authorities are, liable to the clause of the Act of Parliament, which makes them subject to the responsibility of paying compensation. The two Acts are precisely the same, and therefore it is not necessary to deal with the Act of 1875, and the question of the Avenue-road sewer separately from the other question.

JAMES, L.J.—For certain reasons I have not given a judgment in this case, but I may say that I have heard it all through, and I entirely concur in the judgment.

Solicitors for the appellants, *Wright and Pilley*, agents for *Ruston, Clark, and Ruston*, Brentford.

Solicitor for the respondent, *W. H. Thompson*.

May 5 and 9, 1879.

(Before JAMES, BRETT, and COTTON, L.JJ.)

GLOSSOP v. THE HESTON AND ISLEWORTH LOCAL BOARD. (a)

Nuisance—Pollution of stream—Local board—Omission to perform statutory duty—Action by individual injured—Mandamus—Public Health Act 1875.

In an action brought in July 1876 by a landowner, whose property was situate within the district of

(a) Reported by E. S. ROCHE, Esq., Barrister-at-Law.

the defendants, to restrain them from permitting a brook which flowed through his land to be polluted with sewage, the plaintiff alleged that the pollution of the stream was caused by the omission of the defendants to discharge their statutory duty of constructing sewers to carry the drainage of the whole district. The defendants were not constituted as a local board till Nov. 1875, and they alleged that they had not been guilty of unreasonable delay in trying to place the drainage of the district in a satisfactory state. The action was commenced in July 1876. *Malins, V.C.* having granted an injunction in the terms of the claim, the defendants appealed.

Held (reversing the decision of *Malins, V.C.*), that the defendants had not been guilty of any neglect to perform the parliamentary duty cast on them as the sanitary authority of a particular district, and that, even if there had been any default on their part in that respect, the present action could not be maintained.

The local board were liable, just as any other owner of a sewer, for an unlawful use of it to the injury of any other person, but the statute imposed on them no duty to any particular individual.

If there is any neglect or refusal by a local board to perform their public duties, the proper remedy is by an application for a mandamus to the Queen's Bench Division in the exercise of its prerogative jurisdiction over all public bodies.

There is no precedent in the practice of the Court of Chancery for granting a mandatory injunction to compel a public body to do something for the benefit of an individual.

THIS was an appeal from a decision of *Malins, V.C.*—The plaintiff, Mr. F. Glossop, the owner and occupier of an estate known as Silver Hall, Isleworth, brought his action against the local board for Heston and Isleworth, claiming an injunction to restrain the defendants from permitting sewage or water polluted with sewage or other offensive matter to pass through the drains or channels under their control into the river Crane in such a manner as to render the water in the river at or near the plaintiff's residence unfit for use by the plaintiff, or injurious to the health and comfort of the persons resident on such premises. The river Crane passed through the plaintiff's pleasure grounds and garden for a distance of 200 yards, and within thirty yards of his residence. The plaintiff alleged that formerly the river was a clear running stream, with a clean gravel bottom, and full of clean feeding fish. Water plants of various kinds grew in the stream, and the water was used for bathing by some of the plaintiff's family and other persons, and was fit for ordinary domestic purposes; but now the water, as it passed through the plaintiff's garden, was always turbid with faecal matter more or less disintegrated. Much solid sewage matter might occasionally be seen floating on the surface of it. The bottom was seldom visible, and was found to be covered for the most part with black offensive mud. No water plants grew in it, and none of the clean feeding fish ever visited it. The stream frequently gave off an offensive smell, and was a constant nuisance to the plaintiff and his family, and in hot weather he was unable to permit the windows of his house overlooking the stream to be left open all night in consequence of the smell

from it. The plaintiff further alleged that his family had suffered from attacks of low fever and other forms of disease, which, so far as could be ascertained, arose from the poisonous gases given off by the water of the river Crane. He then charged that the altered condition of the water was caused by the drains and sewers flowing into it, and which were under the defendants' control; that the district was not provided with any system of sewers, that no attempt was made to deodorize or disinfect the water, and that it was their duty under sect. 15 of the Public Health Act of 1875, to remove the cause of nuisance, to make such efficient drains as to render the water free from the pollution complained of, and to make the locality a healthy residence for persons in the neighbourhood of the river as it formerly was.

The action was commenced in July 1876. The defendants were first constituted under the Public Health Act in Nov. 1875, the previous sanitary authority of the district having been the rural sanitary authority of the Brentford Union. Under sect. 15 of that Act the duty of the board was to "cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

By their statement of defence the defendants denied many of the plaintiffs' allegations as to the condition of the river. They admitted that the stream was not now so pure as it was many years ago, when the neighbourhood was thinly populated; but they stated it was not in the condition of pollution represented by the plaintiff, and that there was nothing which should render the residence of the plaintiff unhealthy. They also alleged that the river had been in the same state for the last twenty years and upwards. They had not at present had time to provide a proper system of sewers for their district, but they intended as speedily as possible to do so, and they were now preparing to construct sewage works, and to procure an Act of Parliament which would enable them to carry out the scheme.

When the case first came before the Vice-Chancellor in March 1878, a considerable amount of evidence was produced before the court, but it was of so contradictory a nature that his Lordship proposed to appoint a scientific man to inspect the locality, and to make a report to the court upon the subject. That had been done by consent of the parties, and the report of Lieut.-Col. Hope, the gentleman appointed, was to the effect that Mr. Glossop had a real and substantial grievance, though it was not so great as the plaintiff imagined. It might also be that the plaintiff, looking back to the days of his boyhood, invested the river of those days with a purity which modern science would not have certified to. Nevertheless, there was more putrescent matter discharged into the stream than it could oxidise. He believed that the report which had been furnished by a medical man as to the unhealthy state of the water was not exaggerated, and that a species of fever might be produced from the exhalations from the water.

On the 4th June 1868 the Vice-Chancellor came to the conclusion on the evidence that the plaintiff had good grounds for his complaints, and his Lordship granted an injunction.

The defendants appealed.

Higgins, Q.C. and *Methold*, for the appellants, contended that even assuming the nuisance to be

such as the plaintiff alleged, the defendants were not responsible to him, inasmuch as they had done no act to cause the nuisance, but, at the most, had neglected or omitted to perform the duty imposed on them by section 15 of the Public Health Act of 1875 of making such sewers as might be necessary for effectually draining their district for the purposes of the Act. If they had been guilty of any neglect, that would not justify a private person in bringing a distinct action because he had not the advantages he otherwise would be entitled to have if the Act had been properly put into execution; the remedy in that case being by an application to the Queen's Bench Division for a *mandamus*, in the exercise of its prerogative jurisdiction over all public bodies. They, however, contended that the defendants had not been guilty of neglect of such duty; and that the neglect of any previous board to exercise the powers given them by Acts of 1848 and 1872, could not be imputed to the present board.

Glasse, Q.C. and Decimus Sturges, for the plaintiff, contended that in delaying to carry into execution the powers of the Act, the defendants clearly rendered themselves liable to an action. Although the fact of prospective nuisance was not in itself a ground for the interference of the court, yet if some degree of present nuisance existed, the court would take into account its probable continuance and increase. Here, unless the cause of nuisance, which was under the defendants' control, was removed, the plaintiff's residence would be rendered still more unhealthy. The court might take into consideration the delay of the previous local board and attribute that to the present defendants who were also liable for any negligence on the part of their servants. They cited

Goldsmid v. The Tunbridge Wells Improved Commissioners, 14 L. T. Rep. N. S. 154; L. Rep. Ch. App. 349;

Foreman and wife v. Mayor of Canterbury, 24 L. T. Rep. N. S. 385; L. Rep. 6 Q. B. Div. 214;

Hartnall v. The Ryde Commissioners, 4 B. & S. 361; 33 L. J., Q. B. 39;

Gibson v. The Mayor of Preston, 22 L. T. Rep. N. S. 293; L. Rep. 5 Q. B. 218;

The Attorney v. The Sheffield Gas Consumers' Company, 3 De G. M. & 304;

The Attorney-General v. The Mayor, Alderman, &c. of Kingston-on-Thames, 12 L. T. Rep. N. S. 665.

JAMES, L.J.—I am of opinion that, whatever may have led to this action, it was commenced through a misapprehension of what the plaintiff's legal rights were against the board. It is manifest from the form of the claim and the evidence, that the action was not based upon any act whatever done by the defendants. It was based entirely upon their alleged neglect to perform the parliamentary duty cast upon them as the sanitary authority of a particular district. It is said that this is a serious matter to the plaintiff and to the public generally. It appears to me that, if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any legal authority upon whom duties are cast for the benefit of the locality. If this action could be maintained I do not see why it could not in a similar manner be maintained by every owner of land in that district, who could allege that if there had been a proper system of sewage his property would be much improved. I do not see why, if that is so, every owner of property in

London who has not received the benefit he ought to have received from a complete system of sewage carried out by the Metropolitan Board of Works, may not say "my court or alley is not properly cared for," and who might not bring an action against the Metropolitan Board of Works, or any local board having duties in the district, and why he would not be entitled to bring it on the very day the boards were constituted, and the duties cast upon them. According to my view there is no sufficient principle to sustain that, and no authority which comes near it, except the authority of the case before Hall, V.C., which I will refer to. Let us see how the rights and liabilities stand under the Act of Parliament. By the 13th section, all existing and future sewers within the district are vested in the sanitary authority, and vested in them, to a certain extent, as owners. It is difficult to say whether the exact ownership is the same as it is with regard to the surface of a road as to persons having control of the roads. The sewers *qua* sewers are under their control and vested in them; and by that section alone, as it appears to me, they are under the same liabilities, and have the same defence in respect of any alleged liability, as any private owner of a sewer would have. But the case here is not based upon any common law nuisance or any nuisance or damage existing irrespective of the Act of Parliament, but upon the alleged neglect to comply with the provisions of the Act. Now, as far as I can make out, the greater part of the mischief alleged here is, mischief caused by a brewery, which we know historically to have existed from the time of the seige of Brentford in the time of Oliver Cromwell, and which therefore had apparently acquired a legal right that could not have been interfered with under the 14th and 18th sections of the Act. The rights are to be preserved if they require preservation. By the 14th section any person who "has acquired a right to use such sewer shall be entitled to use the same or any sewer substituted in lieu thereof to the same extent as he would or might have done if the purchase had not been made." Then the 18th section provides that any local authority may from time to time enlarge any sewer," and so on, on condition of providing a sewer as effectual for the use of any person who may be deprived in pursuance of this section of the lawful use of any sewer, "provided that the discontinuance, closing up, or destruction of any sewer shall be so done as not to create a nuisance." Now, therefore, they were in this position: there were certain persons who had a lawful use of the sewer as the law then stood. If any person were using any existing sewer unlawfully as against the plaintiff in respect of his rights of property as they stood before this Act, he had his remedy against them, and was in no way deprived by the Act nor by anything the defendants had done or permitted to be done, of any right he had against any person who had not acquired a prescriptive right to throw the sewage water or foul matter so as to affect his property. That, as it appears to me, was the right, and that was really all that was determined in those cases to which we have been referred. There are a long series of cases of which *Goldsmid v. The Tunbridge Wells Commissioners* (*supra*) may be considered as the principal example. That was a case in which what was done was itself a legal wrong—a legal nuisance not justifiable or excusable, unless it could have been

justified or excused under the Act of Parliament and it was held that the Act did not justify or excuse it, and the defendants not being able to allege justification or excuse were put in exactly the same position as any private person would have been of being restrained—not of having a mandatory injunction to make works or do anything of that kind—but put under an injunction to restrain the continuance of that which was, independently of the Act, a legal wrong and not justified or excused by the Act. That will be found to be exactly what occurred in every one of the cases referred to except the case before Hall, V.C., in which, however, there may have been exactly the same thing because we have not the facts sufficiently clear before us to state positively that that was true in that case; but I see no reason to doubt that there the board had got a sewer vested in them, which according to the view that the Vice-Chancellor took of the facts, would have made them liable, as a private owner of that sewer would have been, unless they could escape from the jurisdiction of the court by reason of their particular character; and what the learned judge decided was that they were not entitled to escape from the jurisdiction of the court, which so fixed itself upon any private person, by reason of any particular character which was alleged as the ground of their immunity. That is the position upon the facts as to the transfer, and the vesting of the sewers. Now what are the duties the board have to perform? Their main duty is described in the 15th section: "Every local board shall keep in repair all sewers belonging to them and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." Then there are certain powers to take the sewer under carriage roads and so on, independently of rights; and then comes the 17th section which I read as being a proviso. It was so expressed in the other Acts of Parliament. It provides that "Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse," and so on. Supposing there had been a prior Act of Parliament authorising the board to make the sewer; or supposing, before this board was constituted, their predecessors or they themselves had acquired by actual grant from the absolute owner of a canal, pond, lake, or stream of water which nobody but that one proprietor had any interest in whatever—supposing they had acquired by grant from such a person a right to make a sewer, it appears to me impossible to say that this section would avoid any such grant, or deprive them of the right they had acquired under such grant. It would be equally impossible to say that the section applies to the defendants in this case unless they find it necessary to excuse or justify themselves in what they are doing under that Act of Parliament. Then they are in this position: They are to cause the whole district to be drained; that is to say, they have no particular duty cast upon them with reference to any particular individual, but it is a duty cast upon them for the effectual draining of the whole district. How is that to be done? It is impossible that that can be done except upon some deliberate scheme. It is a system of sewage which requires to be prepared and to be put into operation. They have practically no compulsory

powers. They are to drain the whole district, and their duty is to the district, and the limitation of the exercise of that duty in sect. 17 is a thing that affects, not only the district, but any running stream which may be affected by what they are doing. How are they to do it? It cannot be expected that the local board are to do it with their own hands except by the employment of labour to be paid for out of the rates of the district. They cannot do it without going on somebody's property, and it is utterly impossible they could make a single drain or sewer without acquiring property for that purpose. Then we must consider how that property is to be acquired. By part 5 of the Act they have power to contract for carrying the Act into execution. Then "any local authority may for the purposes and subject to the provisions of this Act purchase or take on lease, sale, or exchange any lands." Then sect. 176 says, "With respect to the purchase of lands by a local authority for the purposes of this Act the following regulations shall be observed;" and the first subdivision of that section states that the Lands Clauses Consolidation Acts 1845, 1860, and 1869 shall be incorporated with this Act with a certain exception mentioned. Then, before they put in force any of the powers of the Act they must publish once, at least, in each of the consecutive weeks in the month of November in some local newspaper circulated in their district, an advertisement describing shortly the nature of the undertaking in respect of which the lands are proposed to be taken. Now, I believe this board was constituted in November, and therefore they could not have advertised in each of the consecutive weeks in that month. Then they are to serve a notice in the month of December on every owner or reputed owner, defining the particular lands intended to be taken. Then they are to present a petition, under their seal, to the Local Government Board, stating what they are going to do, and then the "Local Government Board shall take such petition into consideration, and may either dismiss the same or direct a local inquiry as to the propriety of assenting to the prayer of such petition, but until such inquiry has been made no provisional order shall be made affecting any lands without the consent of the owners;" and then, "after the completion of such inquiry the Local Government Board may by provisional order empower the local authority to put in force, with reference to the lands referred to in such order, the powers of the Lands Clauses Consolidation Acts with respect to the purchase and taking of lands otherwise than by agreement." It then provides, "That the notices required to be given by the Act in the month of November and December may be given in the month of September and October, or of October and November, but in either of such last-mentioned cases an inquiry preliminary to the provisional order to which such notices refer, shall not be held until the expiration of one month from the last day of the second of the two months in which the notices are given," that is to say, they are put in exactly the same position as a company is which requires to get the compulsory clauses. These local bodies are able to get the substitute for an Act of Parliament; that is to say, an order of the Local Government Board authorising them to acquire lands compulsorily, being satisfied, of course, that the whole thing is right. They cannot do anything of that kind until they have made a scheme which they can

submit to the Local Government Board, and you cannot say that these persons were guilty of neglect up to the month of May, because, being only elected in Nov. 1875, they were absolutely powerless to comply with that section that they should cause such sewers to be made as should be necessary for effectually draining the district for the purposes of the Act. Then it appears to me they were not guilty of neglect; but if they had been guilty of any refusal, such as is necessary for the purpose of applying for a *mandamus*, or guilty of any *mala fides*, for it must be brought up to that to make it equivalent to a refusal to take steps, that is not the ground of an action by any proprietor in the district who is deprived, as he says, and it may be so in fact, of the benefit he expected to derive from the performance of their public duty. If the neglect to perform a public duty for the whole of the district is to enable anybody and everybody to bring a distinct action, or to file a distinct claim, because he has not had the advantages he otherwise would be entitled to have if the Act had been properly put into execution, it appears to me the country would be buying its immunity from nuisances at a very dear rate indeed by the substitution of a far more formidable nuisance in the litigation and expense that would be occasioned by opening a door to litigiousness, or to persons who might be anxious to make profit and costs out of this Act of Parliament. If there has been any neglect or refusal by such a board to perform its public duties it appears to me the proper remedy would be by an application for a *mandamus*. This suit is not, in substance or in form, an application for a *mandamus*. It is said to be an application which shall have the effect of a mandatory injunction; that is to say, the application is in form to restrain the defendants "from permitting sewage, or water polluted with sewage or other offensive matter, to pass through the drains or channels under their control into the river Crane in such a manner as to render the water of the river injurious to the plaintiff." That is an injunction to restrain them from doing that which is wrong; that is to say, if the thing itself were legally wrong, independent of the neglect to make an effectual system of drainage, it would be a right thing to say, "You have got a sewer, and you are permitting the sewage to flow so as to be a legal wrong to me." Now, under colour of that, it is said we are to grant what would be a mandatory injunction which would operate as a *mandamus* to compel them to take all the steps necessary for putting into force the provisions of the Act of Parliament. I am of opinion there is no ground for that. We are dealing with a matter of Chancery jurisdiction, and the Court of Chancery never granted a *mandamus* to a public body to compel it to do things for the benefit of private persons who might be benefited thereby. A *mandamus* to compel a man to erect a building was never granted except in one case, I think, where a railway company had to make a bridge—it was an injunction granted where a railway company, in severing a man's land, did not make a bridge. A *mandamus* might, on proper evidence of refusal, of which I can see none here, be applied for in the Queen's Bench Division for the exercise of its great prerogative jurisdiction to compel all bodies having an authority under an Act of Parliament to perform the duties the Legislature has imposed on them. That

mandamus might be applied for by any individual who could show a sufficient cause, and the court might grant it if it could see that something the public body ought to do was neglected to be done. The statute that has created that duty has given a very special provision for enforcing it, a provision which is very material in considering what the court ought to do, and that is, that there is power to apply to the Local Government Board, and if it thinks the local authority has made default in providing the district with sufficient sewers, or in maintaining the existing sewers, or in providing the district with a supply of water, and so on, they can apply for a *mandamus*, or they may appoint some person (which is a very special additional duty) to do the duty, and to order the costs of doing that duty to be provided for at the expense of the district by its own authority. There is that remedy given which seems to me to make the whole system tolerably complete. The Legislature has provided a particular duty and a mode by which that can be enforced. It would not oust the jurisdiction of any court, either that of the old Court of Chancery, or any division of the existing High Court, in the case of any legal wrong done. I use the words "legal wrong" as distinct from neglect to perform the duties cast upon them by this Act. If this board were to create a nuisance which they were not excused from; if they were, in the apparent exercise of their duties, using or making a sewer which would convey sewage or filthy water into any natural stream or watercourse, or any canal, pond, or lake, that would not prevent the jurisdiction attaching which existed before, or prevent it being exercised, to remedy the wrong being done. That again is the case of an actual legal wrong accompanied with a local damage such as in those cases at common law, where actions for damages have been maintained against such bodies. If the same thing had occurred here—if this local board, while in the course of exercising its duties and rights under this Act, were to make a hole or cut a drain in a public thoroughfare, or put a heap of stones or drain pipes unlighted, as in the case of *Foreman v. The Mayor of Canterbury*—if anything of that kind were done, and damage arose which could be attributed to the unlawful neglect of the persons they employed, they would be liable for it just as any person making a hole and not sufficiently lighting it, or putting a heap of stones or other matter and not sufficiently warning people against it, would be liable. But those cases have no application to this case where all that can be alleged against the defendants, even if the allegation were sustained, which it does not appear to me to be, is that they have not, within a reasonable time, performed the public duty which they owed, not to the plaintiff, but to the district of which the plaintiff is an inhabitant, if the plaintiff had suffered any legal wrong. The only case the plaintiff has alleged or attempted to prove, is that he has not been relieved from a damage to which he was subject before this body were called into existence—that he has not been relieved from that damage in the way he hoped to be, and as he would be if they had done their work in draining this district. Under all these circumstances I am of opinion that the order of the Vice-Chancellor cannot be sustained, and that the action was brought upon an inaccurate view of the relations

between the several landed proprietors in the district and the sanitary board.

BRETT, L.J.—It seems to me that in this case the defendants have not been guilty of any wrongful act or neglect which gives the plaintiff a right to a remedy of any kind; but if they had been guilty of any neglect the proper remedy has not been asked for, neither has the proper court been applied to. I should be very sorry to hold that this river was not in a state which gave reasonable cause of complaint to the plaintiff. There was conflicting evidence on the subject, but looking to the correspondence between the parties, and to the report made to the Vice-Chancellor by Colonel Hope, which it seems to me was only a report and not a binding decision, which report therefore we might have disregarded, but which we ought not to disregard unless convinced it was wrong—looking to the correspondence, the report, and the evidence I should be sorry to disagree with the Vice-Chancellor as to his holding that there was a substantial grievance with reference to the state of this river, and that it was a substantial grievance affecting the plaintiff. I should also be sorry to hold that the drainage of the district was in a satisfactory state. On the contrary, it seems to me to be made out as a matter of fact that the drainage of the district is in an unsatisfactory state, and in a state which requires remedying. I should also be extremely sorry to hold that it is not the duty of the defendants to cure the unsatisfactory condition of the drainage of the district; and it seems to me that that duty is imposed upon them by the 15th section of the Public Health Act. No district can be said to be satisfactorily or effectually drained for the purposes of that Act where any part of the drainage causes a nuisance, so that if the drainage running through any open ditch causes in that ditch a nuisance, or if the drainage running into any stream causes that stream to be offensive, then so long as that state of things exists, it seems to me the district cannot be said to be effectually drained for the purposes of the Act, which purposes are that the district may be in a sanitary condition. I agree with James, L.J., that the 17th section would not impose any obligation upon them on the mere ground that they turned sewage into a running stream, or that they allowed sewage to run into a stream or pond without having freed the sewage from excrementitious or other foul or noxious matter. But I still think, taking the 15th, 17th, 19th, 91st, and 92nd sections together, that although the owner of the stream or pond could not object to the mere fact of their draining sewage into his stream or pond, yet that if the sewage is in a stream in the district so as to make that stream offensive and dangerous, that district is not effectually drained, and that the local authority would be omitting to do their duty if they did not drain it. These defendants therefore are, as it seems to me, in this position—they have a district which is not effectually drained, within the statute; they are bound to cure that defect, and to do so, among other instances, with this result, that they should prevent the river Crane from being offensive to the inhabitants of the district, and among others, to the plaintiff. But the defendants had a duty to perform, and they had certain powers given to them by and through which they were to perform that duty. It is obvious that the remedy they are called upon

to apply is one of the utmost difficulty. They have under their control only one district. They are not to be allowed to drain into a running stream so as to make it offensive; they are not to be allowed to drain into the Thames so as to make it offensive, and they have no right to make any works which shall create a nuisance to any individual, and yet it is said they are to effectually drain their district. How are they to do it? Where are they to take the sewage? I agree with what has been suggested, that it is most difficult for them to do it, although perhaps not impossible, unless they can make arrangements with the authorities of other districts so as to have some combined effort by which to get the sewage away to a considerable and safe distance. They therefore, have a very difficult duty to perform, and one that must naturally require a considerable time for its accomplishment, and anybody who has to deal with them in, finding fault with the ineffectiveness of what they have done, is bound to look at their conduct with the greatest indulgence. Now, it seems to me made out in fact, that they have never refused to endeavour to perform the duty which is imposed on them, but on the contrary they have always, when challenged, admitted their duty and have answered that they were endeavouring to perform it. Then has there been any neglect so great as to enable anybody to say that by long and continuous negligence, they are really refusing to perform their duty, although they do not refuse expressly? Taking into account the difficulty of their position and the magnitude of the operation they must perform, it would not be right to say so; and even up to the time of the hearing it is impossible to say they have been so negligent as to enable any court to hold that they were refusing to perform the public duty imposed upon them. Under these circumstances what is their position with regard to the law? They have done no wrongful act. It is suggested that it might have been proved they have done some wrongful act, but I cannot accede to that argument. It seems to me that the statement of claim, which must have been drawn before any act of the defendants that could mislead the course of the litigation had occurred, assumes that the plaintiff could not state any act done by the defendants which was a wrongful act, but that his claim was founded solely upon a neglect by the defendants to perform their duty under the Act; and it also seems to me that the paragraphs alluded to in the statement of defence make the main defence of the defendants this, that they had never refused to perform their duty, but on the contrary had always been endeavouring to perform their duty. So that they accepted the charge made against them in the statement of claim to be a charge of refusal or neglect to perform their duty; that is to say, in the statement of defence they have set up the very defence for which they have argued throughout this long discussion. The defendants having done no act, it seems to me that the Court of Chancery has never, without some act done by such a body as this, granted what is called a mandatory injunction. The Court of Chancery has never granted a mandatory injunction which could be in effect a *mandamus* against a public body, in order to force them merely to enter upon and to do their duty. There was a long list of cases cited to us, and I watched them care-

fully, and there was not one of them in which the defendants had not done an act which had caused an injury to a private individual and was unjustified by any statute; and which was such an act as if, done by a private individual, would have given a cause of action at law. That being so, and that being done which might have given a claim for damages in a common law court, the Court of Chancery in those days gave a large remedy which it had the power to give, and which the common law courts had not. A common law court could only give damages, but the Court of Chancery could not only give damages if it thought right, but either with damages or instead of damages, they granted a mandatory injunction against the defendants directing them to cease from continuing the act which was a wrongful act against the individual. That is the proper function of a mandatory injunction, and they never gave it in any any other cases. To-day the case of *Foreman v. The Mayor of Canterbury* (*supra*) has been cited, but that comes within the category of all the other cases. There the servant of the defendants first of all placed a heap of stones on the highway, and then left that heap of stones without being lighted. There was an act done, but an act done which he was entitled to do, namely, the laying of the heap of stones on the road, if he did it with reasonable care; but he did it without reasonable care because he left it there in the dark without being lighted. That obviously would give a cause of action. The case in which no act was done, and where it was mere negligence was the case of *Hartwell v. The Ryde Commissioners* (*supra*). That was an exceptional case. Lord Blackburn, one of the judges, put it upon the statute which imposed that duty, and which statute not only imposed on those commissioners the duty to keep the highway in repair, but had an express enactment that if they did not, they should be liable to an indictment. He founds his judgment upon that, and applies the well-known common-law rule, that if people do that which, as against the public, amounts to misdemeanour and lays them open to an indictment, and if besides the injury to the public, they so do it as to do any injury to a private individual, that individual may maintain an action for damages for the breach of the statutory enactment which lays them open to an indictment. Now, with regard to the case before Hall, V.C., my impression is, that the predecessors of the defendants there, had been the people who diverted sewage into artificial sewers, and by those artificial sewers diverted sewage into the drain which belonged to the plaintiff. If so, their predecessors had done an act which would bring the case within the ordinary principle of all the other cases; and, probably, in that case there was some enactment that carried down the obligation of what their predecessors had done to the defendants, and so made the defendants liable also under the ordinary rule, as indeed, I am inclined to think that, under this statute, if the former board had done an act that would have given the plaintiff here a right to damages or to a remedy, and the effect of that act continued in the defendants' time, the defendants would have been liable for the continuance of the consequence of that act, and would have been liable to an injunction. Therefore, it seems to me that the case is not brought within the rule that would enable the Court of Chancery to grant

a mandatory injunction. Then it is said that nevertheless the defendants are open to a *mandamus* to do their duty. Now supposing they had neglected or refused to do their duty, then I think they would have been liable to a *mandamus*, but not to a *mandamus* to be granted by the Court of Chancery. It would have been a prerogative *mandamus*, as it is called, to a public body to enter upon and do their duty. That, under the Judicature Act, as it was before, is a matter that can be taken only in the Court of Queen's Bench. I think the *mandamus* spoken of in the 8th sub-section of the 25th section of the Judicature Act is not the prerogative *mandamus*, but only a *mandamus* which may be granted to direct the performance of some act—of something to be done which is the result of an action where an action will lie. Therefore, supposing the defendants here had refused to enter upon or to perform their duty, they would have been liable to a *mandamus*, but only to a *mandamus* granted by the Court of Queen's Bench, and not here. It seems to me their conduct has not laid them open to such a *mandamus*. They have never refused to perform their duty. They have done all acts towards performing their duty. They have not been guilty of any such negligence as amounts to a refusal to enter upon the jurisdiction that is given to them, and even, therefore, if a *mandamus* could have been asked for from this court, there are not materials on which the court ought to grant it. In every view, therefore, the defendants are right. I doubt whether the point which has been so long argued before us was really argued before the Vice-Chancellor. I doubt whether we are overruling any formed opinion of his. If we are I am sorry, with great deference, to differ, but I must say that here I think the plaintiff has made out no case for any legal remedy whatever.

COTTON, L.J.—The plaintiff in the present action bases his case upon this, that a stream running through his grounds is in such a state as to be a nuisance, and in consequence of that he asks for relief against the defendants, not by way of damages, but for a decree which will relieve him from the nuisance he complains of. I agree with Brett, L.J. that as regards the question of fact, if the right of the plaintiff would follow the decision on that, he has made out his case; that is to say, he has shown, in my opinion, that the water in this stream is in such a state that if that were the result of an act of an individual or of a body not having parliamentary authority to put the stream in such a state, or to do acts which necessarily brought the stream into that state, he would have a ground of action against them; but although that is established, it is a very different thing and a very different consideration whether, as against these defendants, he is entitled either to the decree granted by the Vice-Chancellor or to any decree in this action. Now, the decree made by the Vice-Chancellor went further than what has been considered in the argument, for the decree was against the defendants restraining them from causing or permitting any sewage to go into the river Crane, and also from causing or permitting any new outfall or sewer for the conveyance of sewage into the river Crane to be made. Now, in this case there is no evidence at all, as I understand it, that they have expressed any intention to make any new sewer which would have the effect of bringing fresh sewage into the Crane, nor is there

anything to show that they had before the commencement of the action, or at any time, by their own act in any way brought any fresh sewage down the existing sewers which go into the river Crane; and I think that part of the decree to which I have referred, which restrains them from causing or permitting any new outfall to be made, must have got into the decree *per incuriam*, without the attention of the Vice-Chancellor being directed to it. I advert to that for this reason, that it must not be supposed, although I concur in thinking that the plaintiff is not entitled to any decree, that I am of opinion—and I am sure that the rest of the court are not—that the defendants have a right under this Act of Parliament to make any new sewer and thereby to conduct any sewage matter into the river Crane. In my opinion, if they were intending to do so or had done so, there would have been a clear case on the part of the plaintiff for an injunction against the defendants, because that would be within the clear prohibition of the Act of Parliament. The decree against them in substance, no doubt, was intended to be a decree to restrain them from permitting any sewage to go into the river Crane. It is not said they have done any act the consequence of which has been to bring the sewage down to the Crane. If that were so, unless they could show that that act, causing a nuisance to the plaintiff, as in my opinion it has done, was protected by the Act of Parliament, then of course it would be the duty of this court, as it has done in many cases already, to restrain the defendants from creating a nuisance; and although they are a public body having public duties and powers to perform those duties, that would not exempt them from legal liability in consequence of a nuisance caused by them. On the evidence there is no ground for saying they have done that. I shall have to refer to the cases on this point on another part of the case, but it is sufficient to say here that those cases, for the present purpose, may be disregarded. There has been no act done by the defendants. It is not their act that has caused any nuisance to the plaintiff. Then it is said that, although the decree asked for is in the form of a mandatory injunction to restrain them from permitting the sewage to fall into the Crane, that is done to enforce obedience to obligations imposed by the Act under which they are constituted. It is necessary to consider what are the duties imposed by the Act which the plaintiff seeks to enforce, because the consideration would be very different if the Act, either directly or indirectly, contained that which amounted to a prohibition against them from doing a particular thing, of which the plaintiff complains as causing him a nuisance. In fact, that was felt by counsel for the plaintiff, who contended that there was in the Act of Parliament that which amounted to a prohibition, either in the form of a direction, or in the form of a prohibition against their allowing any sewage to go down into the river Crane. Let us see whether there is any such prohibition. For the purpose of convenience I will take first of all the 19th section, which is the last of those referred to on this point. It says, "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept, so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." That was relied upon. I may dismiss it in a word. The complaint here is,

not that injury is caused to the plaintiff by sewers constructed by the defendants being improperly constructed, or by their leaving sewers not constructed by them in a state to be offensive to him and his health, but that the sewers are constructed in such a way as independently of their being in a good or bad state, to bring down sewage into his stream. The complaint, therefore, is of the way in which the sewer brings down sewage water, and not of the state of the sewers. That section has nothing to do with it. Then sect. 17 was more relied upon. James, L.J. has already referred to it. The section begins thus: "Nothing in this Act shall authorise any local authority to make or use any sewer," and so on. That is not a prohibition, but it is a direction that nothing in the Act is to be supposed to give them the power of doing that which is afterwards mentioned in the section—it is not to authorise any local authority to make any sewer, drain or outfall, for the purpose of bringing sewage or filthy water into a running stream. It is said that they were using it by permitting it to be used. I cannot agree to that. "Making or using a sewer" means that you must not make a sewer which brings down the sewage into the river; you must not use existing sewers for bringing sewage which you by other means bring into the old sewer. The answer to the whole thing is that it is not prohibitive or directory of what they are to do unless they exercise, or before they exercise, the powers given by the Act, but only that in exercising the powers given by the Act they are not to continue that particular form of nuisance. We then come to sect. 15, and upon that the question must turn. "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." I think I may respectfully differ a little from what has been said by Brett, L.J. I hardly think this can be considered as a direction that they shall make sewers for the purpose of diverting from running streams any sewage that then went into them. It is a direction that they shall effectually drain the district; that is, that they shall provide drainage for every house in the district. They are to provide sufficient and proper drains for the purpose of carrying off all the sewage and other matter that is to go through the district, and no doubt, doing that in a proper way will have the consequence of making a series of drains, and a system of drainage which will have the result of not allowing any sewage to go down into the running water, and the natural streams in the district. That is the result of effectually draining a district by a proper system of drainage, and not the consequence of anything in the Act that can be looked upon as a direction that they shall divert sewage going into streams by drains. The result will be that, no doubt, but there is nothing in the Act that can be looked upon as a direction to that effect. I ought to advert to sects. 91 and 92 which refer to the abatement of nuisances. In my opinion those sections have no bearing on the present question. They refer really to this, that the local authority are to inspect their district, and to see what individuals in it are doing acts which are nuisances, as there defined, and then to take proper proceedings, and a summary remedy is pointed out for those individuals to abate the nuisance; and power

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is given to them to remove it themselves if the individuals do not do it. What then is the result? By this decree the plaintiff says, I am directing and causing the defendants to do their duty under the Act of Parliament—not to do their duty by restraining them from infringing a direct intimation in the statute by not doing a thing that they ought to do; but that having a duty and obligation under this Act of Parliament effectually to drain the district, I, indirectly, by this injunction, by restraining them from allowing the sewage to go into my stream, am compelling them to do that, because that is the only way by which they can do it. Putting aside for the present the difficulty of doing such a thing by means of an injunction of this nature, I will deal with it as if it were a question of a mandatory order; that is to say, a *mandamus* in the sense of a decree directing the defendants on proper grounds at the instance of the plaintiffs to perform the duties and obligations thrown upon them by the Act of Parliament in which he has a special interest. Then comes this question: Ought we to do that unless we can see either something definite which the court can direct the defendants to do, or some practical way by which they can carry out that scheme of drainage by which the plaintiff will, he says, benefit? In my opinion we ought not to do so. We are asked to make a decree, something in the nature of a decree for specific performance, and the plaintiff says, "If the defendants will do their duty the result will be a consequential benefit to me practically, and therefore I have a right to call upon you as if it was a private claim I had against you, to perform that duty and to give that benefit to me." Granted; but it would be contrary to the practice of the court to make a decree of that nature against the defendants, unless one was satisfied that there was some particular mode by which they could carry into effect this scheme of drainage, and then direct them to do that, and in that way exercise the powers of this Act of Parliament. But it was said, that is not the way in which the Court of Chancery has dealt with cases of this sort, where a public body has been brought before it by an individual, or by the Attorney-General, complaining either of a private or public nuisance; and it was argued that in such cases the Court of Chancery has said it had nothing to do with the question how these bodies can perform the duty of draining the district which the Act has thrown upon them. All they had to do was to relieve the plaintiff from the nuisance. But cases not at all analogous have been quoted in support of the plaintiff's contention. In those latter cases the complaint was, not that the defendants were not carrying into execution the powers of the Act, but that the plaintiffs were complaining of a nuisance which the defendants said they had caused in the discharge and execution of their duties under the Act. The answer was, "No; the Act gave you, for the purposes of a particular district, certain powers of drainage; but it also said that, in doing this, you should not create any nuisance, or you should not do what you are doing, namely, draining the sewage into a stream." If once the proceeding has been established to be a nuisance, and not within the protection of the statute, it is no answer to the plaintiff to say, "We are doing this in discharge of a duty," when the

Act that gave them the power and obligation of discharging that duty for the benefit of other persons had expressly reserved the right of the plaintiff to complain of any act being done to his prejudice or wrong. Therefore the court said, "We have nothing to do with how you are to perform the duties imposed by the Act, if this act, wrongful against the plaintiff, is stopped. We must stop that. You have your powers on condition of not doing a wrongful act; the act is wrongful, and therefore is not protected by the statute, and you must be, as regards the district you are to drain, just as if you had no parliamentary powers." Therefore those cases are entirely out of the question. Here it is not that the defendants have done a wrongful act, and that they are seeking to protect that wrongful act by saying that unless they do that, they cannot do something else; but the plaintiff asks that they may be called upon to exercise the powers of this Act, because that will consequentially relieve him from the nuisance and injury—an injury, not done by the act of the defendants, but which existed before the defendants came into existence. Those cases are not at all authorities for the suggestion that we should make a mandatory decree without seeing that there is a practical mode of carrying into effect the powers given by this Act of Parliament effectually to drain the district. One may say, besides that, that the Court of Chancery ought not, and no branch of the High Court ought, to direct the defendants by its decree to exercise powers and to do their duty, without being satisfied that there has been something in the nature of a refusal on the part of the defendants to do their duty, and comply with the obligation of the Act. Here it is clear there has been no refusal. The delay of the defendants was only from November, when they were constituted, till the month of July, when the action was brought. Then it is said, if there has been no omission on the part of the defendants amounting to a refusal, one may take into consideration the delay of the previous local board, and attribute that to the present defendants. For that purpose sect. 12 of the Act was relied upon. Without looking at the special words of the section, it is obvious it could not be intended to apply to such a case, on any fair construction. The previous local board had to exercise the powers given to them by the then existing Act under which they were then constituted, and over a different area. The present board have to exercise powers under this Act of 1875 over their area; and how can neglect to perform duties imposed by the Act of 1848, or of 1872, be neglect to perform the duties created by the Act of 1875 in a body existing only under that Act, and having duties to perform specified and defined by that Act? Really it comes to this, that as regards the property vested in the late board, the defendants take it subject to all the obligations and liabilities imposed upon it while under the control of the former board; and if the former board had, by any act done by them, given a right of action or incurred any liability—if by any contract they had incurred any debt, or if they had come under any obligation capable of being enforced by action, then that would have been enforced in the same way as if they were still the same persons who entered into the contract, or had done the act or incurred the obligation. It cannot be said, in my opinion, that the delay, if there were delay, on the

part of the old board, can be imputed to the present board so as to make it a refusal to exercise the powers given by the Act of Parliament. Then there are two other points. This is not a decree to direct them to perform certain duties imposed by the Act, but it is a decree in the form of a mandatory injunction. Now, in my opinion, if the court can order the defendants to carry into execution the powers given by the Act, it ought to do so directly, and not to do so by restraining them from permitting a thing to be done which it is not clear will necessarily be removed by their exercising the powers given by the Act. It ought to be to direct them what they are to do and how to exercise the powers of the Act. It certainly ought to be to direct them to exercise the powers of the Act, and not to put them under an injunction for breach of which there might be a sequestration, by enjoining them from permitting a thing to continue which they may not have power to remove under the Act. There is one other matter which I may refer to, although James, L.J. referred to it, because I think Mr. Glasse did not quite see the point I put. I mean with regard to sect. 299. That section provides a mode by which steps shall be taken to compel a public body to discharge its duties under the Act. If they had done any act, it is impossible to say that that section could have taken away any jurisdiction of the court either to grant damages or an injunction to restrain them from continuing that act, if the act was one which the plaintiff could complain of as a legal wrong done to him. Nor do I suggest that the existence of that section takes away the power of the court to interfere by decree to compel them to do their duty. When it is at least doubtful how this scheme can be carried into effect, and the Local Government Board have great control over the manner in which the scheme is carried into effect and may say whether it is done reasonably or not, it would be the duty of the court not to grant a decree in such a case compelling them to do their duty, but it might interfere when there is a way pointed out, guiding the court to say whether, under the circumstances, it ought, if the jurisdiction exists, to make a decree for the defendants to carry out such works and system of drainage as under the Act they might have power to carry into execution. On all these grounds I am of opinion the plaintiff fails, and the action must be dismissed.

JAMES, L.J.—I think there is no sufficient ground to alter the general rule that costs must abide the result. The defendants will have the costs of the suit in the court below and here.

Solicitors: *Young, Jones, Roberts, and Hale; Pyke, Irving, and Pyke*, agents for *Briggs, Isleworth*.

SITTINGS AT WESTMINSTER.

Thursday, June 12, 1879.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

NIGOTTI v. COLVILLE. (a)

Sentence of imprisonment—Computation of time—One calendar month—Expiration of sentence.

A sentence of one calendar month's imprisonment expires on the day preceding that day which corresponds numerically in the next succeeding month with the day on which the sentence was

passed. If there is no such corresponding day in the next month, then the sentence expires on the last day of that month.

Where a prisoner was sentenced to one calendar month's imprisonment on the 31st Oct.,

Held (affirming the decision of Denman, J.), that the month expired on the 30th Nov.

APPEAL from a decision of Denman, J. giving judgment for the defendant.

The action was to recover damages against the governor of Coldbath Fields Prison for alleged false imprisonment of the plaintiff. At the trial, before Denman, J. and a common jury, the following facts were proved in evidence or admitted.

The plaintiff was convicted by a Metropolitan police magistrate of two different assaults. The convictions took place at 11 a.m. on the 31st Oct., and the commitments were drawn up in accordance with the sentences passed. The plaintiff, for the first assault, was sentenced to be imprisoned for "one calendar month," and for the second assault "for fourteen days, to commence at the expiration of the imprisonment previously adjudged." The prisoner was accordingly taken into the custody of the defendant, who was the governor of Coldbath Fields Prison, during the afternoon of the 31st Oct., and finally released at 9 a.m. on the 14th Dec., having asked to be released on the preceding day. Denman, J. on these facts, asked the jury to assess the damages (which they did at 20s.), and reserved for further consideration the question whether judgment ought to be entered for the plaintiff or defendant. After hearing the arguments of counsel on further consideration, the learned judge directed judgment to be entered for the defendant, with costs.

The plaintiff appealed.

The case in the court below is reported 40 L. T. Rep. N. S. 522.

The plaintiff in person contended that, as his imprisonment must be taken to have commenced at midnight on the 30th Oct., the calendar month expired on the 29th Nov., and that being so, that he ought to have been released on Dec. 13. Otherwise, he said, he would have been imprisoned the whole of November, which was a calendar month, and one day in October, and also for the fourteen days. He submitted that the question of time was one of fact for the jury.

A. L. Smith, for the defendant, was not called upon to argue.

BRAMWELL, L.J.—I am of opinion that this judgment must be affirmed. As Denman, J. said, there is no doubt a plausible argument for the now plaintiff that, according to his opinion, he has been imprisoned during the whole of November and one day in October as constituting one calendar month. The difficulty really arises because the term "calendar month" is not applicable except as applied to particular months, and that it is inapplicable where the month begins in the middle of a particular calendar month. Then the month is made up of a portion of two calendar months, which may be of unequal lengths, and various consequences seem to follow. It is clear that the only sensible rule which can be laid down is this, that where the imprisonment begins on a day in one month, so many days of the next month must be taken, if there are enough days to do it, as will come up to the date of the day before that on which the imprisonment com-

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.

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menaced. That is to say, that, if the day of imprisonment commenced on the 5th of the month, it must go on until the 4th of the next month; if on the 29th until the 28th. That is to say, you must take as many days out of the next month as had passed in the month when the imprisonment began before that imprisonment commenced. If that were not so, see what the consequences would be. The plaintiff says, "I was sent to prison on Oct. 31st. Therefore, I ought to have been let out on Nov. 29th. Otherwise I should have had one calendar month's imprisonment, and one day of another month. The effect of his argument is this, that whereas the imprisonment began on Oct. 30th, it ought to end on the 29th Nov. So ought it if the imprisonment began on the 31st. There is no reason why that should be so. Suppose a man is sentenced to two calendar months' imprisonment, when does he come out? Certainly not until Dec. 30th. Now, if one month ends on Nov. 29th, how do you get the next month ending on the 30th? The only way to make sense of it is to apply the rule I have mentioned. It would never operate to the prejudice of the prisoner. If he was sent to prison in a long month he would get thirty-one days; if in a short one he would get thirty days. If he was sent to prison in February, so much the better for him. If he went to prison on the 29th Jan., according to the rule expressed he would get out on the 28th Feb.; so he would if he went to prison on the 30th Jan. or on the 31st or on the 1st Feb. He would then have the benefit of an imprisonment shortened by the number of the days wanting to make up the days which had elapsed in the month in which he was imprisoned at the time of his imprisonment. As the plaintiff was sent to prison on Oct. 31st, there were thirty days wanting from the next month, and, as a consequence, the month did not expire until the 30th. Then the fourteen days did not begin until the first, and the plaintiff therefore was duly kept in prison until the 14th. I think the judgment should be affirmed.

BRETT, L.J.—The expression one calendar month is a legal and technical phrase to which we must give a legal and technical meaning. It does not, strictly speaking, mean any particular number of days, but one month according to the calendar. We must therefore look to the calendar in calculating it, and not count the days. Now, one month according to the calendar, in my view, is one month from the day of the imprisonment until the corresponding numerical day of the next month less one. In some cases there is no corresponding numerical day in the next month, because it is a shorter month than the one in which the imprisonment begins. There the imprisonment is less than it otherwise would have been, and in favour of the prisoner it must end on the last day of the short month.

COTTON, L.J.—I am of the same opinion. I think Denman, J. was right in dealing with this point as a matter of law. It was for the judge to say, on the meaning and construction of the sentence, what was "one calendar month." The plaintiff contends that he could not be imprisoned during the whole of one calendar month and one day of another month. The question then is, what is the meaning to be given to the term "one calendar month?" I am of opinion, although difficulties and incongruities no

doubt arise, that where there is a sentence of a calendar month's imprisonment not commencing on the first day of the month, you must consider it as expiring at twelve o'clock on the corresponding numerical day of the next month, and, if there are not enough days in the next month, in favour of the prisoner, the sentence will expire on the last day of the month. The consequence is that he never gets a longer imprisonment than the number of the days in the month in which he is to be imprisoned, and sometimes will get a less number of days' imprisonment than the number of days to be found in the calendar month for which he was imprisoned.

Appeal dismissed.

Solicitors for plaintiff, *Gold and Son.*

Solicitors for defendant, *Nicholson and Herbert.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Tuesday, May 13, 1879.

(Before COCKBURN, C.J. and MELLOR, J.)

THE PRISON COMMISSIONERS v. THE MAYOR, &C., OF LIVERPOOL. (a)

Reformatory school—Liability to provide proper clothing for juvenile offenders—Prison authorities—Reformatory Schools Act 1866 (29 & 30 Vict. c. 117), s. 23—Prison Acts (28 & 29 Vict. c. 126; 40 & 41 Vict. c. 21, s. 4).

T. M., a juvenile offender, was sentenced by the stipendiary magistrate of L. to a short term of imprisonment, and a further period of five years in a reformatory school. Previously to his entering the school the Prison Commissioners of England had provided the said T. M. with clothing proper and suitable for such school. Under the Prison Act of 1865 the mayor, aldermen, and burgesses of L. were the prison authorities for the prison of the borough of L., and under the Reformatory and Industrial Schools Act of 1866 they still are the authorities for the reformatory and industrial schools of the borough. By the Prison Act of 1877 the borough prison of L. was transferred from the old prison authorities and vested in one of Her Majesty's principal Secretaries of State. The question was whether the providing of clothing for juveniles sentenced to a period of years in a reformatory or industrial school after a term of imprisonment was a prison or reformatory school expense, and whether the Prison Commissioners, or the mayor, aldermen, and burgesses of L., as the authorities having the management of the reformatory schools, were liable for the expense of such clothing.

Held, that the Prison Commissioners were liable, and that the mayor, aldermen, and burgesses of L. should not be burdened with the expenses of matters over which they had no control.

THIS was a case stated by consent, under Order XXXIV. r. 1. :—

1. Down to the commencement of Prison Act, 1877, the mayor, aldermen, and burgesses of the borough of Liverpool acting by the council were the prison authority of the borough of Liverpool, and of the borough prison of that borough, and as such authority they, down to the commence-

(a) Reported by A. H. POYSEY, Esq., Barrister-at-Law.

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ment of the said Prison Act 1877, were liable to defray, and they defrayed, the expenses mentioned in sect. 23 of the Reformatory Schools Act 1866, in the case of youthful offenders sentenced under sect. 14 of the last-mentioned Act, to be sent to and detained in a certified reformatory school, after imprisonment in the borough prison of the said borough.

2. On the 28th March 1877 Thomas Mulloch was convicted by the police magistrate of the borough of Liverpool, of an offence punishable with imprisonment, and was sentenced to be imprisoned for more than ten days in the above-mentioned prison, and to be sent at the expiration of his period of imprisonment to the Reformatory school ship *Akbar*, and to be there detained for a period of five years. The said ship *Akbar* was a certified reformatory school.

3. The said Thomas Mulloch was imprisoned in the said prison, in accordance with the said sentence, and was at the time in that behalf directed by the sentence removed by the plaintiffs to the said reformatory school, and was there received and detained under the said sentence.

4. Under the Prison Act 1877 the said prison became vested in one of Her Majesty's principal Secretaries of State, and during the whole period of the imprisonment of the said Thomas Mulloch in the said prison, the general superintendence of the said prison was and it still is vested in the plaintiffs under the said Prison Act 1877.

5. At the time of the removal of the said Thomas Mulloch from the said prison to the said reformatory school, the said Thomas Mulloch was possessed of proper clothing necessary for his decent conveyance from the prison to the school.

6. Previously to and for the purpose of the admission of the said Thomas Mulloch into the said reformatory school, he was also provided by the plaintiffs with certain other clothing at a cost of 30s. Such other clothing was proper clothing for the said Thomas Mulloch requisite for his admission to the said school, and unless he had been provided with such last-mentioned clothing he would not have been admitted by the managers of the said school.

7. A question having arisen between the plaintiffs and the defendants with respect to the liability to pay for such last-mentioned clothing, and in order to obtain the admission of the said Thomas Mulloch into the said reformatory school, it was arranged between the plaintiffs and the defendants that the plaintiffs should repay the cost thereof in the event of the court being of opinion that the defendants were liable for the cost of such clothing.

8. The question is, whether, having regard to the provisions of the Prisons Acts 1865 and 1877 and the Reformatory Schools Act 1866, the defendants were liable for the expense of proper clothing requisite for the admission of the said Thomas Mulloch to the said school.

Poland (the *Attorney-General* with him), for the plaintiffs, maintained that the providing the proper clothing before entering a reformatory school was a school expense, and that the defendants were liable for it. The mayor and corporation of Liverpool were, under 28 & 29 Vict. c. 126, the prison authorities for the borough of Liverpool, and by 29 & 30 Vict. c. 117, s. 3, are still the authorities having the control and management of the reformatory and industrial schools of the

borough. The plaintiffs concede that by 40 & 41 Vict. c. 21, s. 3, the prison of the borough of Liverpool became vested in the Home Secretary, who has appointed the plaintiffs to assist him in carrying out the provisions of the Act; but the mayor and corporation have still the control and management of the reformatory schools, for sects. 4 and 52 of the Act of 1877 must be read together. The clothing requisite for admission into the school does not come under the 4th section, which deals with the defraying of expenses connected with prisoners. [COCKBURN, C.J.—Up to the time that the juvenile offender is started for the school he is a prisoner, and all expenses connected with him are prison expenses.] The question here is who is to pay for the boy's suit in the school. During the term of imprisonment the prison authorities are clearly bound to support the prisoner, but by 29 & 30 Vict. c. 117, s. 23, the prison authorities had to provide the uniform suits of the children in the reformatory, and as the Act of 1877 does not affect the jurisdiction of the defendants in reference to their borough reformatory schools, they are liable to defray such expenses. The Legislature undoubtedly intended that the borough authorities should retain their old powers of raising rates for the support of their reformatory and industrial schools.

R. S. Wright (*Herschell*, Q.C. with him), for the defendants, was not called upon. (But see ss. 23 and 30 of 29 & 30 Vict. c. 117, and ss. 52 and 57 of 40 & 41 Vict. c. 21.)

COCKBURN, C.J.—The Legislature clearly intended by the Prisons Act of 1877 to relieve the local rates; and to throw burdens like these on imperial taxation. By the same Act the powers and jurisdiction of the old prison authorities with reference to reformatory and industrial schools are kept alive, but not their duties and obligations, and we must read sect. 57 with sect. 4. This providing of suitable clothes is a prison expense, and the plaintiffs are liable to defray it. The Government have taken away the control and management of prisons and prisoners from the old prison authorities, and they must not be saddled with the expenses of matters over which they have no control.

MELLOR, J.—I am of the same opinion.

Judgment for the defendants.

Solicitors for the plaintiffs, *Hare and Fell*.

Solicitors for the defendants, *Venn and Son*, for *Rayner*, Liverpool.

Thursday, May 8, 1879.

(Before COCKBURN, C.J. and LOPES, J.)

REG. v. THE JUSTICES OF WILTSHIRE. (a)

Poor rate—Objection to valuation list—Time for appealing—Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), s. 1—25 & 26 Vict. c. 103.

Where a valuation list has been objected to before the assessment committee, and subsequently a rate has been made based upon such list, it is not a condition precedent to an appeal that the list should again be objected to before the committee after the making of the rate.

A supplemental valuation list for the parish of S. was deposited by the respondents on the 13th April 1878. The appellant on the 11th May gave to the assessment committee notice of objec-

(a) Reported by A. H. POTSER, Esq., Barrister-at-law.

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tion to the amount at which they were rated in the said list. On the 22nd May, at a meeting held to consider the objection, the assessment committee refused to reduce the amount, and approved and signed the valuation list. On the 23rd May a poor rate was made, and on the 28th May demanded, the appellants being assessed to the same on the amount entered in the supplemental list. The next meeting of the assessment committee was held on the 12th June, and the next Quarter Sessions on the 2nd July.

The appellants again gave notice of objection to the list on the 31st July, which objection was overruled on the 4th Sept. The appellants then gave notice of appeal for the Michaelmas Sessions held in October, but the Court of Quarter Sessions declined to enter and respite the appeal.

Held, that the decision of the Court of Quarter Sessions was right, as the appellants having been before the assessment committee and taken exception to the list, and having failed to obtain relief, were in a position to have appealed at the July Sessions.

THIS was an application for a *mandamus* to compel the justices to enter continuances and hear the appeal.

It appeared that an application was made by the appellants, the Great Western Railway Company, to the Court of Quarter Sessions for the county of Wilts, held on the 16th Oct. 1878, to enter and respite an appeal against a poor rate made by the respondents, the assessment committee of the Highworth and Swindon Union.

The following were the facts as stated for the opinion of the court:—

1. The respondents, on the 13th April 1878, deposited a supplemental valuation list of certain rateable hereditaments in the parish of Stratton St. Margaret, in which list the property in the occupation of the appellants in the said parish was entered as a rateable value of 6703*l*. The said parish of Stratton St. Margaret is included in the Highworth and Swindon Union.

2. The appellants, on the 11th May 1878, gave to the assessment committee for the Highworth and Swindon Union (hereinafter called "the assessment committee") notice of objection to the amount at which their said property was valued in the said valuation list.

3. On the 15th and 22nd May 1878 the assessment committee held meetings for hearing the objections of the appellants, and on the latter day refused to reduce the amount at which the said property of the appellants was valued as aforesaid, and duly approved and signed the said supplemental valuation list.

4. The respondents, on the 23rd May 1878, made a poor rate of ninepence in the pound for the relief of the poor of the said parish, and assessed the appellants to the same according to the rateable value of their property appearing in the said valuation list.

5. The rate mentioned in the last paragraph was duly published on the 26th May 1878, and demand made upon the appellants for payment thereof on the 28th May 1878.

6. The next meeting of the assessment committee after the making and publication of the said rate was held on the 12th June 1878, and the next quarter sessions for the county of Wilts,

hereinafter called "the July sessions," were held on Tuesday, the 2nd July 1878; so that, if it was necessary again to give the assessment committee notice of objection, the appellants could not have given the proper notices in order to appeal to the sessions held on the 2nd July. The appellants subsequently to the 12th June attended two meetings of the assessment committee by their agent after the publication and demand of the rate aforesaid, but made no further objection to the said valuation list until the 31st July 1878, when the appellants gave notice of objection against the said valuation list to the assessment committee, who on the 4th Sept. 1878, at a meeting for hearing amongst others the said objections of the appellants, refused to grant any relief to the appellants.

8. The appellants, on the 17th Sept. 1878, gave notice to the respondents and to the assessment committee of their intention to appeal against the said poor rate to the next quarter sessions to be holden in and for the county of Wilts, and in pursuance of such notice application was made at the Wilts quarter sessions held on the 16th Oct. 1878, to enter and respite the appeal.

9. It was objected on the part of the respondents that the Court of Quarter Sessions had no jurisdiction to entertain the application to enter and respite the said appeal on the following grounds: (1) That the appellants ought to have appealed to the next quarter sessions, i.e., the next practicable sessions after the allowance and publication of the poor rate, pursuant to 17 Geo. 2, c. 38, s. 4. for there was ample time between the 28th May 1878 (the day the rate was demanded) and 2nd July 1878 (the day of holding the July quarter sessions) for the appellants to have given the twenty-one days' notice to the assessment committee as required by sect. 1 of the 27 & 28 Vict. c. 39, of their intention to appeal at the next quarter sessions. (2) That the appellants having objected to the valuation list on the 15th and 22nd May 1878 before the assessment committee, and failed to obtain relief, had done all the Legislature intended should be done by the proviso contained in the 1st section of the 27 & 28 Vict. c. 39, and that it was not necessary for the appellants to go through the same process of objecting again after the first poor rate based upon such valuation list had been allowed, but, if still aggrieved, they should forthwith have given the twenty-one days' notice of intention to appeal to the July quarter sessions, which was the next sessions after the failure to obtain relief, and that having failed to go to such sessions they had lost the right of appeal at the following October quarter sessions. (3) That if it was necessary for the appellants to renew their objection to the assessment committee to the valuation list after a poor rate based upon such list had been allowed and published, such objection should have been preferred at the meeting of the assessment committee next after demand of the rate on the 28th May 1878 had been made, and not deferred until the 31st July 1878, after two meetings of the committee had been in the meantime holden.

10. The appellants contend: (1) That notwithstanding their having objected to the said valuation list as aforesaid before any rate was made upon the basis of it, they had no right of appeal against the said poor rate until they had given to the assessment committee notice of objection

against the valuation list in force in the said parish at the time of the making of the said rate, and had failed to obtain relief in the matter, and that the fact of the appellants having stated their objection to the said valuation list to the assessment committee before the approval of the said list by the assessment committee did not relieve the appellants from the necessity of objecting to the said list after the making of a rate on the basis of it as a condition precedent to an appeal against the said rate. (2) That as, the said rate was published on the 26th May 1878, and the next meeting of the assessment committee was held on the 12th June 1878, it was impracticable for the appellants, if their contention in the last paragraph is correct, to appeal to the July sessions, because a decision of the assessment committee could not be obtained in time to enable the appellants to give the requisite twenty-one days' notice of appeal prior to such quarter sessions. (3) That as it was impracticable to appeal to the July sessions, the appellants were not obliged immediately to object against the said valuation list, but that their notice of objection given on the 21st July 1878 as aforesaid was sufficient, and that it was not until the assessment committee on the 4th Sept. 1878 refused to grant relief as aforesaid, the appellants became entitled to appeal to the sessions held on the 16th Oct. 1878.

11. The question for the opinion of the court is: Whether the Court of Quarter Sessions were right in deciding that they had no jurisdiction to enter and respite the appeal against the said poor rate. If the court shall be of opinion that the decision of the Court of Quarter Sessions was wrong, then the appeal is to be entered and respited as asked for.

By 27 & 28 Vict. c. 39, s. 1:

Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union, provided that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, &c.

B. E. Webster, Q.C. (Lopes with him), for the appellants, contended that, before notice of appeal could be given, the appellants must have made objection to the list subsequent to the making of the rate based upon that list. He cited

Reg. v. Great Western Railway Company, L. Rep. 4 Q. B. 323; 20 L. T. Rep. 481;

Reg. v. The Justices of Derbyshire, 25 L. T. Rep. 43;

Reg. v. The Guardians of Biggleswade Union, 21 L. T. Rep. 494.

Charles, Q.C. and Ravenhill, for the respondents, showed cause in the first instance, and contended that it was sufficient if objection were made to the list prior to the appeal, and that being so, the justices rightly decided that they had no jurisdiction to respite this appeal, which might have been made at the July sessions.

Cockburn, C.J.—I am of opinion that this rule

moved for by Mr. Webster must be refused. The case all turns, no doubt, upon the modification introduced by the 1st section of the 27 & 28 Vict. c. 39, of the preceding Act of the 25 & 26 Vict. c. 103. Under the first of those two Acts of Parliament a party could appeal against a rate founded upon a valuation list approved by the assessment committee, without having taken an objection before the assessment committee to his assessment or the assessment of other people upon that valuation list. The new Act comes in and says that no one shall appeal against a rate who shall not have given notice to the assessment committee, and who shall not have taken objection to the valuation list before he appeals against the rate. That is, no doubt, to a certain extent, a salutary provision, for this reason: the purpose of the valuation list and the legislative opportunity given to take exception to that list was a means of preventing the expense, sometimes very considerable expense, of going to quarter sessions to appeal against a rate and to get relief. By the alteration of the valuation list it could be obtained cheaply and readily without occasion to resort to the more expensive process of going before the quarter sessions on appeal. On the other hand, it being left open to a party to appeal without having recourse to the more summary and less expensive mode of obtaining relief, the Legislature interposed and said, "You shall not appeal against a rate until or unless"—for that is the way I read the statute—"you have been before the assessment committee, and have sought there the relief which you may obtain in this cheaper and easier mode; unless you are defeated there, you shall not be permitted to have recourse to the more expensive process of appealing against a rate of taking it to the quarter sessions." Mr. Webster's contention is, that, although the party deeming himself aggrieved and desirous of appealing has in the first instance gone before the assessment committee, and there sought the relief which it was the object of all this legislation to make him seek in that easier form, instead of going to quarter sessions to appeal; that, although he has been once before the rate, as soon as the rate is made upon the valuation lists with reference to which his objection has been already heard and determined, he must go again, and go through the very same discussion, in order to be entitled to appeal against the rate. Now that in itself would be a legislative absurdity of so striking a character, that one cannot suppose the Legislature could have intended anything so nonsensical. It desires that a man shall go before the assessment committee, and makes it a condition of his being entitled to appeal to quarter sessions, but never could have intended that, having done before the rate was made that which the statute desired he should do, he shall be obliged to go through it over again in order to be entitled to bring his appeal to quarter sessions. I should struggle to the utmost against a conclusion involving really so preposterous an absurdity as that. But, says Mr. Webster, the court is bound by its former decision in the *Great Western* case, where it was held that, although the valuation list is by the Act of Parliament permanent, and need not be renewed in the shape of a fresh valuation list, and therefore rate after rate may be made in succession on the same valuation list, this court held

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no doubt that between each successive rate, if a man intend to appeal against a later rate, he must challenge the valuation list, although the Act of Parliament intended to make it permanent, and that that is conclusive in the present case. I own that the present discussion has somewhat shaken my confidence in the correctness of that decision: but it is by no means necessary to overrule it on the present occasion, because the two cases appear to me to be plainly distinguishable. A man may not have appealed against the first rate, he may have relied upon the opportunity of a fresh valuation list being made to which he could make exception, circumstances may have induced him to desist from presenting an appeal against the first rate; but when he finds the valuation list is kept in a state of permanency, and he feels that he has been aggrieved by the first rate upon him, he may well say, when the second rate comes, "I will appeal against a rate founded on that valuation list." Then he does not satisfy the exigency of the Act of Parliament, which says, "You shall not appeal unless you have objected to the valuation list," unless he object to the list as the list upon which the second rate has been founded. That decision, as far as it goes, is, or at all events may be, what the Legislature might well be thought to have had in its contemplation, and what I think is essential to the working out of this legislation, that though the valuation list is by the terms of the Act to be permanent until a new one is made, yet, in order that there may not be any appeal without objection being taken to the list, which might be cured in that simple and summary manner instead of appeal to quarter sessions being resorted to, it is necessary to appeal for the purpose of each successive rate against the valuation list to which exception not only may be taken, but must be taken. I think, looking at it in that point of view, the former decision of the Court of Queen's Bench remains intact, and we may give effect to this legislation by saying, at all events, where a second rate is not in question, where you are dealing with the first rate made after the valuation list has been approved, that the party who has been before the assessment committee and has there taken his exception and has failed to obtain relief, is then in condition at once to appeal to the next practicable quarter sessions. It is admitted that the next practicable quarter sessions is the one to which the appeal should be made, and that between the time when this valuation list was finally approved by the committee and the 2nd of July, the necessary period would have elapsed, and therefore the quarter sessions and the one to which the appeal should have been made.

LOPES, J.—I have nothing to add.

Rule discharged with costs.

Solicitor for the appellants, *R. R. Nelson.*

Solicitors for the respondents, *Bradford and Foote, Swindon.*

Saturday, April 26, 1879.

(Before COCKBURN, C.J. and LOPES, J.)

REG. on the prosecution of THE GUARDIANS OF THE POOR OF THE PARISH OF LEWISHAM v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. (a)

Metropolis Management Act (18 & 19 Vict. c. 120), ss. 159 and 161—Rating—Exemption of property of a particular nature from the full rate levied—Particular parts of the parish to be described by metes and bounds—Equal pound rate.

The London, Brighton, and South Coast Railway Company objected to the rate levied upon their property in L. parish on the ground that a district board under the 159th section of the Metropolis Management Act 1855 cannot exempt or order a less rate to be levied upon different portions of a parish not described or marked out by metes and bounds in the precept ordering such rate to be levied, which portions of the parish were in such precept described only as all "land used as arable, meadow, or pasture ground only, or as wood land, orchard, market garden, hop, herb, flower, fruit, or nursery ground;" and that such rate being described in the precept as a general rate, but not being an equal pound rate, was bad under the 161st section of the said Act.

Held (following Howell v. The London Dock Company, 8 EU. & Bl. 212), that particular descriptions of property within a parish may, under the 159th section of the above Act, be relieved from the full rate as not being equally benefited with the rest of the parish by the expenditure of such rate.

THIS was a case stated by justices at quarter sessions under 12 & 13 Vict. c. 45, s. 11. The material paragraphs are the following:—

3. By sect. 159 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) it is enacted that,

Where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied, have or has been incurred for the special benefit of any particular part of their parish or district, or otherwise have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require.

4. By the 161st section of the said Act it is enacted that

The overseers of the poor of every parish to whom any such order as aforesaid is issued, shall levy the amounts mentioned therein according to the exigency thereof, and shall for that purpose make separate equal pound rates upon their parish, or the part thereof upon which any sum specified in such order is required to be levied in respect of each sum thereby ordered to be levied; that is to say, a separate rate in respect of each sum ordered to be levied for defraying expenses connected with sewerage, to be called a sewers rate; a separate rate in respect of each sum ordered to be levied for defraying expenses of lighting (where a separate sum is ordered to be levied for defraying such expenses), to be called a lighting rate; and a separate rate in respect of each sum ordered to be levied for defraying other expenses of executing this Act, to be called a general rate; and shall make such respective rates of such amount in the pound on the annual value of the property rateable as will in their judgment, having regard to all circumstances, be sufficient to raise the sums specified in such order; and such rates shall be levied on the persons, and in respect of the property, by

(a) Reported by A. H. FOSYER, Esq., Barrister-at-Law.

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law rateable to the relief of the poor in the respective parishes, and shall be assessed on the net annual value of such property, ascertained by the rate for the time being for the relief of the poor.

6. The order or precept upon which the said rate so appealed against was levied was as follows:

The Board of Works for the Lewisham district constituted by the Metropolis Management Act 1855 in pursuance of the provisions of the said Act, and of the Acts for amending and extending the same, hereby order and require the guardians of the poor of the parish of Lewisham to levy within the said parish the sum of 11,524*l.* for the purpose of defraying the expenses already or hereafter to be incurred by the said board in the execution of the said Act or Acts, and to pay the said sum to the London and Westminster Bank, &c., &c. And it appearing to the said board that the expenses in respect of which the said sum of 11,524*l.* is required are not for the equal benefit of the said parish, the said board do further order and require that the rate or rates to be raised in pursuance of this present precept shall, as regards all such parts of the said parish as consist of land used as arable, meadow, or pasture land only, or as wood land, orchard, market garden, hop, herb, flower, fruit, or nursery ground, be assessed and levied in (the proportion of one-fourth part only of the net annual value of such land.

8. The parish of Lewisham is very extensive in area, containing in the aggregate about 5500 acres. Of this area a very considerable proportion is covered with houses; about 3000 acres are lands under cultivation, and fall under the classes of land mentioned in the precept. There is also land in the parish used in other ways, and rated at the higher rate. The 3000 acres do not lie together, but are scattered through the parish. The rateable value of the 3000 acres, according to the valuation list, amounts to about 11,000*l.* The total rateable value of the property in the parish amounts to 324,009*l.*

9. Throughout the said parish, all property, wheresoever situate, which consisted of land used as arable, meadow, or pasture land only, or as wood land, orchard, market garden, hop, herb, flower, fruit, or nursery ground, was rated or assessed in the rate at 2½*d.* in the pound, and all other property was rated or assessed at 10*d.* in the pound upon the net annual value of such property respectively, as ascertained by the rate for the time being for the relief of the poor.

10. It was contended on the part of the London, Brighton, and South Coast Railway Company (1) that the said precept of the Lewisham District Board of Works was bad in law, inasmuch as the said district board have no power, under the 159th of the Metropolis Management Act 1855, or otherwise, to order the said rate to be levied in the manner directed by the said precept, and can only exempt or order a less rate to be levied upon any particular portion of a parish described and marked out by metes and bounds. (2) That the said rate was bad in law, inasmuch as it was not an equal pound rate as required by the Metropolis Management Act 1855, sect. 161.

The Court of Quarter Sessions dismissed the appeal.

Meadows White, Q.C. (*Paine* with him), for the guardians of the parish of Lewisham, maintained that the rate was good, and that while it was indisputably in the discretion of the district board of works to exempt local areas, it was not necessary to describe in the precept by metes and bounds those portions of a parish that were to be exempt or relieved from the full rate to be levied.

It was the intention of the Legislature that relief should be extended to those portions of a parish which do not participate equally with others in the expenditure of the rate to be levied; and here the district board have proceeded not on the ground that the portions relieved are of a different kind of property from the rest, but that a difference should be made in their favour as not participating equally in the benefits of such rate; and in coming to this decision the board have exercised a proper discretion. *Howell v. The London Dock Company* (8 Ell. & Bl. 212) is to the point and conclusive in this matter.

Oppenheim, for the London, Brighton, and South Coast Railway Company, contended that it was competent for the district board to exempt only areas of considerable extent, and not certain portions scattered over the parish, and such areas must be described by metes and bounds in the precept, and here the district board have not done so. Again the precept of the district board calls this a general rate, and under the 161st section of the Act such rate must be an equal pound rate; but the rate appealed against was not an equal pound rate; therefore, on these two grounds, the rate was bad. *Howell v. The London Dock Company* (*ubi sup.*) does not apply, and, if it did, it has been virtually overruled by the remarks made by Erle, J. in *Reg. v. The Great Western Railway Company* (Ell. Bl. & Ell. 613).

COCKBURN, C.J.—I think this appeal must be dismissed, and the order of sessions must be affirmed. I confess that, upon the first reading of sect. 159 of the Metropolis Management Act 1855, I felt inclined to come to an opposite conclusion to that at which I have arrived; but this court is bound by its decision in *Howell v. The London Dock Company*. In that case the rate had been made uniformly on all the property of the dock company without any difference as to one portion deriving greater benefit from the expenditure of the rate than the other. The court there held that the district vestry should distinguish between the difference of benefits derived from such rate by the different kinds and classes of the property belonging to the company. In this case we think that, without distinguishing the local area and limit of each particular piece of agricultural or pasture land or of market garden or the like, the district board may in their discretion, under this 159th section, make a distinction between different portions of the parish or district on the ground that such portions would not benefit equally with others in the rate so levied. There is nothing in this case to make us distinguish it from *Howell v. The London Dock Company*, or override the latter case. The decision in that case is consonant with equity and justice. There have been countless opportunities for the Legislature to amend and alter that decision, but it has not thought fit so to do. We therefore, notwithstanding the remarks made upon that case by my brother Erle in *Reg. v. The Great Western Railway Company*, cannot take upon ourselves to alter or override it.

LOPES, J.—I am of the same opinion, and for the same reasons.

Order of sessions affirmed.

Solicitor for the guardians, *S. Edwards*.

Solicitors for the company, *Norton, Rose, Norton, and Brewer*.

Q.B. Div.] PHARMACEUTICAL SOCIETY v. LONDON AND PROV. SUPPLY ASSOCIATION. [Q.B. Div.]

March 15 and April 5, 1879.

(Before COCKBURN, C.J. and MELLOR, J.)

THE PHARMACEUTICAL SOCIETY OF GREAT BRITAIN
v. THE LONDON AND PROVINCIAL SUPPLY ASSO-
CIATION LIMITED. (a)

APPEAL FROM INFERIOR COURT.

Pharmacy Act 1868 (31 & 32 Vict. c. 121), ss. 1, 15
—Sale of poisons by corporation—Corporation
liable to penalty—"Person" to include corpora-
tion.*Any corporation whereof the members are not all
duly registered pharmaceutical chemists or
chemists or druggists, which shall sell or keep
open shop for the retailing, dispensing, or com-
pounding poisons, is liable to the penalties im-
posed by the Pharmacy Act of 1868, although
such business is managed by a duly registered
chemist who is a member of the corporation.**The defendants were a company registered under
the Companies Acts 1862 and 1867. The object
of the company was to purchase or acquire the
trade or business of a wholesale and retail grocer
and general warehouseman.**W. M., who was not a duly registered chemist with-
in the meaning of the Pharmacy Act, was the
managing director. The business of the company
included a department for the sale of drugs, and
for retailing and compounding poisons within
the meaning of the Pharmacy Acts. The business
of the drug department was conducted by one
H. E. L., a duly registered chemist, with two
duly qualified assistants. H. E. L. was a
partner in the company, but was paid by salary
for superintending the drug department. An
action was brought by plaintiffs to recover from
defendants a penalty under 31 & 32 Vict. c. 121,
for having sold poisons in contravention of the
Act.**Held, that the plaintiffs were entitled to recover, as
the intention of the Legislature was to exclude
all persons other than the registered members of
the Pharmaceutical Society from keeping open
shop for the compounding or retailing of poisons.
That the word "person" in sections 1 and 15 of
the Pharmacy Act applies to a corporation as
well as to a natural person, and therefore the
defendants could be sued, and were liable to pay
the penalty imposed by sect. 15 of that Act.**THIS was an appeal by the plaintiffs from a decision
of the judge of the Bloomsbury County Court in
favour of the defendants in an action for a penalty
under the 31 & 32 Vict. c. 121.**The facts are set out in the judgment of
Cockburn, C.J. below.**The Attorney-General (Sir J. Holker, Q.C.)
(Lumley Smith with him) for the plaintiffs.—Prior
to 1868 any person might keep a chemist's shop
and sell poisons, but by the Pharmacy Act
restrictions are imposed on the sale of poisons.
It requires that there should be some responsible
person to fall back upon in case anything goes
wrong. It is not intended that an unqualified
person should conduct a business with a duly
qualified assistant. The proprietor himself must
be qualified. The word "person" in sects. 1 and
15 of the Act is wide enough to and does include
a corporation:**Coke's 2 Inst. 732;
Maxwell on Statutes, 292.**An offence may be committed by a corporation
(7 & 8 Geo. 4, c. 28, s. 14), and it may be pro-
ceeded against:**Terry v. The Brighton Aquarium Company, 32 L. T.
Rep. 458; L. Rep. 10 Q. B. 306;
Reg. v. Birmingham and Gloucester Railway Com-
pany, 3 Q. B. 223;
Reg. v. Great North of England Railway Company,
7 L. T. Rep. O. S. 468; 9 Q. B. 315;
Green v. The General Omnibus Company, 1 L. T.
Rep. 95; 29 L. J. N. S. 13, C. P.**It was the intention of the Legislature that every
person should be prevented from keeping an open
shop for the sale of poisons unless such person be
a duly qualified chemist, but that intention could
not possibly be carried out if a corporation is
allowed to escape the penalties imposed by the
Act.**A. Wills, Q.C. (Finlay with him) for the
defendants.—There are many passages in this Act
where it cannot possibly be intended that the
word "person" is to include a corporation. The
word person does not naturally include a cor-
poration at law. This may be a *casus omissus*. If
the contention of the Attorney-General is correct,
a corporation can never carry on the business of
a chemist. That might apply to Apothecaries'
Hall, but that surely was not the intention of the
Legislature. 7 & 8 Geo. 4, s. 14, applies to certain
defined cases. That is rather an argument to
show that, except by Legislative provision, a cor-
poration is not included in the word person.**Lumley Smith in reply.**Cur. adv. vult.**April 25.—The following written judgments
were delivered:**COCKBURN, C.J.—This is an appeal from the
decision of the judge of the Bloomsbury County
Court in favour of the defendants in an action for
a penalty under the 31 & 32 Vict. c. 121, for having
sold poison and kept open shop for the sale of
poisons in contravention of that Act. By the
first section of the statute it is enacted that it
shall be unlawful for any person to sell or keep
open shop for retailing, dispensing, or com-
pounding poisons, or to assume or use the title
"chemist and druggist, or chemist or druggist,
or pharmacist, or dispensing chemist or druggist
in any part of Great Britain, unless such
person shall be a pharmaceutical chemist or
a chemist and druggist within the meaning of this
Act, and be registered under this Act." And by
the 15th section "any person who shall sell or
keep an open shop for the retailing, dispensing,
or compounding poisons, or who shall take, use,
or exhibit the name or title of chemist and
druggist, or chemist or druggist, not being a duly
registered pharmaceutical chemist, or chemist or
druggist, or who shall take, use, or exhibit the name
or title of pharmaceutical chemist, or pharmaceu-
tist, not being a pharmaceutical chemist, shall, for
every such offence, be liable to pay a penalty or sum
of five pounds, and the same may be sued for, re-
covered, and dealt with in the manner provided
by the Pharmacy Act for the recovery of penalties
under that Act." By the Pharmacy Act, sect. 12,
the penalty recoverable under that Act is to be
recovered in England or Wales "by plaint under
the provision of any Act in force for the more
easy recovery of small debts and demands." The
defendants are a company registered under the*

Companies Acts 1862 and 1867 as a limited company, with a nominal capital of 10,000*l.*, divided into 1000 shares of 10*l.* each. Of these one William Mackness holds 560 shares fully paid up. Six persons (one of whom was Henry Edward Longmore) hold five shares with 2*l.* 10*s.* paid on each share. Three persons hold one share each with 2*l.* 10*s.* paid on each share. The remaining shares are unallotted. The defendants' company was registered on the 29th Jan. 1878, and was formed "To purchase or acquire the trade or business of a wholesale and retail grocer and general warehouseman," then carried on by William Mackness at 113, Tottenham Court-road. Mackness is the managing director of the company. He is not a duly registered pharmaceutical chemist or chemist and druggist within the meaning of the Pharmacy Act 1868. Henry Edward Longmore is a pharmaceutical chemist or chemist and druggist within the meaning of the Act, but no other shareholder is so. The business of the company is carried on, as that of Mackness was before the company was formed, at 113, Tottenham-court-road, and includes, amongst other departments for the sale of various goods, a chemist's and druggist's shop or drug department, which is an open shop for the retailing, dispensing, and compounding poisons within the meaning of the Pharmacy Act 1868. Longmore, as has been stated, is and at the time of the sale of the poisons in question was a duly registered chemist and druggist within the Pharmacy Act 1868, and the business of the said drug department was conducted by him with the aid of two qualified assistants. He, with the two assistants, attended regularly to the drug department, and to nothing else. He and his assistants were the servants of the company, and were paid by salary or wages. Upon this state of facts the question presents itself whether the defendant company, as such, is amenable to the penal enactments of the statute. It was fully admitted on the argument, nor could it be contested, that if this had been an ordinary partnership, the individual partners, at all events such of them as were not qualified under the statute, would have incurred the penalties it imposes. The intention of the Legislature appears clearly to have been to prevent any shop or establishment existing for the sale of poisons except under the immediate superintendence and control of a duly qualified proprietor. It is not enough that the proprietor employs a qualified person to manage the business. The master must himself be duly qualified. Two parties could not combine to carry on the joint business of grocer and chemist, though the one attending to the latter department of the business might be a qualified chemist. There would be nothing to insure in such a case that in the absence of the qualified partner the other might not take upon himself to act in his stead, and thus the security against fatal mistakes in the dispensation of medicines which the statute was intended to insure might be seriously compromised. The defendants are therefore within the scope of this legislation, the case comes within the evil against which the statute was intended to provide a remedy. But they are said not to be within the statute as being an incorporated company; the main ground on which this contention rests being that the Act in question, in its pro-

hibitory as well as its penal clauses, uses the term "person," a term which it is contended cannot be properly applied to a corporate body. The objection thus founded on the use of the word "person" in the penal clauses of the Act would seem at first sight to present some difficulty, but, when the scope and purpose of this legislation are taken into account, the difficulty does not appear to be insuperable. Reliance was placed by the Attorney-General in his argument in support of the appeal, on the enactment of the 14th section of the 7 & 8 Geo. 4, c. 28, that whenever any statute relating to any offence, whether punishable by indictment or summary conviction in describing the offender or the offence, uses words importing the singular number or the masculine gender only, it shall be understood to include several matters as well as one matter, several persons as well as one person, males as well as females, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction. But that Act is expressly confined to proceedings on indictment or summary conviction, and therefore cannot apply here, where the proceeding is by civil action. It shows no doubt the disposition of the Legislature to include corporations under the general designation of person or individual in penal statutes. But the terms of the Act will not admit of its application to the present case. To solve the question we must therefore confine our attention to the statute itself on which this action is brought. That an incorporated company is within the mischief against which this legislation was directed is, I cannot help thinking, quite obvious. If a company, by reason of its being incorporated, is not within the provision of the Act and amenable to its penalties, and effect is to be given to the argument of Mr. Wills, it necessarily follows that such a company might openly carry on the business of chemists and druggists, and sell poison without a single member of the company, even the person employed to conduct this portion of their business, being qualified. The person actually selling the poisons might be amenable, and it was probably with the view to avoid this that in the present instance a qualified person was employed to manage this department of the defendants' business; but the company employing him would enjoy complete immunity. A person desiring to combine the business of a chemist and druggist with that of a grocer would have only to get one or two persons to join him, providing them with a share or two, as appears to have been done in the formation of this company, and so founding an incorporated company to set the statute at defiance. It cannot be supposed that the Legislature can have contemplated a result so entirely at variance with the policy and purpose of the Act, or intended to place incorporated companies on a different footing in this respect from that of ordinary partnerships or individuals. It is no doubt possible that, although joint-stock companies existed at the time this statute was passed, the formation of such companies for the purpose of continuing trades hitherto carried on singly, and among other things for that of superadding the business of the chemist and druggist to that of the grocer or provision merchant, may not have been

present to the minds of those who framed and passed the statute. Still, if the case, though unforeseen, is within the mischief which the Legislature had in view, and the enactment is large enough to embrace it, without any forced or strained construction being put on the language of the Act, it is our duty to advance the remedy intended to be afforded. It is true that the term used in the 1st section of the Act is a "person," and that ordinarily speaking this word would not be applicable to a corporation. But when the meaning and effect of the enactment is looked at without too close an adherence to its precise phraseology, it amounts to no less than a general prohibition to every one not qualified according to the Act from dealing in poisons, or carrying on the business of a chemist and druggist. The fallacy of the argument urged on behalf of the defendants is that it assumes that the prohibition is addressed to individual persons. But the provision being universal must extend to all persons, whether acting in an individual or corporate capacity. The defendants, it is true, are thus infringing the law, are not acting in their individual capacity, and may not (but on this it is unnecessary to pronounce any opinion) be liable individually. But in their aggregate or corporate capacity they are breaking the law, and being in the latter capacity, as well as individually, within the prohibition, they must, if capable of being sued, be also amenable to the penalty, and must for this purpose be taken to be persons within the meaning of the statute. The fact so strenuously insisted on by Mr. Wills, that in other sections of the Act the word "person" is applicable to individual persons only, and not to a corporate body, only tends to show that the adoption of the business of chemist and druggist by incorporated companies like the present was not contemplated when the Act was passed. It by no means shows that the prohibition being general, and the mischief clearly within the statute, the company, though as such they may be incapable of complying with some of its requirements, as for instance to undergo examination under sect. 6, ought not to be held to be within the penal clauses of the Act, or should be allowed openly to break the law under the belief that they are beyond its reach. In the present case it so happens that a member of the company, who manages the chemical department of its business (Mr. Henry Edward Longmore), is a qualified chemist. But it is not as a member of the company that he so acts, but as the paid servant of the company. It is clear therefore that his being qualified will not exonerate the other members of the company who are not so. Nor would it be otherwise, even if it were as a member of the company that he so acted. So long as any of the company are disqualified the body is disqualified, and the one who, though himself qualified, acts for the body, becomes a party to their offence, and becomes liable conjointly with them. The qualified chemist, who, in partnership with a grocer, carried on the business of grocer and chemist, would be as liable to the statutory penalty as his unqualified partner. The County Court judge was therefore wrong in holding that because the chemical department of the defendants' business was managed by a qualified person the defendants were not liable to the penalty. Being thus of opinion that a company, though incorporated, is none the less within

the prohibition of the statute, I come to the remaining question whether such a company is capable of being sued for the penalty provided by the 15th section. Upon this point the authorities referred to by the Attorney-General in his argument appear to me to afford a satisfactory answer, although it is true that a corporation cannot be indicted for treason or felony. It was established by the case of the *Birmingham and Gloucester Railway Company* (*ubi sup.*) that an incorporated company might be indicted for non-feasance in omitting to perform a duty imposed by statute such as that of making arches to connect lands severed by the defendants' railway. It was further held in *Reg. v. The Great Northern of England Railway Company* (9 Q. B. 315) that an incorporated company could be indicted for misfeasance as in cutting through and obstructing a highway, though they could not be indicted for treason or felony, or offences against the person. In the present instance we are dealing not with an indictment on information, but with an action in a civil court. Though the sum to be recovered is no doubt a penalty for the infraction of the statute, the means to be resorted to for its recovery are of a purely civil character. If a corporation can be indicted for misfeasance, I am wholly at a loss to see why it may not be proceeded against in a civil suit for the recovery of a penalty which it has incurred by disobedience to a statutory prohibition. I am therefore of opinion that this appeal must be allowed, the decision of the late judge of the County Court reversed, and judgment entered for the plaintiffs.

MELLOX, J.—I have come with considerable hesitation to the conclusion that our judgment should be for the plaintiffs, and that both questions submitted to us must be answered in their favour. I was for some time inclined to think that the circumstances of the defendants' case were not within the contemplation of Parliament when the Pharmacy Act 1868 was passed, and that, although clearly within the mischief intended to be provided against, words sufficiently comprehensive had not been used in framing the Act to include the acts of the defendants, and that consequently it became a *casus omissus*. A fuller consideration of the provisions of the Act 31 & 32 Vict. c. 121, has however brought me to the same conclusion as that expressed by my Lord Chief Justice in his judgment in this case. I think the great object of the Legislature was to prevent the sale of poisonous or dangerous drugs by persons not qualified by skill or experience to deal in such commodities. It, therefore, proposed to form into one association all persons who for the future should alone be deemed qualified to deal in the same, and who should be registered under the provisions of the Act which we are now considering. It accordingly provided for the interests of all chemists and druggists who had been in business as such previously to the passing of the Act; but with regard to the future it made careful provision for the examination and registration of all persons who should in future form the only qualified body of persons who should be permitted to keep open shop for the retailing or compounding of poisons; and I now think that the sections are really, when carefully considered, only the provisions regulating the steps which in future are to be taken by all persons who desire to obtain the privilege of keeping open shop and retailing, dispensing, or

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compounding the poisonous drugs in question, and who, upon being registered as pharmaceutical chemists, or chemists and druggists, within the provisions of the Act, will become qualified so to do. To incorporate such a society, and to give to its members in future the sole privilege of keeping open shop as chemists, or chemists and druggists, for the sale or dispensing or compounding poisons, rendered it necessary to prohibit all other persons, not so registered or qualified, from keeping open shop or retailing, dispensing, or compounding such drugs for sale, and from assuming the title of pharmaceutical chemist or chemist and druggist; and therefore, whilst one set of sections are qualifying, and intended to regulate for the future the mode in which persons should become qualified as members of the association, and to provide for the government of the body incorporated, sections 1 and 15 of the Act which contain the prohibitory words, upon the meaning of which we have to decide, have an entirely distinct effect. The object of those sections is absolutely to prevent the danger assumed to be likely to arise to the public by keeping open shop for the retailing, dispensing, or compounding poisons by any persons not being qualified pharmaceutical chemists or chemists and druggists, and the intention and scope of those sections, and the general object of the Act, is absolutely to exclude, from the time of the passing of the Act, all persons other than the registered members of the Pharmaceutical Society from keeping open shop or retailing, dispensing, or compounding poisons. Now, before the passing of the Act 1868 all persons, whether "natural persons" or "artificial persons," constituted by incorporation for trading purposes, might, either as individuals or as a corporation, have kept open shops and retailed, dispensed, or compounded poisons. It was essential, therefore, to the effectuating the objects of the Act, that all persons, whether natural or artificial, should for the future be prevented from dealing as before in the prohibited matters; and the cases cited by the Attorney-General in his argument show that an incorporated company may commit an offence either of non feissance or misfeissance, and may be punished by indictment for the same as if the Act had been done by a natural person. We may well, therefore, interpret the word person with sections 1 and 15 so as to include not only any natural person, but any artificial person created by the law, which would be capable of committing the offence referred to in the 15th section, and we are authorised upon the principle of decided cases to say not only that the "offence" has been committed by the defendants, but that they are liable to be punished for it under the provision of the 15th section.

Judgment for plaintiffs.

Solicitors for plaintiffs, *Flus and Co.*

Solicitors for defendants, *Crouch and Spencer.*

Thursday, May 15, 1879.

(Before COCKBURN, C.J., MELLOR and LUSH, JJ.)

REG. v. MILLEDGE AND OTHERS, Justices of Weymouth. (a)

Justice of the peace—Disqualification—Interest in matter to be adjudicated upon—Justice a member of urban sanitary authority—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 258.

The Local Board of Health for the borough of Weymouth instituted a prosecution under the Public Health Act 1875, against the appellants for a nuisance committed by them, and they were convicted on a summons by the justices sitting in petty sessions. Three members of the town council, and as such members of the urban sanitary authority, sat at the trial in their capacity as justices of the peace, and took part in the conviction of the appellants. The appellants moved for a certiorari to quash the conviction on the ground that three of the justices who adjudicated on the summons were members of the local authority that ordered the prosecution, and so disqualified because of their interest in the proceedings; and that therefore the conviction was bad.

Held, that the conviction was bad, as those justices who had taken part in the proceedings which led to the prosecution of the appellants were disqualified by their interest in the matter from sitting at the hearing of the summons.

THIS was a rule to show cause why a certiorari should not issue to bring up for the purpose of quashing it a conviction made by the justices for the borough of Weymouth sitting in petty sessions.

It appeared that there was an alleged nuisance committed by the appellants with reference to certain timber pounds; and a representation with respect to this nuisance was made to the Local Government Board, and they in turn communicated with the local urban sanitary authority of Weymouth, and desired them to abate the nuisance; and that they would approve of any measures undertaken in that behalf. Thereupon a meeting of the town council as the local urban sanitary authority of the borough was convened, and they passed a resolution that an inquiry should be made into the alleged nuisance, and a report made to them. On the receipt of that report they took out a summons against the appellants. Three members of the town council were justices, and sat on the bench when the summons was heard. The section on which the respondents relied was the 258th of the Public Health Act 1875 (38 & 39 Vict. c. 55).

No justice of the peace shall be deemed incapable of acting in cases arising under this Act by reason of his being a member of any local authority, or by reason of his being as one of several ratepayers or as one of any other class of persons liable in common with the others to contribute to or be benefited by any rate or fund, out of which any expenses incurred by such authority are under this Act to be defrayed.

Pitt Lewis showed cause.—The three magistrates were really not interested in the matter; they took no part in the discussion at the meeting at which proceedings against the appellants were directed to be taken. They had no animus against the appellants, but were per-

(a) Reported by A. H. POTTER, Esq., Barrister-at-Law.

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forming a public duty; they could not help themselves; as members of the town council they had to carry out the directions of the Local Government Board. Again, they are not incapacitated from sitting as justices, because the 258th section of the 38 & 39 Vict. c. 55 provides for such a case as this. If the contention of the appellants were to stand, the effect would be that a town councillor who happened to be on the commission of the peace would be obliged to retire from the room whenever such a question as this came up for discussion.

Channell, in support of the rule, was not called upon.

COCKBURN, C.J.—In this case it appears that three of the magistrates, who adjudicated upon the summons issued against the appellant, and convicted them, were members of the town council of Weymouth, and in virtue of that office members of the local sanitary authority for that borough, and so parties to the resolution to prosecute the appellants. They therefore assumed the double rôle of prosecutors and judges in their own cause. Mr. Pitt Lewis urged upon us that these gentlemen could not help prosecuting; the answer to that plea is, they were not obliged to sit at the hearing of the case; and there were plenty of magistrates whose services were available for the trial of the case, without having recourse to those who had participated in bringing about the matter on which they were called upon to pass their judgment. If the three gentlemen had not sat or taken any part in the hearing it would have been otherwise. In that case the provisions of the Public Health Act would apply. That enactment certainly does not warrant a person sitting as a judge in a cause in which he is a prosecutor. Although it may be that a man sitting as judge in a prosecution which he has ordered and arranged may not consciously feel prejudiced, but may even bring his mind unprejudiced and unbiassed, to consider the case impartially; yet the public inconvenience, questionable policy, and unseemliness of a prosecutor sitting as judge in his own cause, and its opposedness to all our received notions of right and wrong, and of justice and injustice, make us hold that this conviction should be quashed. The gentlemen in question need not have sat on the bench, or the urban sanitary authority might have allowed a private prosecution to have issued, but the latter did not so think fit, and the former did not refrain from sitting; therefore, for the reasons I have adduced, I think this conviction bad, and the rule for a *certiorari* must be made absolute.

MELLOR and LUSH, JJ. concurred.

Rule absolute.

Solicitors for the appellants, *Combe and Wainwright*.

Solicitors for the respondents, *F. J. and G. F. Braikenridge*.

EXCHEQUER DIVISION.

Wednesday, July 2, 1879.

(Before KELLY, C.B. and STEPHEN, J.)

MALTON URBAN SANITARY AUTHORITY (apps.) v. MALTON FARMERS' MANURE AND TRADING COMPANY (resps.). (a)

Public Health Act 1875—Offensive trades—Nuisance—Injury to health.

The Public Health Act 1875 (38 & 39 Vict. c. 56), sect. 114, provides that the urban authority shall direct a complaint to be made before a justice where "any manufactory, building, or place used for any trade, business, process, or manufacture causing effluvia is certified . . . by their medical officer of health . . . to be a nuisance, or injurious to the health of any of the inhabitants of the district," and that "if it appears to the court that the business carried on by the person complained of is a nuisance, or causes any effluvia which is a nuisance or injurious to the health of any of the inhabitants of the district, and unless," &c. . . "the person so offending . . . shall be liable to a penalty," &c.

The respondents, whose business had been certified by the appellants' medical officer to be a nuisance, and who were charged under this section in respect of their manufactory of artificial manures, were proved to have caused offensive effluvia, which materially interfered with the comfort and enjoyment of the inhabitants in the streets, and penetrated into some of the houses. By one witness certain cases of nausea and vomiting were attributed to them; while evidence was, on the other hand, given that, though the effluvia might make sick persons worse, they would probably do no permanent injury to health.

Held, that the effluvia in question, being proved to interfere with the comfort and enjoyment of the inhabitants, constituted a "nuisance" within the meaning of the 114th section of the Act, and that they were moreover "injurious to health" within the meaning of that section.

Per Stephen, J.: It is not necessary, in order to bring a nuisance within this section, to prove injury to health.

The case of The Great Western Railway Company v. Bishop (L. Rep. 7 Q. B. 550 and 41 L. J. N. S. 120, M. C.) considered.

CASE stated by justices of the East Riding division of the county of York, under 20 & 21 Vict. c. 43.

A complaint was preferred by the appellants against the respondents, under sect. 114 of the Public Health Act 1875 (38 & 39 Vict. c. 55), charging that the respondents, being the occupiers of a certain manufactory, building, or place for boiling, burning, or crushing bones, or used for a certain trade, business, process, or manufacture, causing effluvia, to wit, the process or manufacture of manures carried on by the respondents, within the appellants' district, did unlawfully carry on the said trade, business, process, or manufacture of manures, and of boiling, burning, or crushing bones, or some or one of such trades, businesses, processes, or manufactures, so as to be a nuisance, or so as to cause an effluvia which was a nuisance, or injurious to the health of the inhabitants of the said district, contrary to the Public Health Act 1875. Upon the hearing the complaint

was dismissed, but without costs, subject to the statement of a case for the opinion of the court.

It was proved that the respondents were the occupiers of certain buildings, in which the process or manufacture of artificial manures (including bone manures and the dissolving of bones and coprolites with sulphuric acid, but not the boiling or burning of bones), was extensively carried on, and that during the process of manufacture, or whilst the hot product was being moved after manufacture, or from the storage of material, effluvia were thrown off in large quantities, a considerable portion of which escaped from the buildings, and had been from time to time on certain occasions (but not continuously), according to the direction of the wind, blown or carried into some parts of the town forming the appellants' district; and that numerous complaints had been made of a nuisance arising therefrom to the inhabitants. It was also proved that the medical officer of health for the district had certified to the appellants, under the provisions of the 114th section of the Public Health Act 1875, that the building or place occupied by the respondents, being used for the purposes aforesaid, and for the carrying on of a trade, business, process, or manufacture, causing effluvia, was a nuisance, and injurious to the health of the inhabitants of the district.

The evidence on behalf of the appellants showed that the effluvia was offensive, and had materially interfered with the comfort and enjoyment of the inhabitants in the streets of the town, and at the Malton station of the North-Eastern Railway Company (the works being situate about two hundred yards from the latter place), and that such effluvia penetrated into some of the houses within the said district, causing the inhabitants to close their windows; and in one or two instances nausea and vomiting were attributed to it. The appellants' principal medical witness did not think there was anything in the vapours to make the witness who attributed vomiting to them sick; but the medical officer of health adhered to the statement in his certificate that the works caused a nuisance and an effluvia which was injurious to health. Other medical men, however, also called by the appellants, whilst giving it as their opinion that the effluvia might make sick people worse and cause nausea, yet did not think any permanent injury to health would arise therefrom.

It was contended by the respondents that this was not a nuisance within the meaning of the Public Health Act 1875, because to be so it must be proved to be injurious to health; and that, as the medical evidence given on behalf of the appellants had failed to prove this, the justices had no summary jurisdiction in this case under the 114th section of the Public Health Act, and they relied on the case of *The Great Western Railway Company v. Bishop* (L. Rep. 7 Q. B. 550; 41 L. J. N. S. 120, M. C.).

It was contended by the appellants that the justices had summary jurisdiction under sect. 114 if the business carried on was a nuisance, or caused effluvia which was a nuisance, and that it was not necessary to prove the same to be injurious to health.

The justices, on the above contention and evidence, without the respondents having called any witnesses, held that, although the appellants had proved a nuisance to exist in the ordinary sense

of that word, yet under the provisions of the Public Health Act 1875, and on the authority of the case quoted, it was necessary to prove that the nuisance was moreover injurious to health; and, considering that this was not satisfactorily proved, they dismissed the complaint, but without costs; and at the instance of the appellants stated this case.

If the court should consider that it was not necessary for the appellants to prove that the nuisance caused by the effluvia was also injurious to the health of the inhabitants of the district; or, considering it necessary, should be of opinion that the appellants sufficiently proved the effluvia to be "injurious to health" within the meaning of the statute, the case was to be remitted to the justices for rehearing. If the court should be of a contrary opinion, the complaint should stand dismissed, and the decision of the justices be confirmed.

The 114th section of the Public Health Act of 1875 (38 & 39 Vict. c. 55), so far as it is material to this case, is as follows:

Where any candle-house, melting-house, melting-place, or soap house, or any slaughter-house, or any building or place for boiling offal or blood, or for boiling, burning, or crushing bones, or any manufactory, building, or place used for any trade, business, process, or manufacture causing effluvia, is certified to any urban authority by their medical officer of health, or by any two legally qualified medical practitioners, or by any ten inhabitants of the district of such urban authority, to be a nuisance or injurious to the health of any of the inhabitants of the district, such urban authority shall direct complaint to be made before a justice, who may summon the person by or on whose behalf the trade so complained of is carried on to appear before a court of summary jurisdiction.

The court shall inquire into the complaint, and, if it appears to the court that the business carried on by the person complained of is a nuisance, or causes any effluvia which is a nuisance, or injurious to the health of any of the inhabitants of the district . . . the person so offending shall be liable to a penalty, &c.

Herschell, Q.U. for the appellants.—There are two questions to be considered: first, whether on the right construction of the Public Health Act the respondents are liable under it for any nuisance unless it be injurious to health; secondly, whether that only is rightly deemed injurious to health which makes people in good health permanently unwell. The group of sections commencing with the 91st and dealing with nuisances are distinct from the group which deals with offensive trades, the 112th and following. The first group deals with matters immediately affecting the health of people, and the word nuisance may well have there a somewhat different meaning to that attached to it in the sections relating to offensive trades, which have a distinct scope and object; and the nature of the matters with which these latter sections deal must regulate the interpretation of the word as used in them. It is clear that the nuisance complained of comes within the scope of these sections, and that the respondents are liable. The case of *The Great Western Railway Company v. Bishop* (L. Rep. 7 Q. B. 550; 41 L. J. N. S. 120, M. C.), which will be cited for the respondents, would be in point if the question arose under the 91st section of the Act; but under the 114th I submit that it is irrelevant. (See *Passy v. Oxford Local Board*, in the Q. B. Div. reported in the *Times*, 8th May, 1879.) But, further, I say that it cannot be successfully contended that that alone is injurious to health which

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makes people who are well permanently ill, and that temporary nausea is of no account; effluvia which make sick people worse, as these are proved to do, must be considered injurious to health.

Oave, Q.C. for the respondents.—The decision of the magistrates was right on both grounds. The sections in question correspond to those in the Act of 18 & 19 Vict. c. 121, on which the case of *The Great Western Railway Company v. Bishop* (L. Rep. 7 Q. B. 550; 41 L. J. N. S. 120, M. C.) was decided. The word nuisance cannot receive two meanings in the same Act of Parliament, when its collocation and the synonym with which it is coupled are the same. The scope of the Act must determine the limitation and construction to be put on the word. The ordinary power of proceeding by indictment for nuisance is not limited; the summary powers given by the Act are limited. Sects. 112 and 113 deal with the establishment of offensive trades or manufactures in the future; in sect. 114, which deals with those already established, the word "offensive" does not occur, nor does the word "nuisance" stand alone. The case of the railway company against Bishop, which has been cited, was decided in 1872. The framers of this Act, with that decision before them, have deliberately used similar language to that of the former statute. Why, if a different construction were intended, did they not employ different words, or give a different interpretation? Further, I submit that to be injurious to health a thing must be injurious to persons in an ordinary state of health. Everything which injuriously affects the health of an invalid cannot be deemed injurious to health.

Kelly, C.B.—We should be wrong to put such a construction on the statute as would put an undue restriction on traders carrying on useful businesses. But we must be governed by the words of the 114th section on which our decision must turn. Nothing can be clearer than that the statute meant to deal with trades of the same description as that complained of. Now, the words of sect. 114 are, "any of the inhabitants" of the district. The question is, whether this effluvia is a nuisance, or carried on so as to be injurious to the health of any of the inhabitants. It is evident, I think, that it is a nuisance and disagreeable to many of the inhabitants; and I think that it is clear that any effluvia caused by means of this kind that has the effect of making any persons who happen to be sick worse, as this is proved to do, comes within the terms of this section. The words of the Act are, "a nuisance, or injurious to the health of any of the inhabitants of the district." It is clear that the effluvia in question do seriously affect certain of the inhabitants of the district, and I hold that effluvia having such an effect are injurious to health. The case therefore must go back to the magistrates, with our directions to this effect.

Stephen, J.—There are two questions before us. The first is this: Was it necessary for the appellants to prove injury to health? I answer, no. It was sufficient to prove that this manufactory causing effluvia was so conducted as to be a nuisance, whether injurious to health or not. In other words, the question is whether the conjunction "or" is disjunctive or not—whether, that is, the expressions "nuisance" and "injurious to health," which are connected by it, are to be under-

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stood as equivalent terms or not. Though it is so interpreted sometimes, that is obviously not its literal meaning, and here it is not, in my opinion, its proper meaning, although by reference to the provisions of 18 & 19 Vict. c. 121, sect. 8, and the case of *The Great Western Railway Company v. Bishop*, which has been cited, it has been attempted to show that it is. The principle is stated in the judgment of Cockburn, C.J. in that case (L. Rep. 7 Q. B. 552): "It is plain that the object was to protect the public health and private health of individuals living in towns, or in the neighbourhood of towns. I think that affords us a guiding principle by which to construe this Act, and that 'nuisance,' the general term used in the Act, must be taken to mean a nuisance affecting public health. We have then to say whether this is a nuisance of that description." Applying that principle here, "nuisance" in sect. 114 must mean any nuisance connected with the carrying on of an offensive trade which diminishes the comfort and enjoyment of life; and disagreeable smells are among the nuisances by these sections held in view and prescribed. I think, moreover, that this section is complete in itself; and this case comes within it, since the obvious effect of the processes described would be to create a bad effluvia, such as it is admitted would be a nuisance at common law. As to the second question, I think that the appellants proved that the nuisance was injurious to health within the fair meaning and construction of the statute. It was proved that it was such that sick persons might suffer from the smells, and I quite agree with the judgment of my lord on this point. It seems almost self-evident that that which makes sick persons worse must interfere with the general standard of health of people who are well. On both questions therefore our opinion is in favour of the appellants.

Case remitted accordingly.

Solicitors for the appellants, *Williamson, Hill, and Co.*, agents for *Hugh W. Pearson*, New Malton.

Solicitors for the respondents, *Emmet and Son*, agents for *Arthur H. Jackson*, Malton.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Nov. 29 and Dec. 21, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

NUTTER v. ACCRINGTON LOCAL BOARD. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Local board—Power to raise level of street—Right to compensation—11 & 12 Vict. c. 63, ss. 2, 68, 144.

By the Public Health Act 1848 (11 & 12 Vict. c. 63) s. 68, all streets which were highways were vested in and were under the management and control of the local board of health.

By sect. 2 the word "street" applied to and included any highway (not being a turnpike road). By sect. 144 compensation was to be made to any persons sustaining damage by the exercise of the powers of the Act.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

4 I

Defendants, by agreement with the trustees of a turnpike road, took upon themselves the maintenance and repair of the footway only of the road; defendants raised the level of the footway, and thereby caused damage to the house and land of the plaintiff, which were adjacent.

Held, by Brett and Cotton, L.J.J. (Bramwell, L.J. dissenting), that this damage was the subject of compensation within sect. 144.

Judgment of the Queen's Bench Division reversed.

THE following case was stated by an arbitrator in an action on an award:—

1. The plaintiff was in Sept. 1864, and is now, the owner of a house and land in the town of Accrington, adjacent to a certain road called the Whalley-road.

2. The defendants became in 1857 the local board of health, and are the urban sanitary authority for the town and district of Accrington, under the provisions of the Public Health Act 1848, and the other Acts therewith incorporated.

3. The house and land of the plaintiff, and that part of the Whalley-road adjacent thereto, are within the district of the said local board.

4. By Act of Parliament of 29 Geo. 3, a turnpike trust was established which included the Whalley-road, part of which was within and part without the district of the Accrington Local Board, and such trust expired in 1874, up to which time toll-gates were maintained, and tolls taken at various parts of the road.

5. There has always, for fifty years at least, been a footway immediately adjacent to the plaintiff's premises, and previous to the establishment of the local board, the turnpike trustees had maintained, and from time to time repaired the footway and the carriage-way, both within and without the local board district, with the exception of the pavement within the local board district. The carriage-way adjacent to the plaintiff's property had not been paved at the time the footway was raised as hereinafter set forth.

6. After the establishment of a local board, and previous to the year 1871, by agreement between the local board and the turnpike trustees, the local board sometimes provided curb stones for the footpath of such part of the Whalley-road as was within their district, and the trustees put them in; and the trustees did everything that was done for the maintenance and repair of the carriage-way.

7. In the year 1864 the trustees communicated to the defendants their intention of erecting a toll-bar in another turnpike road in the township of Accrington subject to the same trust; and afterwards in Feb. 1865, the defendants, in order to induce the trustees not to erect such toll-bar, passed the following resolution, which was in due course communicated to the trustees, and accepted by them: "Resolved that the proposal made to a deputation from this board by the trustees of the turnpike road at their meeting of 15th Sept. last, to the following effect: 'That the local board should take upon themselves the future repair of such parts of the turnpike road within their district as are already and may be hereafter pitched with stone, and all such parts of the footpaths as are already or may hereafter be flagged at least a yard in width, and that other parts of the road or footpaths shall be continued to be repaired by the trust,' be accepted by this board."

8. That part of the footpath immediately adjoining the plaintiff's land was flagged more than a yard in width previous to 1864.

9. Previous to 1871 a further agreement had been entered into between the local board and the trustees, whereby, amongst other things, the trustees undertook to raise the level of the carriage-way at a part of the road immediately opposite the house and land of the plaintiff, and the defendants on their part undertook to raise the footpath to a corresponding height.

10. In or about the month of May 1871, in execution of the last-mentioned agreement, the trustees raised the level of the carriage-way opposite to the plaintiff's house and land; and the defendants raised the footpath to a corresponding height.

11. The plaintiff sustained damage within the meaning of sect. 144 of the Public Health Act 1848, by the raising of the footpath by the defendants, and such damage was the necessary and direct result of the raising of the footpath, and not of any negligence of the defendants in the execution of the work.

12. In Oct. 1874 proceedings against the defendants were commenced by the plaintiff to obtain compensation under the provisions of the Public Health Act 1848, and after all due preliminaries required by the Act were performed, were carried on *ex parte* by the plaintiff, and on the 19th Jan. 1875 an award was published whereby the defendants were ordered to pay to the plaintiff 112*l.* compensation for the damage she had sustained, and a further sum of 111*l.* 5*s.* 8*d.* taxed costs.

13. The said award was in all respects a good and valid award, provided that the damage sustained by the plaintiff was a proper subject for arbitration and compensation within the meaning of the Public Health Act 1848, and the other Acts therewith incorporated.

14. Neither of the sums of 112*l.* and 111*l.* 5*s.* 8*d.* have been paid by the defendants to the plaintiff.

15. That part of the Whalley-road which is adjacent to the plaintiff's house and land was at the time the footpath was raised as herein mentioned, and is, "a street," unless the court find (1) that it was a turnpike road; and (2) rule as a matter of law that a turnpike road is excepted from the definition of street within the true intent and meaning of the Public Health Act 1848, (a) and other

(a) Public Health Act 1848 (11 & 12 Vict. c. 63):

Sect. 2. "The word 'street' shall apply to and include any highway (not being a turnpike road) and any road, public bridge (not being a county bridge) lane, footway, square, court, alley, or passage, within the limits of any district."

Sect. 68. "All present and future streets being, or which at any time become highways within any district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof by any surveyor of highways or by any person serving the office of surveyor of highways shall vest in and be under the management and control of the said local board of health, and the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered, or repaired, as and when occasion may require; and they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and place and keep in repair fences and posts for the safety of foot passengers."

Sect. 144. "Full compensation shall be made . . . to all persons sustaining any damage by reason of the exercise of any of the powers of this Act: and in case of

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Acts incorporated therewith. The questions for the opinion of the court are:

(1) Whether the claim of the plaintiff was a claim within the true intent and meaning of the Public Health Act 1848 and other Acts incorporated therewith; and (2) whether the arbitrator had authority to make such award, and whether the said award is good and binding upon the defendants.

Judgment was given for the defendants by Cockburn, C.J. and Mellor, J. (reported *ante*, p. 288; and 38 L. T. Rep. N. S. 609) and the plaintiff appealed.

Nov. 29, 1878.—The case was argued in the Court of Appeal by Gully, Q.C. and Forbes for the plaintiff, and Crompton for the defendants. The following cases were cited:

R. v. Fullford, 33 L. J. 122, M. C.;
Boulton v. Crowther, 2 B. & C. 703;
Brins v. The Great Western Railway Company, 2 B. & S. 402; 81 L. J. 101, Q. B.;
Ferrar v. The Commissioners of Sewers for London, L. Rep. 4 Ex. 227;
Vaughan v. The Taff Vale Railway Company, 5 H. & N. 679; 29 L. J. 247, Ex;
R. v. The Trustees of the Oxford and Witney Turnpike Roads, 12 A. & E. 427.

Cour. adv. vult.

Dec. 21, 1878.—COTTON, L.J.—In this case an action was brought to enforce an award ascertaining the amount of compensation payable to the plaintiff in consequence of alterations which were made in a road near her house by the defendants, the Accrington Local Board of Health, and the question to be decided on this appeal is, whether the matters in respect of which the plaintiff claims compensation were done under the powers of the local board, so that compensation is payable to the plaintiff under 11 & 12 Vict. c. 63, s. 144. An arrangement was entered into between the Accrington Local Board and the trustees of the turnpike road (the road on which the act of which the plaintiff complains was done) that the control of the road should be divided between them longitudinally, i.e., that the one body should retain the footpath and the other the carriage-way; and the defendants altered the level of the part of which they took charge. One point which has been raised is this, that, although by 21 & 22 Vict. c. 98, s. 41, the local board had power to make arrangements with the turnpike trustees to take charge of a particular portion of the turnpike road, yet this power could not be exercised by one body taking the centre and the other the side of the road, but that one body must take a portion of the road up to a particular point, and the other the remainder. I cannot accede to this objection, for I am of opinion that it is not necessary, in order to constitute a valid exercise of the power given by sect. 41, that the local board and the turnpike trustees should divide

dispute as to amount, the same shall be settled by arbitration in the manner provided by this Act."

Local Government Act 1858 (21 & 22 Vict. c. 98), s. 41: "It shall be lawful for any local board, by agreement with the trustees of any turnpike road or with any corporation or person liable to repair any street or road, or any part thereof . . . to take upon themselves the maintenance, repair, cleansing, or watering of any such street or road, or any part thereof . . . on such terms as the local board and the trustees or corporation or person or surveyor aforesaid may agree upon between themselves."

The Public Health Act 1875 (38 & 39 Vict. c. 55) repeats all the above sections (by sect. 343), and re-enacts the same provisions; see sects. 4, 148, 149, 308.

the road between them by a line drawn across it at right angles to the centre line. I think they may divide the road in any reasonable way which they may think fit to adopt. But the real question to be decided is, whether the place where the alterations were made by the defendants was part of a street vested in them under 11 & 12 Vict. c. 63, s. 68. It was contended on behalf of the defendants that this road was not a street within the meaning of that section, because by the interpretation clause of the same Act (in sect. 2) "the word 'street' shall apply to, and include any highway (not being a turnpike road)," &c. The contention was that, looking at the interpretation clause, and sect. 68, nothing can be a street within the meaning of sect. 68 which is also part of a turnpike road. In my opinion this is not so, for the interpretation clause in sect. 2 is not restrictive; it does not say that the word "street" shall be confined to any highway not being a turnpike road, but that it shall "apply to and include" any such highway. By that clause the meaning of the word "street" is enlarged, not restricted, and in my opinion that which in ordinary language, independently of the Act, would be a street, does not cease to be so by the provisions of the Act because it is part of a turnpike road. No doubt it is true that, independently of the interpretation clause, there might be other words in the Act sufficient to show that the provisions relating to streets could not apply to anything that is part of a turnpike road, even though it would otherwise be a street; but, in my opinion, none of the provisions of the Act are sufficient thus to restrict the effect of the enactments as to streets. Some little difficulty may possibly arise in consequence of the street (or some portion of it) over which the turnpike trustees have certain powers being vested in the local board under the statute; but I do not think that any inconvenience which may arise from this cause is sufficient to prevent the meaning which they would otherwise bear from being given to the words. It must be remembered that by a later Act (21 & 22 Vict. c. 98, s. 41) the trustees of the turnpike road and the local board were empowered to make arrangements as to the management and care of particular parts of the streets. I think that section was passed expressly for the purpose of preventing any difficulty which might have arisen under the earlier Act in consequence of a street which also formed part of a turnpike road being vested in the local board, while at the same time the turnpike trustees had certain powers over it under their Act. In my opinion, therefore, this was a street within the meaning of 11 & 12 Vict. c. 63, s. 68, and the plaintiff is entitled to compensation under sect. 144. It was also contended that the amount of compensation awarded was excessive, but that is a matter with which we are not concerned here. We have only to decide whether the act complained of was done by the defendants under the powers given to them by statute; in my opinion it was, and the judgment of the court below ought to be reversed.

BRETT, L.J.—If the road in question had not been a turnpike road it would clearly have been within the definition of a street, and I think the fact of its being a turnpike road does not prevent its being a street. There does not seem to be any inconsistency in saying that a turnpike road is a

street, either independently of the statute or within the meaning of the statute; this road therefore, being a street, was vested in the local authority to the extent stated in *Ooverdale v. Charlton* in this court (40 L. T. Rep. N. S. 88; L. Rep. 4. Q. B. Div. 104). Whatever the obligation of the turnpike trustees might be as to keeping the roadway in repair, the local board might alter the road. They did alter it, and in so doing they assumed to exercise the powers of the Act, and in my opinion they were exercising them. I think therefore that any injury which may have been done to the plaintiff was the subject of compensation, and that compensation was properly awarded for it; I therefore agree with Cotton, L.J., that the judgment ought to be reversed.

BRAMWELL, L.J.—The question in this case turns upon the meaning of 11 & 12 Vict. c. 63, s. 68, by which "all present and future streets" might be altered by the local board. It is said on behalf of the plaintiff that the roadway in question here is a street, for it is said that the word "street" in the interpretation clause in sect. 2 includes not only the highways, &c., there referred to, but everything which is a street; that the interpretation is not the whole of the meaning of the word "street," and therefore that a turnpike road is not necessarily excluded. The consequence would be that the interpretation clause is not exclusive. I quite agree with this. There is one interpretation clause which says that "words importing the singular number shall include the plural number, and that words importing the plural number shall include the singular number;" if that clause were taken to be exclusive, the words in the singular would never mean the singular, and the words in the plural would never mean the plural. This is, therefore, an additional interpretation. Then it is said that this is a street, and it is so, but it is also a turnpike road. Then it is necessary to look at sect. 68 to see if there is anything which will enable one to come to a conclusion as to what the Legislature intended. With the greatest respect for those who hold the contrary opinion, I cannot help thinking, on reading the words of the section, that it means, as the court below held, that a street which is also a turnpike road should not be included. Has the section taken away the management of the turnpike road from the turnpike trustees? I do not think that is intended. But it seems to me that it is speaking of those things with regard to which the management is transferred to the local board. It seems to me, therefore, that the words of sect. 68 show that a street which is also a turnpike road is not included in that section. The case is one on which I would rather not express a very confident opinion, especially after hearing the contrary opinions which have been expressed. There is one other remark. By sect. 117 of the same Act the local board were to be the surveyors of highways; that certainly did not include a turnpike road. I am therefore of opinion, on the question mainly argued, that the judgment was right, and ought to be affirmed. But there is another point, which I think is substantial. If the acts were done under the powers of the turnpike trustees, I cannot see how any action would lie against the trustees, or persons acting on their behalf. The trustees have power, under their Act of Parliament, to raise and alter the road, and it was held in *Boulton v. Crowthor* (2 B. & C. 703), that no action would lie

against the trustees of a turnpike road for acts done *bonâ fide* and within their jurisdiction. I am inclined to think that, on principle, no action ought to be maintainable if the owner of property adjoining a highway is not the owner of the soil of the highway; I do not think that he has any right by law to have the road continued at a particular level. It may be inconvenient to him to have the road altered if he has built with reference to the level of the road; but it may be inconvenient to the public not to have the road altered. I am not clear, therefore, that there was not a more meritorious defence than was supposed in the court below. If so, there is no ground for saying that the defendants are continuing and maintaining a wrong, for, if the act was rightly done by the turnpike road trustees, the defendants were justified in maintaining it. I think the judgment ought to be affirmed, but, as the other members of the court are of a different opinion, it must be reversed.

Judgment reversed.

Solicitors for the plaintiffs, *Ridsdale, Craddock, and Ridsdale*, for *Robinson and Sons*, Blackburn.
Solicitors for defendants, *Johnson, Weatherall, and Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Tuesday, April 1, 1879.

(Before COCKBURN, C.J. and MELLOR, J.)

COLLINS v. THE VESTRY OF PADDINGTON. (a)

Metropolis Local Management Act (18 & 19 Vict. c. 120), sects. 125-127—*Vestry, duty of, to remove rubbish—"Rubbish" and "refuse," what—Tots—Construction of contract.*

A vestry is only bound under sects. 125 to 127 of the Metropolis Local Management Act to remove such things as are or might be injurious to the health of the inhabitants. The vestry of P. sold to the plaintiff "all the breeze, dust, cinders, ashes, dirt, offal, garbage, filth, and refuse, which shall be collected and received by them within the parish of P. during one year" to be collected by the vestry and delivered to plaintiff. During the collection the servants of the vestry appropriated various articles called "tots" which had been thrown into the dust-bins by the owners, in order to be got rid of. The plaintiff now claimed damages under his contract for the value of the tots so appropriated.

Held, that the plaintiff could not recover, as the terms of the contract applied only to such refuse as the vestry were bound to remove under the Act. That there was no duty cast upon the vestry to remove "tots," but only such things as might be injurious to health.

THIS was a special case stated by an arbitrator.

CASE.

1. On the 15th Feb. 1876 the plaintiff entered into a contract with the defendant, of which the following are the material portions:

Whereas the vestry have offered to sell and dispose of all the breeze, dust, cinders, ashes, dirt, offal, garbage, filth, and refuse, which shall be collected and received by them, their contractors, agents, and servants, within the parish of Paddington during the period of one year to be computed from the 25th day of March 1876 unto Edward

(a) Reported by A. H. POTTER, Esq., Barrister-at-Law.

Collins for the sum of sixpence for every cart load of such breeze, dust, cinders, ashes, dirt, offal, garbage, and refuse, and the said Edward Collins has accepted such offer, and agreed to purchase and take the said breeze, dust, cinders, ashes, dirt, offal, garbage, and refuse, at such price accordingly Now, therefore, these presents witness that the said vestry do hereby bargain and sell unto the said Edward Collins, his executors and administrators, all and every part of the said breeze, dust, cinders, ashes, dirt, offal, garbage, filth, and refuse, which shall and may during the period of twelve calendar months to be computed from the 25th day of March 1876 be collected, gathered, and received by the said vestry, or their contractors, servants, and agents, from all and every the houses and other premises situate and being in all and every of the roads, squares, streets, lanes, courts, mews, and other places within the said parish of Paddington. And the said vestry do hereby, as far as they lawfully can or may covenant with the said Edward Collins, his executors and administrators, that the said vestry will, at their own expense, deliver and deposit the said breeze, dust, cinders, ashes, dirt, offal, garbage, filth, and refuse in, to, or upon the brickfield belonging to the said Edward Collins, situate and being in Wood-lane, Shepherd's Bush in such quantities and on such days in every week (Sundays excepted), and at such seasonable times in the daytime as the said vestry may think fit.

2. The deed contained covenants on the part of the said Edward Collins for the payment of the amounts to become due in respect of the deliveries of dust, &c., the accounts to be adjusted on the footing of a payment by him of sixpence a load.

3. Either party is to be at liberty to refer to the contract itself, but it is not necessary to set out any more of it.

4. The manner in which the dust the subject of contract was collected by the vestry was as follows:

5. In each house or other premises to which this contract refers, there was a receptacle called a dust-bin, into which were put all the ordinary refuse of the house or premises. The vestry sent carts under the charge of their servants to collect the contents of these dust-bins. It was the duty of such servants of the defendants to take the contents of the dust-bins in baskets or otherwise out of the bins and put them into the carts sent by the vestry for the purpose of collection, and as soon as a cart was full to conduct it to the brick-field of the plaintiff in Wood-lane aforesaid.

6. The contents of the dust-bins consisted chiefly of cinders and ashes and the sweepings of houses, but they also contained a number of articles of more or less value thrown away by the occupiers of the houses or their servants or other members of their household and put into the dust-bin for the purpose of being taken away from the premises by the dust carts as refuse and got rid of. The dust heap accumulated in the brick-field would at some time or other be sifted in order to separate the cinders, breeze, and ashes, which are used in brick making. In the course of this process the articles in question, which in the business are known as "tots," are separated, and those of the same kind being collected together are saleable, and upon a large contract like the present the tots are of considerable value. The articles are of a very miscellaneous kind, but amongst the most valuable are broken white glass, bones, articles of iron, lead, and other metals, and knife handles.

7. Throughout the period covered by the contract, the servants of the vestry employed in collecting the contents of the bins were more or less in the habit of picking over the contents of the bins

and abstracting portions of the more valuable articles, of putting them into sacks of their own and of selling the articles so abstracted for their own benefit. This process of selection was generally (though not exclusively) carried on upon the premises upon which they entered for the purpose of collecting the contents of the dust-bins, and in these instances the men so acting either took the articles in question from the dust-bin itself or from the baskets used for carrying the refuse from the bins to the carts or as the refuse was in the act of being transferred from the bin to the baskets. They also took such articles from the carts themselves when opportunity offered, and dealt with them in the same manner.

8. The question for the opinion of the court is: whether the plaintiff is entitled to damages for the abstraction under the circumstances mentioned of "tots" by the servants of the vestry.

By 18 & 19 Vict. c. 120:

Sect. 125. It shall be lawful for every vestry, and they are hereby required to appoint and employ a sufficient number of persons for collecting and removing all dirt, ashes, rubbish, ice, snow, and filth, and for the cleansing out and emptying of privies and cess-pools, sewers and drains within their parish.

Sect. 126. Any occupier of any house or land, or other person, who refuses or does not permit any soil, dirt, ashes or filth to be taken away by the scavengers shall forfeit and pay a sum not exceeding five pounds.

Sect. 127. All dirt, dust, night soil, ashes and rubbish collected as aforesaid shall be the property of such vestry, and such vestry shall have full power to sell and dispose of the same for the purposes of this Act as they shall think proper, and the person purchasing shall have full power to take, carry away, and dispose of the same, for his own use.

Croome (Digby Seymour, Q.C. with him) for the plaintiff.—Under the terms of this contract the plaintiff is entitled to recover for these tots—he was bound to remove all "rubbish" that was thrown into the dust-bins, which then became his property. The vestry had sold all "rubbish," and that would include any property abandoned by the owner as valueless; articles so abandoned were called "tots." They would therefore be included in the contract, and the plaintiff is entitled to have them or their value. *Filbey v. Combe* (2 M. and W. 677.)

Harrison, Q.C. (J. Robins with him).—The vestry have only contracted to sell that which by the terms of 18 & 19 Vict. c. 120, they were bound to collect, and by the sections of that Act they were only bound to collect such refuse as might be injurious to health; the word "rubbish" only applies to such things as are *ejusdem generis*, with soil, dirt, ashes and filth, with which it is connected both in the Act and in the contract:

Law v. Dodd, 1 Ex. 845, 10 L. T. Rep. O. S. 286.

COCKBURN, C.J.—Our judgment must be in favour of the defendants. In the first place it is necessary for us to consider what duty is imposed upon the vestry by the 125th, 126th, and 127th sections of the Metropolis Local Management Act. I think that what was intended by the Legislature will at once suggest itself to everyone's mind, since the sections do not refer to the convenience of each householder, but to sanitary considerations and sanitary considerations alone. They are to remove filth, garbage, and other things which are refuse in that sense, and which might be injurious to health, but because it is their statutory duty to collect and remove such refuse which finds its way properly into the dustbins, it by no means follows that

they are bound to take away that which comes into the dust-bins improperly, and which is not within the scope of the Act. The words in the three sections to which I have referred are curiously changed, for in the first of the three they are "dirt, ashes, rubbish, ice, snow, and filth." Now the word rubbish there gives us a key to what the Legislature meant; it clearly has no reference to anything of the kind which is the subject-matter of this discussion; but by rubbish in this section is meant anything of the same description as the words with which it is coupled, which apply to things that would be mischievous to remain in a house with a view to the sanitary conditions of that house, or of the neighbourhood, but not things which it would be merely convenient for the householder to get rid of. In the next section the word rubbish is omitted, which shows that ashes, and filth, and things *ejusdem generis* were alone contemplated by the Legislature. In the 127th section the words are "dirt, dust, night soil, ashes, and rubbish," where the word rubbish is again used in connection with words of a similar description to those in the preceding sections. The duty of the vestry therefore is to remove anything which might be injurious from a sanitary point of view. Now I think we must construe this contract in accordance with the duty cast on the vestry by the statute, and as co-extensive with that duty, and the words of the contract will bear that construction. When we look at the words *in extenso* we find they are "breeze, dust, cinders, ashes, dirt, offal, garbage, filth and refuse," but not one of these words is applicable to these "tots." Mr. Croome contends that they would be included in the term "refuse," but it seems to me that that word must be interpreted by those that have gone before, and by the duty it was evidently the intention of the Legislature to cast upon the vestry. I do not think that it is the duty of the vestry to take away everything which gets into the dust-bin; it may be very convenient to get rid of old shoes, bits of tin and broken bottles, but these are not things which the vestry are bound to remove. The scavenger may have no objection to take these things away and dispose of them on his own account, but in so doing he is not acting as a servant of the vestry, but to oblige the householder and for his own profit. It is not incumbent on the vestry to take them away, and they do not therefore, in my opinion, come within the terms of the contract.

MELLOR, J.—I am of the same opinion. I have had very great difficulty in coming to a conclusion upon this point, but I think that the interpretation put upon this Act by my Lord is the only one we can safely adopt. If the plaintiff's contention were right, a dust-bin might become the receptacle for old shoes and broken bottles, and other articles of that description which it was clearly never contemplated that the vestry should be bound to remove. But no real difficulty arises in disposing of things of this nature, as the collectors are generally willing to take them and dispose of them for what they are worth. I can see no other method of interpreting this contract which so thoroughly reconciles all points at issue as that of my Lord. I do therefore *ex animo* adopt the views he propounds.

Judgment for the defendants.

Solicitor for plaintiff, Macmullen.

Solicitor for Defendants, J. H. Horton.

Saturday, May 17, 1879.

(Before COCKBURN, C.J.)

THE GUARDIANS OF THE CLUTTON UNION v. POINTING. (a)

Public Health Act 1875 (38 & 39 Vict. c. 55) ss. 35, 39—New building—"Sufficient" privy accommodation—One privy for two houses.

The 35th section of the Public Health Act 1875 does not require a separate water-closet, earth-closet, or privy for every newly-built house.

The respondent had pulled down two cottages and entirely rebuilt them, erecting one new privy for the use of both cottages. He was charged under sect. 35 of the Public Health Act 1875, with not providing sufficient privy accommodation for one of the cottages.

The justices were of opinion that the accommodation was sufficient, and dismissed the information. The sessions confirmed this decision.

Held (upon appeal), that the justices were right, as sect. 35 of the Act had been sufficiently complied with.

THIS was a special case stated by the justices assembled at and for the Court of Quarter Sessions, in and for the county of Somerset, holden at Wells, on the 15th Oct. 1878.

1. The appellants are the guardians of the poor of the Clutton Union, being the local authority for the said union.

2. The respondent is a person who has caused two cottages within such district, which have been pulled down to the ground there, to be rebuilt.

3. The said two cottages are in the same ownership, and are rebuilt adjoining one another, and are semi-detached.

4. When the respondent rebuilt the said cottages an old privy in a garden at the back of the said cottages was discarded; such privy had hitherto been used in common by the occupiers of the said cottages.

5. The respondent on rebuilding the cottages, built a new privy to be used in common by the occupiers of both cottages on the spot indicated on the plan annexed hereto.

6. The two cottages are let to, and are occupied by different tenants—John Price occupying one and Charles Price the other, and each tenant has the right to use in common with the other tenant the new privy.

7. The new privy afforded, and is capable of affording, sufficient accommodation to the occupiers of the cottages, using the same in common as aforesaid.

8. The appellants summoned the respondent before the justices at petty sessions, on the complaint that he being the owner did cause to be rebuilt from the ground floor a certain house in the occupation of John Price, without a sufficient water-closet, earth closet, or privy, contrary to the provisions in that behalf of the Public Health Act 1875.

9. The complaint was dismissed by such justices, and thereupon an appeal was brought to quarter sessions.

10. The appellants contended (*inter alia*) that sect. 35 of the Public Health Act 1875 requires that every house pulled down to or below the ground floor shall have a separate sufficient water-closet, earth-closet, or privy.

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11. The respondent, on the other hand, contended that the above section did not require him on rebuilding, as aforesaid, to provide a separate water-closet, earth-closet, or privy for each house, but that the requirements of the section had been met by providing sufficient accommodation in one privy for the use of the occupiers of the two houses.

The Court of Quarter Sessions dismissed the appeal with costs, subject to the opinion of the Queen's Bench Division upon the above contentions.

If that of the appellant is right, then the order of sessions to be quashed.

By 38 & 39 Vict. c. 55, s. 35,

It shall not be lawful newly to erect any house, or to rebuild any house pulled down to or below the ground floor, without a sufficient water-closet, earth-closet, or privy, and an ashpit furnished with proper doors and coverings. Any person who causes any house to be erected or rebuilt in contravention of this enactment shall be liable to a penalty not exceeding twenty pounds.

Sect. 36 :

If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet, earth-closet, or privy, and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house within a reasonable time therein specified to provide a sufficient water-closet, earth-closet, or privy . . . as the case may require. If such notice is not complied with, the authority may do the work and charge for it. Provided that where a water-closet, earth-closet, or privy has been, &c., used in common by the inmates of two or more houses, or if, in the opinion of the local authority, a water-closet, earth-closet, or privy may be so used, they need not require the same to be provided for each house.

Poole for the respondent.—The justices have determined that in this case there is sufficient accommodation. The 35th section of the Act is fully complied with. There is nothing in the section which requires that every house should have a separate privy or water-closet.

Charles, Q.C. (*Vigor* with him) for the appellants.—Sects. 35 and 36 must be read together. The local authority and they alone are to decide what accommodation is to be sufficient. [*Cockburn, C.J.*—The local authority is not introduced at all in sect. 35.] The 36th section explains the 35th, which must apply to a water-closet sufficient for each house, and therefore separate.

Cockburn, C.J.—I think the order of sessions which rejected this appeal must be affirmed, and the 35th and 36th sections of this Act are, in my opinion, entirely distinct, and with specific objects of an entirely different character. The 35th section relates to the building and rebuilding of houses without a sufficient water-closet or privy, and imposes a penalty for contravening the section, once and for all. If the justices find that there is not a sufficient water-closet accommodation they may impose a penalty not exceeding 20*l.*, and the builder cannot be charged again for that offence. In section 36 there is no reference to a penalty at all, but certain powers are given to the local authority which they may exercise, whether the owner has been fined or not, "if it appears to the local authority by the request of their surveyor that there is not sufficient water-closet accommodation. And if the owner neglects to provide such accommodation" the local authority may do

the work themselves, and charge the owner with it. The two sections are entirely distinct, giving different powers; one relates to the act of building, the other to the condition of the premises. I cannot see my way to the conclusion that the Legislature intended that there must be a separate water-closet attached to each particular house. It would have been so easy to insert a word which would have given so obvious a meaning to the section, and finding no such word I feel bound to assume such a construction was not intended. The justices are of opinion that in this case there is sufficient water-closet accommodation, and as this is a penal clause which must be construed strictly, and into which, therefore, we cannot import words or a word which would considerably extend its operation, the decision of the justices must be affirmed.

MANISTY, J. concurred.

Order of sessions affirmed.

Solicitors: For the appellants, *Nutt and Savory*, for *Perria*, Bristol; for the respondent, *Olifton*.

EXCHEQUER DIVISION.

Thursday, July 3, 1879.

(Before KELLY, C.B. and STEPHENS, J.)

LEFTLY v. MONNINGTON. (a)

Churchwarden — Vestryman — Bankruptcy of Churchwarden — Penalty — Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), ss. 2, 54.

Sect. 2 of this Act enacts that the vestry in every parish coming within its operation shall consist of a certain number of persons, qualified and elected as therein provided. . . . Also, that the incumbent and churchwardens of every such parish shall constitute a part of the vestry, and shall vote therein, in addition to the elected vestrymen.

*Sect. 54 enacts that in case any member of any vestry for any parish to which this Act applies be declared bankrupt . . . in every such case such person shall cease to be such member. . . . And any person who acts as a member of any such vestry, after ceasing to be such member, shall, for every such offence, be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same in any of the Superior Courts of law, with full costs of suit.*

The defendant was, on the 20th Aug. 1878, and for some months prior thereto, a churchwarden of the parish of Plumstead, and, by virtue of his office of churchwarden, and not otherwise, was a part of the vestry of the said parish.

On the 14th June 1878 the defendant was adjudged a bankrupt. On the 20th Aug. 1878 the defendant (being still a bankrupt) attended a meeting of the said vestry, and acted at such meeting by voting on a resolution submitted to the said meeting.

*Held, that the defendant was, by sect. 2, a part of the vestry, and, consequently, a member of it, and that by sect. 54 he ceased to be a member of it on being made bankrupt, and, as he had acted and voted at a meeting of the vestry after ceasing to be a member, he was liable to the penalty of 50*l.**

*THIS was an action to recover a penalty of 50*l.* and full costs of suit, on the ground that the defen-*

(a) Reported by W. W. OBE, Esq., Barrister-at-Law.

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dant, after being adjudged a bankrupt, voted at a meeting of the parish of Plumstead contrary to the provisions of the Metropolis Local Management Act of 1855 (18 & 19 Vict. c. 120), whereby, in accordance with the provisions of that Act, he became liable for the payment of such penalty, together with full costs of suit. A special case was stated by consent of the parties, in accordance with the provisions of the Judicature Acts. The case was as follows:

On the 20th Aug. 1878, and for some months prior thereto, the defendant was churchwarden of the parish of Plumstead, and by virtue of his office of churchwarden, and not otherwise, was a part of the vestry of the said parish.

On the 14th June 1878 the defendant was adjudged a bankrupt.

On the 20th Aug. 1878 the defendant attended a meeting of the said vestry, and acted at such meeting by voting on a resolution submitted to the said meeting.

The 2nd section of the Metropolis Local Management Act 1855 provides that the incumbent and churchwardens of each of the parishes mentioned in the schedules of the Act (of which Plumstead is one) shall constitute a part of the vestry, and vote therein, in addition to the elected vestrymen; and the 54th section of the said Act provides that any member of any vestry for any parish mentioned in the said schedules who shall be declared bankrupt shall thereupon cease to be such member, and shall, if he acts as a member of such vestry after ceasing to be such member as aforesaid, be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same, with full costs of suit.

The question for the opinion of the court is, whether the defendant, being a part of the vestry only by virtue of his office of churchwarden, is liable, under the circumstances aforesaid, to pay to the plaintiff the penalty of 50*l.*, with full costs of suit.

Baylis, for the plaintiff, was stopped by the Court.

T. Willis Chitty for the defendant.—There are two classes of persons entitled to act and vote at meetings of the vestry, namely, elected members, who are required to have a certain property qualification, and *ex officio* members, such as the incumbent and churchwardens. The elected members only are subject to the penalty clause of sect.

54, and the Act could never have intended that the *ex officio* members should be subject to this penalty. The incumbent and churchwardens are placed in precisely the same position in this respect, and the Legislature could not have intended that every incumbent in the metropolis should be liable to this penalty. The churchwarden is *ex officio* a part, but not a member, of the vestry; and, therefore, is not within the operation of sect. 54.

KELLY, C.B.—It appears to me that, on a true construction of this Act, there can be no question about the point before us. Is it possible to contend that the incumbent and churchwardens, who, under sect. 2, become a "part" of the vestry, do not become "members" of it? It is clearly impossible; and, passing to sect. 54, we find that, if any member of any vestry for any parish mentioned in the schedules of this Act become bankrupt, he shall cease to be a member; and the section goes on to say that any person who acts as a member of such vestry after ceasing to be such member shall, for every such offence, be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same, in any of the Superior Courts of law, with full costs of suit. It seems to me, therefore, that a churchwarden becomes a "part" of the vestry, and so a "member" of it, and, as such, liable to the penalty under sect. 54. Accordingly, the judgment must be for the plaintiff.

STEPHEN, J.—I am of the same opinion. It is exceedingly probable that, when this Act was passed, the Legislature did not contemplate what might happen to incumbents under certain possible circumstances. But, leaving this consideration aside altogether, the question here is, whether a man who is a part of the vestry, and who has a right to vote therein, is or is not a member thereof? A member of a vestry simply means a man who is a part of it and votes in it. This being so, we go on to sect. 54, which declares that any member of a vestry becoming bankrupt shall cease to be such member, and any person ceasing to be such member, and afterwards voting, shall be liable to certain consequences. I am, therefore, of opinion that our judgment in this case ought to be for the plaintiff.

Judgment for the plaintiff.

Solicitor for the plaintiff, *E. Kimber*.

Solicitor for the defendant, *T. Kipping*.

